



Select Committee on European Scrutiny [Seventh Report](#)

11 Retention of communications data

(a) (25593) 8958/04 —	Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of investigation, detection and prosecution of crime and criminal offences including terrorism
(b) (26872) 12660/05 —	Proposal for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC
(c) (26873) 12671/05 +ADD1 COM(05) 438	

Legal base	(a) and (b) Articles 31(1)(c) and 34(2)(b)EU; consultation; unanimity (c) Article 95 EC; codecision; QMV
Document originated	(c) 21 September 2005
Deposited in Parliament	(b) and (c) 30 September 2005
Department	Home Office
Basis of consideration	(b) and (c) EM of 20 October 2005
Previous Committee Report	(a) HC 42-xxii (2003-04), para 14 (9 June 2004) (b) and (c); none
To be discussed in Council	No date set
Committee's assessment	Legally and politically important

Background

11.1 Document (a) is a proposal by France, Ireland, Sweden and the United Kingdom for a Framework Decision on the retention by service providers of communications data for the purpose of preventing, investigating, detecting and prosecuting crime, including terrorism. Such data ('communications traffic data') is information about communications, such as who called whom and when, and includes telephone and internet subscriber information, itemised telephone call records and mobile phone location data. Such data does not include the content of any communication.

11.2 The previous Committee considered this version of the proposal for a Framework Decision on 9 June 2004. It noted that such data, although not concerned with the content, might nevertheless be used to trace the source of illegal content as well as to identify those involved in the use of electronic communications networks for the purpose of organised crime and terrorism. It also noted that according to the recitals it was considered necessary to retain certain types of data, already processed and stored for billing and other commercial purposes, for an additional period of time for the purposes of criminal investigations or judicial proceedings.

11.3 In reply to the Committee's questions, the Minister confirmed that the proposal would apply only to communications data processed and retained by service providers based in the European Union and did not apply to the retention of communications data relating to UK residents which is held by service providers based in the United States.

11.4 The Minister thought that the proposal did not diverge significantly from the recommendations of the report of the Privy Counsellor Review Committee under the chairmanship of Lord Newton of Braintree (which had recommended that data should be held for a maximum of one year). Although the proposal referred to a retention period of up to three years, the Government would take advantage of the derogation in the draft proposal to maintain the one year period of the current voluntary code under the arrangements provided for under Part 11 of the Anti-Terrorism, Crime and Security Act 2001. The previous Committee maintained its view that the proposal did diverge from the recommendations of the Privy Counsellor Review Committee in that it required the retention of data in relation to crime of all kinds and was not limited to terrorism or other serious crime. The proposal was held under scrutiny pending receipt of a regulatory impact assessment.

The revised draft Framework Decision

11.5 The revised draft Framework Decision (document (b)) incorporates the results of further discussion in the Council working group and the Article 36 Committee.^[30] Whereas the scope and aim of the proposal is largely unchanged, the draft makes a number of other changes. A new definition of "Internet Communications Services" has been included in Article 2, which would bring internet e-mail, "Internet chat" and internet telephony provided by publicly available electronic communications service providers within the scope of the proposal. However, there is a difference of view between Member States as to the extent to which logs of web browsing, internet chat and similar communications should be covered. Article 3 now contains a more detailed list of the type of communications data which is to be retained, which is to include unsuccessful call attempts (i.e. communications where a call has been connected, but is not answered or where the network has intervened). The data which is to be retained is data which identifies the source, time, type and destination of the communication as well as data which identifies the location of mobile equipment.

11.6 Article 4 has been amended so as to reduce the period of retention to 12 months, but authorises Member States to retain data for up to 48 months in accordance with national law when such retention constitutes a "necessary, appropriate and proportionate measure within a democratic society". By way of derogation from Article 4, Member States may decide to retain data for a shorter period, which may not be less than six months.

11.7 Articles 5 and 6 provide for data security and protection, requiring Member States to apply the standards contained in Directive 95/46/EC and Directive 2002/58/EC. Article 7 provides that Member States must execute requests from Member States for transmission of retained data in accordance with the relevant instrument on judicial co-operation in criminal matters. A further qualification is proposed under which the requested Member State may

make its consent to the transmission of data subject to any conditions which would have to be complied with in a similar national case. Some Member States have called for the deletion of this further qualification, on the grounds that it would allow requests to be refused on a wider basis than is provided for under the existing arrangements. The Presidency has proposed a compromise solution whereby the further qualification would be removed, but that retained data would be excluded from the scope of the proposed European Evidence Warrant.

The proposed draft Directive

11.8 Document (c) is a proposal by the Commission for a Directive under Article 95EC. The proposal was made in September in response to concerns by the Commission and the European Parliament about the legal base of the proposed Framework Decision. In the Commission's view, the harmonisation of categories of data to be retained and the periods for storing data are matters which fall under EC competence and the relevant measures would need to be adopted under Article 95EC.

11.9 The draft Directive adopts much of the text of the Framework Decision, but does not make provision for access to retained data or for judicial cooperation in criminal matters. Article 1 states that the Directive seeks to harmonise Member States' provisions relating to data in order to ensure that the data is available for the purpose of preventing, investigating, detecting and prosecuting serious criminal offences such as terrorism and organised crime.

11.10 The draft Directive makes a derogation from Directive 2002/58/EC so as to permit Member States to adopt measures to ensure that relevant data is retained, and only provided to competent authorities for the purpose of preventing, investigating, detecting and prosecuting serious criminal offences. Article 6 provides for a committee of representatives of the Member States, but chaired by the Commission, to review the Annex to the Directive which specifies the types of data to be retained. Article 7 provides for a data retention period of 12 months, except for data relating to communications using the Internet protocol, where the retention period is six months. Article 10 requires Member States to reimburse data providers in respect of the "demonstrated additional costs" of complying with the obligations imposed by the Directive.

The Government's view

11.11 In her Explanatory Memorandum of 20 October 2005 the Minister of State at the Home Office (Hazel Blears) explains that the Government fully supports the retention of communications data and as Presidency will seek to finalise negotiations on a measure requiring Member States to ensure that telecommunications data is retained.

11.12 The Minister reviews both the draft Framework Decision and the proposed Directive, and provides a regulatory impact assessment. In relation to the Framework Decision, the Minister explains that the previous version defined data by reference to its attributes, such as whether it was data necessary to trace and identify the source of a communication, but that the present version contains (in Article 3) a more detailed list of data that should be retained. The Minister adds that the inclusion of unsuccessful call attempts is still under discussion in the Council. Such calls can be used as signals to accomplices or as a way of detonating explosives, but some Member States are concerned about the potential extra costs of retaining such data. On the question of costs, the Minister recalls that a recital to the Framework Decision recognises that the retention of data can cause practical and financial burdens for industry and that Member States are to ensure that implementation of the Framework Decision involve appropriate consultation. The Minister adds that the recital is an acknowledgment by Member States that the costs of data retention are an important issue.

11.13 On the draft Directive, the Minister notes that the Commission proposal has been informed by the work on the Framework Decision and uses identical language to describe the characteristics of data and the list of data to be retained. The Minister also notes that the Directive provides for a formal committee to review the annex to the Directive in line with the procedures for the exercise of implementing powers conferred on the Commission.

11.14 On the question of costs, the Minister comments that the provisions requiring the reimbursement of "demonstrated additional costs" may cause extra costs over and above those incurred under the UK voluntary Code of Practice and the Framework Decision if the Directive goes further than the obligations in those measures.

11.15 In further comment on the question of costs, the Minister notes that there are financial implications for

communications service providers over and above their business requirements, but that the Government is working with those providers who have volunteered or are considering volunteering to retain data under the voluntary code of practice under part 11 of the Anti-Terrorism Crime and Security Act 2001. Section 106 of the 2001 Act places a duty on the Secretary of State to make arrangements for appropriate contributions to be made to communication service providers who undertake to retain data in line with the Code.

11.16 The Minister points out that, unlike the Directive, the Framework Decision does not require Member States to make any contribution towards the extra costs incurred by service providers, but that the UK is likely to continue to contribute towards such costs if either the Framework Decision or the Directive is adopted. The Minister adds that the Framework Decision is in line with current UK requirements so that the costs should not exceed those under the voluntary code of practice, but that the Government is still considering the implications of the Directive.

11.17 The regulatory impact assessment provided by the Minister points out that there is a current trend among service providers to shorten the length of time for retaining data, but that investigations into serious crime and terrorism are often prolonged. In the United Kingdom 55% of data requirements in terrorist cases are more than six months old for murder investigations the proportion is 36%. The assessment concludes that the best option is to adopt a Framework Decision or Directive which was consistent with the arrangements under Part 11 of the 2001 Act. This would provide for the retention of data across the EU and "minimise the possibility of any EU Member State providing a gap in the EU's defences against crime and terrorism".

Conclusion

11.18 We thank the Minister for her helpful discussion of the costs of imposing requirements for data retention and for the regulatory impact assessment.

11.19 We note that there are now two proposed methods of dealing with this issue, one under the EU Treaty and one under the EC Treaty. We ask the Minister if she will explain further if the Government has any preference for a particular approach and for her assessment of the legal and political consequences of accepting that an EC instrument may be adopted for the purposes of crime prevention and investigation.

11.20 We also ask the Minister if the Government is content that such a sensitive issue as the identification and listing of data to be retained is an appropriate matter to be delegated to the Commission under the comitology procedure.

11.21 We clear document (a) on the grounds that it is superseded, but we shall hold documents (b) and (c) under scrutiny pending the Minister's reply.

30 A committee of senior officials which advises the Council in its work under Title VI EU. [Back](#)

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