

JHA COUNSELLORS

I. Presidency proposals for amendments to the instruments on data retention

- Several delegations have raised either the proportionality of the measures proposed on the retention of data and / or the fact that certain types of data will not always be known to the service provider. In light of comments sent to the Presidency and existing language in the draft Framework Decision, JHA Counsellors are invited to consider the following amendments.

Amendment to Article 3(1) of the draft Directive: this mirrors Articles 3(1) and 4(8) of the draft Framework Decision:

Article 3

Obligation to retain data

1. By way of derogation to Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt the necessary and proportionate measures to ensure that data to that extent that it is generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying communication services are retained in accordance with the provisions of this Directive.

To be accompanied by the following Recitals (also for inclusion in the draft Framework Decision):

A: Providers of publicly available electronic communications services and public communications networks can only retain data which they generate or process; to the extent that such data is not generated or processed by those providers, there can be no obligation to retain it.

B: The measures that are adopted to implement this draft Directive / draft Framework Decision should have regard to the necessity and proportionality of the imposition of obligations to retain data on specific electronic communications providers, ensuring that data is not retained in duplicate more than absolutely necessary and ensuring that data is available for the purpose of the investigation, detection and prosecution of criminal offences.

Proposals from specific Member States:

1. Finland has proposed:

"Recital 5 (Framework Decision) / Rec x (Directive)

This Framework Decision relates only to data generated as a consequence of a communication or a communication service and does not relate to data that is the content of the information

communicated. (NEW TEXT:) Given the immense amount of Internet traffic data and some technical difficulties to retain such data selectively, 'generating or processing data in the process of supplying the communications services concerned' (art 3) refers to data which is available, such as data related to Internet telephony and Internet e-mail provided by communications service providers' themselves."

2. Greece has proposed the following on the basis that their technical experts are of the view that this formulation clarifies the meaning of the term "internet access":

Article 4: points c (2) and (3)- pages 8-9 of doc. 13780/05 COPEN 170 TELECOM 116:

" c) Data necessary to identify the date, time and duration of a communication.

(1) Concerning Fixed Network Telephony and Mobile Telephony:

(a) The date and time of the start and end of the communication.

(2) Concerning Internet Access, Internet e-mail and Internet telephony:

(a) The date and time of the log-in and log-off of the Internet Access service based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet Access Service provider to a communication, and the User ID of the subscriber or registered user.

(b) The date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service based on a certain time zone."