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OUTCOME OF PROCEEDINGS

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| of : | Working Party on Cooperation in Criminal Matters |
| on : | 8 and 9 March 2005 |
| No. prev. doc. : | 7897/05 COPEN 71 |
| Subject : | 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. |

The Working Party on cooperation in criminal matters examined on 8 and 9 March 2005 the above draft Framework Decision on the basis of 6566/05 COPEN 35 TELECOM 10 and having in mind the discussions in the Article 36 Committee on the draft on 28 February 2005.

The text resulting from the proceedings is set out in the Annex.

The European Parliament has been invited to give its opinion on the draft.

Several delegations have entered general scrutiny reservations and general parliamentary scrutiny reservations on the draft.

The Commission maintained its reservation on the legal basis for the proposal.¹

DELETED presented a paper on the issue of costs caused by storing and accessing communication data, and thought the issue should be addressed somewhere in the draft. Some delegations thought this issue was a matter for Member States to decide on. Others wanted to examine the **DELETED** paper.

¹ The Commission has since officially transmitted a working paper of the services of the Commission on the legal basis (7735/05 COPEN 64 JUR 138). The Legal Service of the Council has given its opinion on the question in 7688/05 JUR 137 COPEN 62 TELECOM 21.

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.¹

Article 1²

Scope and Aim

1. This Framework Decision aims to facilitate judicial co-operation in criminal matters by approximating Member States' legislation on the retention of communication³ data, generated or processed⁴ by providers of a publicly available electronic communications service or a public communications network, for the purpose of investigation, detection and prosecution of criminal offences.^{5 6}

¹ The preamble has not been reproduced and will be examined at a later stage.

² Scrutiny reservations on Article 1 by some delegations.

³ Scrutiny reservation by **DELETED**.

⁴ The words "generated or processed" was proposed by the Presidency in the light of the outcome of the JHA Council on 2 December 2004. Scrutiny reservations by some delegations. **DELETED** thought data related to failed attempts to establish a communication should be excluded. **DELETED** was concerned regarding costs. **DELETED** thought the text should refer to communication data stored by the service provider.

⁵ **DELETED** proposed the following new recital:

"10. Since, however, introducing a minimum retention period for communications data in itself constitutes considerable interference in the individual liberties both of users of telecommunications services and of network operators and service providers, it is only justifiable in an area of freedom, security and justice if it is necessary in order to protect important interests. Such a necessity arises because of the significance of retrospective analysis of communications data in solving serious offences, in particular terrorist offences, since data relating to communications which took place at an earlier date frequently offer the only promising line of inquiry in such cases and only the creation of an obligation to retain data can ensure that data are available for a certain period. Member States will also be at liberty to allow later access to the stored data in order to clear up other offences apart from those previously mentioned."

⁶ **DELETED** maintained a reservation on the deletion of the reference to "prevention".

2. This Framework Decision shall apply to all means of electronic communication¹, including in particular:

- (a) Telephony excluding Short Message Services, Enhanced Messaging Services and Multi Media Messaging Services.
- (b) Short Message Services, Enhanced Messaging Services and Multi Media Messaging Services provided as part of any telephony service.
- (c) Internet (...) ².

3. This Framework Decision shall not apply to the content of exchanged communications, including information consulted using an electronic communications network.

¹ **DELETED** proposed "...to all means of publicly available telecommunication in public networks". Some delegations reacted positively. Others thought it would confuse and that Article 1(1) covered the point. Scrutiny reservation by **DELETED**.

² **DELETED** proposed "Internet access and internet services".

4. This Framework Decision is without prejudice to:

- national rules on retention of communication data processed or generated by providers of a publicly available electronic communications service or a public communications network for the purpose of prevention of crime;
- the rules applicable to judicial co-operation in criminal matters with regard to the interception and recording of telecommunications;
- activities concerning public security, defence and national security (i.e. State security);
- [- national rules relating to the retention of communication data types which are not held by communication service providers for business purposes.]¹
- exchange of information taking place within the framework of police cooperation.²

¹ Some delegations thought the fourth indent could be deleted, and asked for an explanation on its inclusion from the delegations having proposed the draft Framework Decision.

² Inserted to meet concerns expressed by **DELETED**.

Definitions

1. For the purpose of this Framework Decision, the term ‘communication data’ (...) means:

(a) traffic data and location data as defined in Article 2 of the Directive 2002/58/EC.

¹ **DELETED** would prefer to exclude data relating to unsuccessful attempts to establish telecommunications.

² **DELETED** proposed the following text:

Communication data to be retained for the purpose of this framework decision are data

- (a) necessary to retrace a telecommunication link and
- (b) listed in the following paragraph (or: in the annex of the Framework Decision).

I. Fixed Network Telephony

1. In case of a successful outgoing call:

- a) The calling and called telephone number.
- b) aa) Start,
bb) duration or end
of the connection as indicated by the date and time thereof based on a certain time zone.
- [c) Telephone service used.]

2. Names and addresses of the callers, to whom the telephone numbers were registered at the time of the connection.

II. Mobile Telephony

1. In case of a successful outgoing call:

- a) The calling and called telephone number and, if available, the location label (Cell ID) at the start of the connection, as well as the equipment label (IMEI).
- b) aa) Start,
bb) end or duration
of the connection as indicated by the date and time thereof based on a certain time zone.
- [c) Telephone service used.]

2. Names and addresses of the callers, to whom the telephone numbers were registered at the time of the connection.

III. Internet

1. The dynamic and static IP address allocated by the Internet access provider to a connection.

2. a) Start,
b) end or duration
of the connection as indicated by the date and time thereof based on a certain time zone.

3. The Connection Label or User ID via which the connection to the Internet access provider was made.

4. Name and address of the user, to whom the Connection Label or User ID was allocated at the time of the connection.

- (b) User data, which means data relating to any user¹ of a publicly available electronic communications service, for private or business purposes, without the user necessarily having subscribed to the service.
- (c) Subscriber data, which means data relating to any legal or natural person subscribing to a publicly available electronic communications service for, private or business purposes, without necessarily having used the service.

¹ Scrutiny reservation by **DELETED**.

2. Communication data to be retained for the purpose set out in Article 1 include: ^{1 2}
- (a) Data necessary to trace and identify the source of a communication which includes personal details, contact information and information identifying services subscribed to.³
 - (b) Data necessary to identify the routing and destination of a communication.⁴
 - (c) Data necessary to identify the time and date and duration of a communication.

¹ The Working Party discussed the different possibilities for a list. A first option could be a simple functional list along the lines of the present par. 2, possibly combined with a non-binding manual with technical details. This option would have the advantage that it could survive technical developments but could be criticized for not imposing precise legal obligations. The possible elaboration of a manual could turn out to be a difficult exercise. A second option could be a technically more detailed list in the draft and a mechanism to revise the list. This approach would be more precise, but could create a need for revising the text often. The proposal by **DELETED** in the footnote to Article 2 is based on the approach of a functional list, but it goes somewhat more in detail than the present par. 2 and it refers to the 3 basic categories of telecommunications involved (fixed phone, mobile phone and internet). Such a text would in principle only need to be revised if completely new types of telecommunications, not covered by the 3 categories, emerged. At this stage, the list is subject to scrutiny reservations by several delegations. Many delegations thought that the **DELETED** proposal was too restrictive, in particular concerning the limitation to successful outgoing calls.

The Presidency proposes to keep par. 1 of Article 2 as revised. The Presidency considers that a solution regarding par. 2 may be based on the original approach of a functional list. However, having in mind comments made on the need for precise legal obligations and the proposal made by **DELETED**, the Presidency suggests that the text should deal with the different categories of telecommunications separately and that the text should be as detailed as possible without, however, creating a need for constant revision of the list.

² **DELETED** had earlier proposed the following version of Article 2(2):

"For the purpose of this Framework Decision data retention should in any case be limited to those traffic data, which are created at the provider during the process of connecting the user to the network and are necessary for attributing a network-address (used at a given time) to the respective subscriber ("access data").

These data includes the data listed in the annex of this framework decision."

³ **DELETED** proposed: "Data necessary to trace and identify the source of a communication and user data or subscriber data related to that source.". **DELETED** proposed: "Data necessary to trace and identify the source of a communication and user data and subscriber details related to that source."

⁴ **DELETED** proposed: "Data necessary to identify the intermediate and final destination of communication."

- (d) Data necessary to identify the telecommunication.
- (e) Data necessary to identify the communication device or what purports to be the device.
- (f) Data necessary to identify the location at the start and throughout the duration of the communication.¹

Article 3²

Retention of communication data

1. Each Member State shall take the necessary measures to ensure that, for the purpose of providing judicial co-operation in criminal matters, communication data as referred to in Article 2(2) when generated or processed by providers of a publicly available electronic communications service or a public communications network is retained in accordance with the provisions of this Framework Decision.
- 2.³ Member States shall take appropriate measures for the purpose of the technical implementation of paragraph 1.

¹ **DELETED** proposed: "Data necessary to identify the location at the start, the end and, where it exists, throughout the duration of the communication".

² It has been suggested that Articles 3 and 4 could be merged.

³ The inclusion or otherwise of Article 3(2) depends on further discussions on Article 2.

Article 4¹

Time periods for retention of communication data

1. Each Member State shall take the necessary measures to ensure that communication data referred to in Article 3 shall be retained for a period of 12 months² following its generation. Relating to subscriber data, this period shall run from the end of the subscription.
2. By derogation from paragraph 1, any Member State may provide for retention of communication data referred to in Article 3 for longer periods of up to 48³ months in accordance with national criteria when such retention constitutes a necessary, appropriate and proportionate measure within a democratic society.
3. By derogation from paragraph 1, any Member State may provide for retention of communication data referred to in Article 3 for shorter periods of at least 6 months⁴ in relation to means of communication identified in Article 1(2)⁵ should the Member State not find acceptable, following national procedural or consultative processes, the retention periods set out in paragraph 1 of this Article.
4. Any Member State which decides to make use of paragraph 3⁶ must notify the Council and the Commission of the retention periods provided for with specification of the communication data concerned. Any such derogation must be reviewed annually⁷.

¹ Scrutiny reservations by several delegations on Article 4.

² **DELETED** thought it should be a "minimum period of 12 months".

³ Presidency proposal, having in mind IT legislation. **DELETED** thought "longer periods of up to 48 months" should be replaced by "periods longer than 12 months".

⁴ Reservation by **DELETED**, which did not want a minimum and in any case thought that 3 months would be enough.

⁵ Proposal as a basis for further discussions.

⁶ **DELETED** called for the addition of a reference to par. 2.

⁷ **DELETED** thought a review every 3 or 5 years would suffice.

Data Security

Each Member State shall ensure that, regarding communication data retained under this Framework Decision, providers subject to the retention obligation must comply, as a minimum, to the following data security principles:

- (a) the retained data shall be of the same quality as those data on the network;
- (b) the data shall be subject to appropriate technical and organisational measures to protect the data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, and against all other unlawful forms of processing;
- (c) all data shall be destroyed at the end of the period for retention except those data which have been accessed and preserved;

¹ **DELETED** referred to its proposals in 6909/05 COPEN 45 TELECOM 14.

DELETED proposed the following:

Each Member State shall ensure that data retained under this Framework Decision shall be subject, as a minimum, to the following data security principles and regard shall be given to the provisions of Article 4 of Directive 2002/58/EC:

(a) (unchanged)

(b) (unchanged)

(c) the data shall not be disclosed to anybody who is not legally responsible for the investigation or for the control legitimacy of investigations;

(d) shall effectively guarantee by technical and organisational measures, that access to the data retained is only granted to authorised persons and in every single case only for a pre-defined and limited period of time after legitimacy of access was checked by the competent judicial authority.

(e) (former (c) unchanged).

DELETED proposed:

- a reference to Directive 95/46 on data protection in a recital.
- the deletion of Article 5(b) (already covered by the Directive)
- the addition of the following new paragraph: "Data retained in accordance with the provisions of this Framework Decision shall only be used for the purpose of investigation, detection and prosecution of criminal offences".

Several delegations entered scrutiny reservations on Article 5. Some delegations thought the provision could be deleted. Some support was expressed for the two first indents of the proposal by **DELETED**.

Article 6¹

Access to retained communication data

Each Member State shall ensure that access to communication data retained under this Framework Decision shall be subject, as a minimum, to the following rules and shall establish judicial remedies in line with the provisions of Chapter III on 'Judicial remedies, liability and sanctions' of Directive 95/46/EC:

- (a) data shall be accessed for specified, explicit and legitimate purposes² by competent authorities on a case by case basis in accordance with national law and not further processed in a way incompatible with those purposes;
- (a bis) the process to be followed in order to get access to retained data and to preserve accessed data shall be defined by each Member State in national law;
- (b) the data shall be adequate, relevant and not excessive in relation to the purposes for which they are accessed. Data shall be processed fairly and lawfully;
- (c) data accessed by competent authorities shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purpose for which the data were collected or for which they are further processed;
- (d) the confidentiality and integrity of the data shall be ensured;
- (e) data accessed shall be accurate and, every necessary step must be taken to ensure that personal data which are inaccurate, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

¹ Scrutiny reservations by several delegations. **DELETED** referred to Article 7 of 6909/05 COPEN 45 TELECOM 14. In relation to that text, some delegations thought that a reference to CoE Convention 108 could be made in a recital rather than in an Article.

² **DELETED** proposed "...explicit and legitimate purposes of investigation and prosecution regarding serious criminal offences". several delegations were against this.

Article 7

Request to access communication data for the purpose of judicial co-operation in criminal matters

Each Member State shall execute requests from other Member States for transmission of communication data, retained pursuant to Articles 3 and 4, in accordance with the applicable instruments on judicial co-operation in criminal matters¹. [The requested Member State may make its consent to such a request for (...) communication data subject to any conditions which would have to be observed in a similar national case.]²

Article 8

Implementation

Member States shall take the necessary measures to comply with this Framework Decision by [.....June 2007] within two years following the date of adoption.

By the same date Member States shall transmit the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. The General Secretariat of the Council shall communicate to the Member States the information received pursuant to this Article.

The Commission shall by [....1st January 2008] submit a report to the Council assessing the extent to which the Member States have taken necessary measures in order to comply with this Framework Decision.

¹ Revised text proposed by the Presidency.

² Most delegations called for the deletion of the second sentence, which, in their view, would allow for refusing requests for mutual assistance to a wider extent than provided for under existing instruments. However, several delegations (**DELETED**) wanted to keep it. Some of those delegations referred to ongoing discussions on the European Evidence Warrant.

Article 9

Entry into force

This Framework Decision shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.
