



Her Excellency Viviane Reding  
European Commission  
Commissioner for Information Society and Media  
Rue de la Loi 200 B-1049 Brussels – Belgium

His Excellency Franco Frattini  
European Commission  
Vice President and Commissioner for Justice, Freedom and Security  
Rue de la Loi 200 B-1049 Brussels – Belgium

cc: Members of the LIBE and Industry committees of the European Parliament

Amsterdam, August 30, 2005

Regarding: commentary Dutch ISP's on EC proposal on data retention

Dear Mr Frattini, Mrs Reding,

On behalf of ISPO, the Dutch internet provider platform, we kindly ask your attention for some first comments on the draft Commission proposal for a Directive on data retention. We are well aware this proposal is still in consultation and has not been finalized yet, but feel it is appropriate to send our reflections before September 2005. We expect the negotiations between Commission, Council and Parliament to rapidly reach momentum around the informal JHA Council of 8 september 2005, and are concerned the specific problems of the internet industry might be overlooked.

We are pleased to see the Commission insists on a first pillar directive procedure. We are also pleased the Commission insists on reimbursement of 'additional costs' for the industry, caused by the obligation to retain data without any business purpose. We also see a clear difference in length of storage periods between the Commission proposal and the last UK-prepared version of the JHA proposal for a framework decision. However, we cannot help but notice the same lack of evidence for the benefits of traffic data retention. We will gladly oblige with the proposal to collect statistics on the use of retained data and present these annually to the Commission, but would have expected this information had already been collected by law enforcement agencies as the start of a debate about the necessity of creating a Directive on mandatory data retention.

In fact, as far as we know, the research conducted by the Rotterdam Erasmus University into the usefulness and necessity of data retention is the only public research in Europe into such statistics. But instead of providing a convincing argument for any period of mandatory data retention, this report concludes that law enforcement 'in virtually all cases' could obtain all the data they requested. For a detailed analysis of the Erasmus report, we kindly refer you to the attached document.



The Netherlands do not have any mandatory data retention law, with the single exception of a specific obligation (an administrative decree) on providers of pre-paid mobile telephony services to store caller location data for 3 months, in order to be able to trace the identity of a pre-paid caller. Because a possible European framework decision on this issue would have such a grave financial and operational impact on the telecommunications industry, the Dutch Parliament has forbidden the Minister of Justice to take any further steps in the European Union leading to mandatory data retention until the need for and benefits of data retention have been proven. In our opinion, this same argument applies to a Commission directive proposal.

On the issue of cost reimbursement, we are very concerned about the phrasing of the definition of additional costs. So far, the Dutch government has transferred all costs related to law enforcement unilaterally to the industry. The Dutch Telecommunication Law only prescribes reimbursement for the personnel and administrative costs of executing law enforcement orders, but none of the very high infrastructural and incremental costs. On 1 April 2005, government has unilaterally, without any consultation with the industry, lowered the standard reimbursement fee for personnel costs to the unrealistically low amount of 13 euro per wiretapping order and 6,56 euro for the execution of an order to retrieve traffic data. Given the immense expected costs of implementing data retention, and the repeated intention of the Dutch Minister of Justice not to reimburse any additional costs, we are deeply concerned about our future economic viability and ability to develop new services.

A further issue of concern for ISPO is the fact that the annex of the guideline proposal that specifies the types of data to be retained does not provide a clear-defined scope for the data retained. This is especially the case for data necessary to trace and identify the destination of a communication. ISPO assumes that only person-to-person communication is within the scope of these type of data. ISPO strongly urges the Commission to use a definition that strictly limits the scope data to be retained.

With the Commission we wholeheartedly agree that innovation in the IT-sector is the engine of the European economy. Given the rapid replacement of traditional telecommunication services by IP-based services, we are afraid any seemingly modest list of data, will continuously be subjected to expansion. The proposed 'flexible list' and decision mechanism behind closed doors strike us as the biggest flaw in the Commission proposal. If the purpose is to create a balance between human rights and law enforcement demands, any shift in this balance should be properly debated in the European Parliament and should never bind national parliaments.

Sincerely,

on behalf of ISPO,

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Addition:

Commentary on the Erasmus Study by ISPO.