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22. 03. 2011

**CAD**

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DG Home Affairs  
European Commission  
B-1049 Brussels

Brussels, 11 March 2011  
GB/HK/et/D(2011)509 C 2009-0642

**Subject: Draft evaluation report on the Data Retention Directive (Directive 2006/24/EC) from the Commission to the Council and the European Parliament**

Dear Mr Manservisi,

Thank you for the request for comments concerning the draft evaluation report on the Data Retention Directive. The request was sent to us by your DG and reached us by email sent on 21 February 2011.

We welcome the informal consultation of the EDPS at this stage of the procedure.

You will find attached a note with preliminary comments and without prejudice to the public EDPS opinion that may follow after publication of the evaluation report.

We remain available, should you need any clarification in relation with this note.

Yours sincerely,

Giovanni BUTTARELLI

Cc: Mrs Cecilia Verkleij, DG Home Affairs  
Mr Christian D'Cunha, DG Home Affairs  
Mrs Marie-Hélène Boulanger, DG JUST, Data Protection Unit  
Mr Philippe Renaudière, Data Protection Officer of the Commission

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Contact person: Herke Kranenborg, tel: 02 283 1910



## **Comments on the draft evaluation report on the Data Retention Directive (Directive 2006/24/EC)**

### **1. Introduction**

With the evaluation report the Commission intends to meet the obligation contained in Article 14 of the Data Retention Directive to evaluate the application of the Directive and its impact on economic operators and consumers, with a view to determining whether it is necessary to amend the provisions of the Directive.

In December 2010, the EDPS called upon the Commission to use this opportunity to prove the correctness of the assumption that the Data Retention Directive constitutes a necessary and proportionate measure in the light of the rights to privacy and data protection. In this respect the EDPS called the evaluation 'the moment of truth' for the Data Retention Directive.<sup>1</sup>

The EDPS is pleased to see that in the introduction to the draft evaluation report the Commission, although such is not strictly required by Article 14 of the Data Retention Directive, announces it will examine 'the implications of the Directive for fundamental rights, in view of the criticisms which have been levelled in general at data retention' (p. 2).

### **2. Data retention as a "necessary tool"**

One of the two main conclusions of the report is that the 'evaluation has demonstrated that data retention is a necessary tool for law enforcement and criminal justice systems in the EU' (p. 2). The other main conclusion being that the Directive has not fully harmonised the approach to data retention in the Member States.

After careful analysis of the draft report, the EDPS does not share the conclusion by the Commission that the evaluation has demonstrated the necessity of data retention for law enforcement and criminal justice systems in the EU. Our position is based on two main arguments.

Before explaining these two arguments the EDPS wishes to point at the fact that if the Commission in the final report indeed concludes that a system of mandatory data retention *per se* constitutes a necessary measure, it should subsequently also provide an assessment of whether data retention as it is laid down in the current Directive constitutes a proportionate measure. In the present draft this analysis is completely missing. It should be kept in mind that the requirements of necessity and proportionality are enshrined in the EU Charter of

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<sup>1</sup> See the speech of 3 December 2010, held during the Conference 'Taking on the Data Retention Directive', to be found on the EDPS website (<http://www.edps.europa.eu>) under 'Publications' >> 'Speeches & Articles' >> '2010'.

Fundamental Rights and in the European Convention of Human Rights, and have been rigorously applied by the Court of Justice.<sup>2</sup>

The first main argument: the conclusion that data retention constitutes a necessary measure is not supported by sufficient evidence. The value of the retained data for criminal investigations and prosecutions is discussed in chapter 5.3 of the draft report. A couple of examples from Member State practice are presented in which the retained data played a decisive role in the investigation of a criminal offence (p. 23). Apparently, only one Member State, the UK, has provided more general data on the number of investigations in which retained data were used (p. 23).

Although these rather limited concrete examples might illustrate the important role played by retained data in certain specific situations and the potential benefits of a system of data retention, they cannot lead to the general conclusion that data retention as such constitutes a necessary measure which justifies a large-scale infringement of the fundamental rights to privacy and data protection of citizens.

In order to properly assess the necessity of data retention, much more information should be available to be taken into account. Such information should be both more general in scope and more concrete in nature. It should show the relationship between *use* and *result*, and should allow the assessment *sine qua non* of whether comparable results could have been achieved with alternative, less privacy intrusive means (see next point). Such information should be available from as many Member States as possible, including the ones that appear to be more reserved about data retention, demonstrating what is necessary according to their experience.

The EDPS is aware of the difficult position in which the Commission finds itself, as it is dependent on the information provided by the Member States. However, this fact cannot justify failing to respect the standard of proof for demonstrating the necessity of the system of data retention.

The second main argument: less intrusive means have not sufficiently been examined. Data preservation (quick freeze and quick freeze plus) is mentioned in the context of the cybercrime convention, but is set aside as an inappropriate alternative as it 'does not guarantee the ability to establish evidence trails prior to the preservation order, nor does it allow for evidence to be gathered on movements of, for example, victims of or witnesses to a crime' (p. 4/5). In the conclusions data preservation is mentioned once again but only as a measure which might be *complementary* to data retention (p. 31). This failure to examine the possibility of using this less intrusive alternative is a major flaw in the analysis of the draft report.

The EDPS acknowledges that less information is available when a system of data preservation is used instead of a broad system of data retention. However, it is precisely for that reason that data preservation constitutes a less privacy intrusive instrument. The conclusion at paragraph 8.1 might just as well apply to the necessity and proportionality of data *preservation*. The crucial question is whether, with a view to its added value, data *retention* is necessary in the light of the much greater impact it has on the privacy and data protection of citizens than a system of data preservation. In light of what has been said under the first argument above, there is insufficient information available to draw any general conclusions on this.

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<sup>2</sup> ECJ 20 May 2001, Joined Cases C-465/00, C-138/01 and C-139/01, *Rundfunk*, and ECJ 11 November 2010, Joined Cases C-92/09 and C-93/09, *Schecke and Eifert*.

On the basis of this, the EDPS would advise the Commission to conclude that the necessity of the instrument is not sufficiently demonstrated by the evaluation report in its current form.

### Lack of harmonisation and the existing legal loophole

The draft report recalls in chapter 7 that the EU Charter and the ECHR require that any limitation to a fundamental right must be provided for by law. According to the ECJ, this requirement means that any provision interfering with a fundamental right must be formulated with sufficient precision to enable the citizen to adjust his conduct accordingly and in this way comply with the requirement of foreseeability laid down in the case law of the European Court of Human Rights.<sup>3</sup>

In this respect the EDPS would make the following remark on the second main conclusion of the report: the lack of harmonisation achieved by the Data Retention Directive. It follows from the analysis in paragraph 4.1 that the purpose of 'investigating, detecting and prosecuting serious crime' is interpreted and applied differently in the EU Member States. There are different interpretations of the notion of 'serious crimes' and data are used for other purposes as well. In several Member States this is done with use of the 'legal loophole' created by Article 15 of the ePrivacy Directive.<sup>4</sup>

The draft report itself refers to the 'complex legal relationship' between the two Directives, which makes it 'difficult to distinguish' when one or the other applies (p. 5/6). This situation means that the Data Retention Directive constitutes a limitation of a fundamental right which is, even assuming that it constitutes a necessary measure, not formulated in a clear and predictable manner (see also the comments below), and hence does not respect the requirement of foreseeability.

As to the purpose of data retention, the draft report concludes that the 'need for, and options for achieving, a greater degree of harmonisation [...] should be carefully assessed' (p. 9). However, from a privacy and data protection point of view there is no doubt about the need to have a limited and well-defined purpose. The EDPS would therefore recommend replacing this phrase by a text along the following lines: 'options should be carefully assessed how to reach a degree of harmonisation, which also meets the standards which follow from the right to privacy and data protection'.

Even with a well-defined purpose, data retention will in any event still not meet the standards of privacy and data protection if the legal loophole of Article 15 of the ePrivacy is not remedied. The draft report acknowledges the highly problematic assessment following this provision, but does not commit itself to remedying the legal loophole. The EDPS takes the view that the Commission does so as otherwise all efforts to improve the data retention directive might prove useless from the start.

### **3. A more ambitious approach to the impact of data retention on fundamental rights**

The EDPS considers insufficient the more general analysis in the draft report as to the implications of data retention for fundamental rights. According to its title, chapter 7 is supposed to address the matter. However, this chapter only includes a limited description of the conditions for lawful data processing and the way in which these are interpreted by the ECJ and the ECHR, a very brief reflection of the criticism voiced by civil rights groups, the Article 29 WP and the EDPS and draws only one general conclusion, namely that 'options for

<sup>3</sup> See ECJ 20 May 2001, Joined Cases C-465/00, C-138/01 and C-139/01, *Rundfunk*, para 77.

<sup>4</sup> See the EDPS speech of 3 December 2010.

how to strengthen data security and data protection provisions in the Directive should [...] be carefully considered' (p. 29). This conclusion does not reappear in the final chapter 8, which contains the 'Conclusions and recommendations' of the report.

The EDPS strongly recommends that the Commission give chapter 7 a more prominent place in the report and improve its content. Furthermore, he recommends putting the analysis of the different aspects of the Data Retention Directive as displayed in chapters 4 and 5 more explicitly also in the light of respect for the right to privacy and data protection. Only then will the report live up to the announcement in the introduction, referred to above, that the implications of the Directive for fundamental rights will be examined in view of the criticisms which have been levelled in general at data retention.

Such a fundamental rights analysis would comply with the ambition expressed by the Commission in its Communication of 19 November 2010 on the strategy for effective implementation of the EU Charter of Fundamental Rights, namely that the Charter of Fundamental Rights 'is taken into account in the *ex post* evaluation of Union instruments'.<sup>5</sup>

In this respect the EDPS would like to draw particular attention to the Fundamental Rights 'Check-List' contained in the said Communication. Steps 5 and 6 of this check-list are of particular importance. Step 5 obliges the Commission to see whether a limitation of a fundamental right is formulated 'in a clear and predictable manner', and step 6 requires the Commission to see whether any limitation of a fundamental right is necessary to achieve an objective of general interest and is proportionate to the desired aim.<sup>6</sup>

More specifically the EDPS proposes the following:

As to chapter 7:

- Change chapter 7 into chapter 2;
- Include a reference to the Communication on the strategy for effective implementation of the EU Charter of Fundamental Rights and refer to the check list;
- Delete the phrase that it 'is contestable whether location and traffic data themselves constitute personal data'. In the context of data retention, and as the rest of the sentence concerned makes clear, there is no doubt that such data constitutes data relating to an identified or identifiable natural person. Keeping this statement will lead to unnecessary criticism;
- Merge paragraph 7.1 and 7.3 and clearly list the general conditions under which an infringement of the right to privacy and data protection can be justified and the subsequent interpretation of those by the European Courts;
- Present in a more complete and more correct way the criticism expressed by civil rights groups, the Article 29 Working Party and the EDPS;
- Refer also in this chapter to the decisions of the Rumanian and German Constitutional Courts and to the seminal ruling of the ECJ in *Rundfunk*<sup>7</sup>;

As to chapter 4 and 5:

Throughout chapter 4 and 5 references should be made to the fundamental rights context within which the evaluation takes places. The findings presented in these two chapters are

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<sup>5</sup> COM(2010)573 final, p. 6.

<sup>6</sup> See p. 5 of the Communication.

<sup>7</sup> See ECJ 20 May 2001, Joined Cases C-465/00, C-138/01 and C-139/01.

mainly discussed with a view to see whether further harmonisation is needed. However these findings should also be put in the light of the fundamental rights assessment, with explicit reference to the necessity and proportionality test.

For example, the age of data to be retained on a mandatory basis is an issue which requires more attention in that perspective: although some Member States consider data older than 6 months 'crucial' for certain specific investigations, information provided by the same Member States clearly show (p. 21) that the large majority of retained data (2008 and 2009 years) is under six months old (92 % of data in the mobile telephony; 90 % in the fixed telephony). The Commission should draw conclusions in light of the proportionality principle.

The EDPS wishes to restate that from a privacy and data protection point of view this constitutes a 'second stage' analysis. The Commission should first demonstrate that data retention constitutes a necessary measure *per se* as discussed above.

As to the written declaration on the setting up of a European early warning system (EWS) for paedophiles and sex offenders (see p. 13) the EDPS invites the Commission to take account of the EDPS opinion of 10 May 2010 on the proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography.<sup>8</sup>

As to chapter 8:

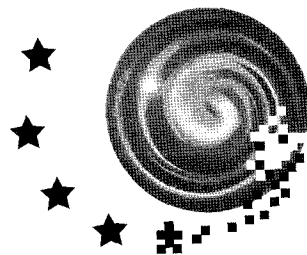
Add a separate paragraph in which conclusions are drawn as to the impact the measure has on fundamental rights. This could contain the following:

- an explicit commitment of the Commission to carefully assess in the impact assessment whether less intrusive means than blanket data retention are available;
- a statement that because of the lack of harmonisation the limitation of a fundamental right is not formulated 'in a clear and predictable manner' (step 5 of the check list) and therefore not complying with the requirement of foreseeability;
- a clear commitment that the areas of examination mentioned in the current paragraph 8.5 will all be assessed also in the light of the necessity and proportionality requirements stemming from the right to privacy and data protection;
- the conclusion of the current paragraph 7.4 to see how data security and data protection provisions can be strengthened.

Brussels, 11 March 2011

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<sup>8</sup> To be found at the EDPS website (<http://www.edps.europa.eu>) under 'Consultation' >> 'Opinions' >> '2010'.



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