



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 May 2011

10806/11

**DAPIX 58
TELECOM 83
COPEN 132
RELEX 580**

OUTCOME OF PROCEEDINGS

of: Working Party on Data Protection and Information Exchange (DAPIX - Data Protection)
on: 4 May 2011
Subject: Summary of discussions

1. Adoption of the agenda

The agenda as set out in CM 2672/1/11 REV 1 was adopted.

2. Evaluation report on the Data Retention Directive (Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC)

9324/11 DAPIX 38 TELECOM 47 COPEN 85
9439/11 11 DAPIX 39 TELECOM 50 COPEN 89

2.1. Presentation by the Commission

The Commission gave a brief presentation of the main findings of its report.

2.2. Presentation by the EDPS

The European Data Protection Supervisor made a number of remarks regarding the evaluation of the Data Retention Directive, to which he referred as the "most privacy-invasive" instrument ever adopted by the European Union. In his view, the Commission evaluation report, whilst being a very thorough analysis of the implementation of the Directive, did not offer evidence that large-scale retention of traffic data was necessary. He also indicated that the data provided by some Member States were credible, but not necessarily comparable. He furthermore questioned the finding that no data breaches had occurred, as any statement in this regard depended on the sources consulted.

2.3. General discussion

Various Member States intervened to express their support for the Data Retention Directive, which, in their view, was a necessary instrument in order to effectively combat serious crime. The difficulty to provide legal evidence of the necessity/indispensability of traffic data was emphasised as courts often did not refer to specific evidence that had been crucial in their determination of the guilt of the accused. Reference was also made to paragraph 5.4 of the report, which contained examples of the indispensability of the traffic data in certain cases.

Other Member States were less positive about the Data Retention Directive and referred to the lack of comparable data and to data protection concerns.

2.3.1. Definition of serious crime and other purposes retained data are used for

Various Member States were of the opinion that the use of traffic data should be limited to serious crime and that the concept of serious crime should be defined at EU level. One delegation indicated that this was not only necessary from a human rights point of view, but also from an internal market point of view.

Many, however, emphasised that sufficient flexibility should be kept and pointed to difficulties in arriving at a satisfactory definition at EU level. Member States opined that the limiting the use of traffic data to serious crime might limit the possibilities to use traffic data at an early stage of an investigation, where the exact nature of the offences being investigated might often still be unclear. The need for having the possibility to use traffic data for other legitimate purposes, such as locating lost persons, was also mentioned.

2.3.2. Principles of necessity and proportionality – missing statistics

Whilst some delegations emphasised the need for more empirical, i.e. statistical evidence to support the necessity to store these data, other delegations were of the opinion that the necessity to store such data could not be argued on the basis of statistical data. It was also stated that the gravity of the offences investigated thanks to traffic data, rather than the mere number of cases in which traffic data were used should receive due attention. Quantitative analysis should be complemented with qualitative assessment.

The Commission pointed to the need of devising an improved and realistic system for collecting statistics on traffic data used in investigations.

2.3.3. Periods of retention

Some Member States stated their opposition to any proposal to increase the current minimum period of six months during which providers of publically available electronic communications services or of public communications networks are obliged to retain traffic and location data. Other Member States, however, indicated that if the minimum threshold were to be modified, it should, for operational reasons, be at least for one year. The EDPS stated his opposition to the "window" between six months and two years, which could also be problematic in cross-border cases involving Member States with different retention periods.

2.3.4. Misuse of retained data

No other Member State than Hungary had knowledge of a concrete case about misusing data.

2.3.5. Use of unregistered (anonymous) SIM cards

A few Member States indicated that they might consider the possibility of excluding the sale of anonymous SIM cards, as these offered a means of communication without identification of the owner of the telecommunication means. One Member State that had already prohibited the sale of anonymous SIM cards stated that this was not violative of human rights. The Commission indicated that any Commission proposal to limit or ban the sale of anonymous SIM cards would have to be preceded by a business cost impact assessment.

2.3.6. Data preservation as an alternative to data retention.

Regarding the new type of data preservation, known as 'quick freeze plus', several Member States indicated that it could not replace data retention in the future. Others were uncertain as to what exactly this new instrument covered.

3. Negotiations for an agreement between the European Union and the United States of America on protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters

- Information from the Presidency on the EU-US JHA Ministerial meeting in Gödöllő, 14 April 2011

The Presidency briefly presented the main outcome of this meeting.

- State of play by the Commission

The Commission stated that only one round of negotiations had taken place, namely on 28 March 2011 (videoconference) and that a second round was scheduled to take place on 5-6 May 2011.

Further to a question from delegations, the Commission indicated it would conduct an assessment of the possible impact of the future EU-US Agreement on the bilateral cooperation arrangements between Member States and the United States of America and the consequences thereof on the nature of the Agreement. One delegation suggested that the Working Party could be tasked to look into the question of the nature of the Agreement.

4. Any other business

The Incoming Presidency briefly presented its plans for the second half of 2011. It also referred to a data protection conference it was organising in September 2011 in Warsaw.