

## Summary: Intervention & Options

<b>Department /Agency:</b>	<b>Title:</b> <b>Impact Assessment of The Final Transposition of the EU Data Retention Directive</b>	
<b>Stage:</b>	<b>Version:</b> 0.1	<b>Date:</b> 26 January 2009
<b>Related Publications:</b> Final Transposition of Directive 2006/24/EC: relating to the retention of communications data.		

### Available to view or download at:

<http://www.homeoffice.gov.uk/documents/cons-2008-transposition>

**Contact for enquiries:** Andrew Knight

**Telephone:** 0207 035 4848

### What is the problem under consideration? Why is government intervention necessary?

Increasingly the Police, Security and Intelligence agencies and additional Public authorities are using communications data to undertake their law enforcement and public safety functions. For long running investigations there is a danger that this vital data will be erased by the communications company and therefore no longer available to assist law enforcement. This European Directive was designed to make mandatory the retention of communications data by communications companies, which would otherwise not be available for law enforcement.

### What are the policy objectives and the intended effects?

The Directive represents a transition from the current voluntary regime in the UK, to a framework which mandates minimum requirements for retention of internet-related data across EU Member States. This will create greater certainty that communications data will be available to support long running investigations, which tend to be those into murder, serious sexual offences and terrorism. Retaining this data will better enable law enforcement organisations build stronger prosecution cases (providing evidence in court) and also preventing serious offences before they happen.

### What policy options have been considered? Please justify any preferred option.

1) Stop work on internet data retention. 2) Continue with voluntary data retention. 3) All communications providers to retain data. 4) Selected communications providers to store data.

Option 4 was preferred. This gives the Law enforcement community the full benefit of retained data, subject to existing strict access provisions, whilst minimising the number of communications companies that need to implement this directive and reducing the cost to the taxpayer. This options also minimises the possibility of any EU infractions proceedings.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** The review of the EU data retention Directive will take place in September 2010 and the UK is contributing to that review. The UK will be providing costs and benefits as part of that process.

**Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:

..... Date:

## Summary: Analysis & Evidence

<b>Policy Option:</b>	<b>Description:</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups' The Home Office will bear all costs relating to the design, development and installation of Data Retention Facilities with communication companies sufficient to implement the directive requirements to capture defined sets of communications data. Resource will continue to be met by public authorities on a per use basis.			
	<b>One-off</b> (Transition) <b>Yrs</b>				
	<b>£ 30.35m</b>		3		
	<b>Average Annual Cost</b> (excluding one-off)				
	<b>£ 2.21m</b>		<b>Total Cost (PV)</b>	<b>£ 46.58</b>	
Other <b>key non-monetised costs</b> by 'main affected groups' n/a					

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups'			
	<b>One-off</b> <b>Yrs</b>				
	<b>£ n/a</b>				
	<b>Average Annual Benefit</b> (excluding one-off)				
	<b>£ n/a</b>		<b>Total Benefit (PV)</b>	<b>£ n/a</b>	
Other <b>key non-monetised benefits</b> by 'main affected groups' The retention of internet communications data will enhance the ability to; prevent and detect serious crimes including murder and sexual offences, to provide evidence to prosecute offenders for those crimes and to eliminate suspects from enquiries. It will also assist in public safety considerations.					

**Key Assumptions/Sensitivities/Risks** Assumption: That the number of companies that carry communications data remains stable and that the growth in communications related data remains in line with forecasts.

Price Base Year 2008	Time Period Years 8	<b>Net Benefit Range (NPV)</b> <b>£ 0</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 0</b>
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What is the geographic coverage of the policy/option?	UK wide				
On what date will the policy be implemented?	01 April 2009				
Which organisation(s) will enforce the policy?	Home Office				
What is the total annual cost of enforcement for these organisations?	£ 133,000				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ 0				
What is the value of changes in greenhouse gas emissions?	£ 0				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro</td> <td style="width: 25%; text-align: center;">Small</td> <td style="width: 25%; text-align: center;">Medium</td> <td style="width: 25%; text-align: center;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of    £ 0	Decrease of    £ 0	<b>Net Impact    £ 0</b>

Key:      Annual costs and benefits: Constant Prices      (Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

1 Four options were considered to implement the EU Directive. As always, it is necessary to consider the 'Do Nothing' approach. In addition to the need for Government Intervention to mitigate the risks associated with a decline in the available communications data, we have a commitment to implement this Directive as a Member State of the European Union. Failure to do so is likely to result in infraction proceedings.

1.1 The broad direction of the policy is set by the Directive. There are three key areas of flexibility:

- the Directive does not comment on costs but the Commission made a declaration to the Council in February 2006 which acknowledged that retention of data may generate significant additional costs for communications providers and that reimbursement of demonstrated additional costs by Member States may be necessary. Therefore, there is a spectrum of options around funding from full funding by industry at one end, to full cost reimbursement by Government at the other, with a range of burden-sharing arrangements in between.
- the Directive applies to the whole communication provider industry but within it, Recital 13 declares that data should be retained in such a way as to avoid their being retained more than once. We discussed this with the Commission in early January 2007 and again in 2008 and the Commission raised no concerns about interpreting this recital to minimise the impact on communication providers. A range of options are available which seek to capture the data required from different parts of the industry, attempting to minimise duplication whilst ensuring full coverage of communications data.
- the Government must ensure that the data is retained for periods of not less than six months and not more than two years from the date of the communication.

1.2 As these dimensions are broadly independent – our choice of retention period, for example, can be considered separately from our choice of funding model – we identify below the best solution over each dimension in turn before combining these to generate a composite option which represents the optimal way to implement the Directive in the UK. This is then compared to the “do nothing” option to decide whether implementing the policy in this way is the right course of action.

1.3 The existing legislation in the UK on retention of internet-related data places a duty on the Secretary of State to ensure that arrangements are in force to make appropriate contributions towards communications providers who have incurred costs as a consequence of retaining communications data in accordance with the Act (Section 106 of ATCSA). However, given that the majority of other Member States have indicated that they do not intend to reimburse

communications providers for additional costs, we must consider whether or not the UK should change its position with regard to this.

1.4 The retention work initially carried out under ATCSA has demonstrated that in order to realise the benefits of this data, it is important to invest in good retrieval systems where appropriate. Whilst the Directive includes an article requiring data to be transmitted without undue delay, we believe that a cooperative approach is the most effective way of ensuring effective retrieval systems are in place.

1.5 The reimbursement of costs would be restricted to expenditure that public communications providers have incurred by putting in place additional capability that is uniquely for the purpose of providing retention and disclosure of communications data to authorities empowered to access it under the Regulation of Investigatory Powers Act (RIPA) 2000.

1.6 The highly competitive market in the UK means that without reimbursing additional costs, those public communications providers receiving high volumes of disclosure requirements from RIPA authorities would be disadvantaged relative to other public communications providers in the UK.

1.7 Rather than reimbursing additional costs for retention and disclosure, or expecting industry to bear full costs of the proposals, we have also given thought to the option of requiring industry to bear the costs of retention but reimbursing additional costs for suitable retrieval solutions for those public communications providers who receive the highest volumes of requests. The work conducted under ATCSA and the Data Retention (EC Directive) Regulations 2007 suggests that retention and retrieval mechanisms are so intertwined that it would be difficult to introduce such measures without potentially introducing an advantage to public communications providers who receive the highest volumes of requests. This is because there is a risk that those providers who received funding for a suitable retrieval solution may unintentionally be subsidised for retention costs because it is difficult to separate this out from a retrieval solution.

1.8 To avoid the potential distortion of the UK market and to smooth the transition from our legislation under ATCSA (where it relates to the retention of internet-related data) to the draft Regulations that implement the final phase of the Directive, we propose that we continue reimbursing additional costs for both the retention and disclosure of all communications data.

1.9 The Directive applies to all public communications providers. However, within the Directive, Recital 13 declares that data should be retained in such a way as to avoid their being retained more than once. In order to avoid duplicative storage of data, we have identified the potential to interpret this to reduce the number of public communication providers required to retain communications data whilst continuing to aim for full retention of communications data in the UK. Our engagement with industry and law enforcement agencies has concluded that if more than one public communications service provider is in possession of particular communications data, then only one need retain the data for the purposes of the Directive, for example where a mobile network provider's services are sold by another provider, that provider will not be required to retain copies of itemised bills as that same detail will be retained within the scope of the Regulations by the mobile network provider. The European Commission has raised no concerns with this interpretation of Recital 13.

1.10 We expect this interpretation to reduce the number of public communications providers required to retain data because a significant proportion of the industry is involved in providing communications across networks owned by other communications providers. To reiterate the point, in such circumstances only one will need to retain the data and Government will continue to engage with industry and law enforcement to ensure matters are coordinated.

1.11 There are several reasons to seek to reduce the number of public communications providers who need to retain data subject to the Directive:

- Minimising the number of public communications providers who are retaining the communications data will reduce the number of industry partners with whom the authorities requiring this data will need to interact. This will improve the efficiency of the disclosure process as it will result in a smaller pool of more experienced industry partners.
- As recognised by the 2003 consultation paper on the Code of Practice for Voluntary Retention of Communications Data and our public consultation<sup>2</sup> on the initial transposition of the Directive, concerns may be raised under Article 8 (the right to respect for a person's private and family life, their home and correspondence) of the European Convention on Human Rights when considering retention of communications data. Article 8(2) of ECHR permits interference with individuals' right to privacy if it is in accordance with the law and is necessary in the interests of national security and the prevention and detection of crime. Such interference must also be proportionate. If it is possible to reduce duplicative storage of communications data, this should be done for the purposes of proportionality.
- Reducing the number of public communications providers involved in retaining communications data will also minimise the costs associated with building specific storage and retrieval systems.

1.12 Variation in the number of public communications providers which must retain data is a primary determinant in the overall cost of implementing the Directive and is illustrated in the costs section below.

1.13 We propose that the most appropriate option is to continue to make provisions in the draft Regulations to enable public communications providers to avoid duplicative storage of data. This should minimise the number of public communications providers who are affected by these draft Regulations.

1.14 Because of the dynamic nature of the industry, there are difficulties associated with introducing definitions that subdivide the industry into a hierarchy that ensures communications data is only retained at the network level.

## Costs for options

2 Taking into account the optimisation of these different dimensions, our preferred option for recommendation is for a set of Regulations that:

- allow Government to reimburse public communications providers for additional costs;
- make provisions to avoid duplicative retention of communications data and
- require communications data to be retained for a period of 12 months;

2.1 This preferred option, along with 'Do nothing' and an option identical except that it would not allow for the avoidance of duplicative retention of communications data, are illustrated in terms of costs and benefits in the table below.

Options	Costs	Benefits/drawbacks
<b>'Do nothing'</b> continue with EU DRD fixed and mobile	<ul style="list-style-type: none"> <li>• £3.5m capital</li> <li>• £7.75m resource over 8 years remain to be spent on EUDRD fixed and Mobile</li> <li>• This does not include an estimate for the cost of potential infraction proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>• Some data will be available for the investigation, detection and prosecution of serious crime – but the data available will depend on the policy of individual businesses.</li> </ul>
<b>As above but proceed with ATCSA voluntary retention for internet</b>	<ul style="list-style-type: none"> <li>£25.65m capital, £12.23m resource over 8 years</li> <li>• This does not include an estimate for the cost of potential infraction proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate data will be available to support the investigation, detection and prosecution of serious crime.</li> <li>• Infraction proceedings will not be avoided.</li> </ul>
<b>All public communications providers must retain data.</b>	<ul style="list-style-type: none"> <li>£68.44m capital, £39.40m resource over 8 years</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate data will be available to support the investigation, detection and prosecution of serious crime.</li> <li>• Infraction proceedings will be avoided.</li> </ul>
<b>Duplicative storage of communications data is avoided</b>	<ul style="list-style-type: none"> <li>£30.35m capital, £16.23m resource over 8 years EUDRD internet data retention including the cost of continuing with the fixed and mobile projects</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate data will be available to support the investigation, detection and prosecution of serious crime.</li> <li>• Infraction proceedings will be avoided.</li> </ul>

## Effect on Competition

3 The proposed Regulations are designed to ensure that no public communications provider is either advantaged or disadvantaged by the requirements to retain communications data or the provisions for reimbursement of additional costs. Particular attention has been given to ensuring that the Secretary of State is able to fully audit payments made for additional costs to ensure that competition is not distorted and that there is no contravention of State Aid regulations. Three key measures have been introduced to ensure this happens.

- Cost reimbursement
- Provision of assistance to work through what the directive means for each company, and;
- Small Firms

### Cost reimbursement

3.1 The actual cost incurred by communications companies in complying with the directive is reimbursed by the Home Office. This includes;

- The time spent by internal staff and any contractors who are involved in delivery of the requirements of data retention is covered.
- The cost of designing, building and installing any solution (Capital Cost)
- The cost of running and maintaining the solution (Resource Cost)
- Any cost incurred in responding to the RIPA notices will be met by the law enforcement agency making the request (by agreement)

3.2 The costs covered by the directive (and those covered under RIPA) will be subject to audit (by an independent regulated audit firm). The cost of preparation for this audit procedure is itself included in the cost recovery regime. The companies who implement data retention solutions may have valuable equipment provided to them. Through the audit regime we will ensure any potential element of business benefit is identified. If the company decides to make use of any identified business benefit then they would be required to provide appropriate contributions to the cost of the data retention solution.

3.3 We will transpose the directive in a way that minimises the amount of additional information that is stored, but, to do so in a way that does not remove requirements from one company simple to transfer then to another. Similar, it is important to ensure, through the audit regime, that there is no element of opportunity for a business benefit in those companies who are reimbursed.

### Provision of assistance to all companies

3.4 Prior the issuing of a notice the Home Office will enter into discussions with the communications company to determine;

- whether there is a need for the communications company to do anything at all – in many instances the current retention policy of the company will be sufficient to meet

the needs of the directive, in other cases the data will be already be held by a different communications company and again there will be no need create an additional store of data.

- What the best method of storing the data will be. This will vary depending on the circumstances of each company; however key considerations in each case will be data security and availability of data for law enforcement.
- The timing of when the company is compliant with the directive. This will involve balancing the needs of law enforcement with the ability of the company to delivery the solution.

## Small Firms Test

3.5 During the last 5 years of retention under ATCSA and initial EU data retention work different companies have outlined particular requirements. These particular requirements might include paying in advance of delivery or working with two or more companies to build a joint solution. We have worked with some smaller companies have chosen to outsource their data retention to minimise that companies involvement. We will continue to seek to work with the communications industry to implement data retention in a way that reduces the impact.

3.6 Through reimbursing public communications providers for additional costs in complying with the proposed Regulations and by interpreting Recital 13 to minimise the number of public communications providers who must retain communications data, we believe that we will avoid a disproportionate impact on small firms.

## Human Rights Considerations

4 The Directive provides flexibility with regard to the period for which communications data must be retained. Under our existing legislation (ATCSA), a retention period of 12 months was adopted. The 2003 consultation paper on the Code of Practice for Voluntary Retention of Communications Data considered three factors in assessing the proportionality of the retention period:

- degree of intrusion involved into an individual's private life
- strength of public policy justification
- the adequacy of the safeguards in place to prevent abuse

4.1 The 2003 consultation paper concluded that 12 months is the optimal trade-off between law enforcement requirements and the associated interference with individuals' right to privacy. We do not believe that the period of time for which data must be retained is a significant driver of financial costs. We do not believe that the proposed regulations alter the balance of these factors compared to the 2003 analysis.

4.2 A key aspect of debate, both during the public consultation on, and Parliamentary debate about, the Code of Practice for Voluntary Retention of Communications Data, and also during the debate about the Directive within the European Council and the European Parliament, has been the impact, or potential impact, that retention of communications data has on individuals'

human rights. The retention period has been considered as a significant factor in determining proportionality; however we do not propose to alter the retention period of 12 months.

4.3 The debate about the surveillance society raises wider concerns. For completeness, those measures already in place to counter those concerns are worthy of comment here.

4.4 Some commentators have suggested that data retention will lead to greater acquisition of communications data by the police, law enforcement agencies the security and intelligence agencies. It is important to state the acquisition of communications data is governed by the Regulation of Investigatory Powers Act 2000 (RIPA) and no changes are planned to this arrangement.

4.5 RIPA stipulates that access to communications data must be necessary to achieve one of the purposes set out in the Act. RIPA also sets out in law the requirement for a “designated person” within each law enforcement body to consider the proportionality of the access to communications data in terms that respects the right to respect for the privacy of individuals.

4.6 Further, more detailed guidance is provided by the Acquisition and Disclosure of Communications Data statutory code of practice. The designated person is obliged to balance the extent of the intrusiveness of the interference with an individual’s right of respect for their private life against a specific benefit to the investigation or operation being undertaken by a relevant public authority in the public interest. Further, the code of practice outlines how the “actual or potential infringement of the privacy of individuals who are not the subject of the investigation or operation” should also be considered as part of the proportionality test.

4.7 Any conduct that is excessive in the circumstances of both the interference and the aim of the investigation or operation, or is in any way arbitrary will not be proportionate. The impact of these measures on Human Rights has already been considered (RIPA in 2000, and the Code of Practice in 2007). We do not propose to alter the statutory mechanisms through which data is accessed.

4.8 Under RIPA, the Interception of Communications Commissioner, currently Sir Paul Kennedy, has oversight of the process of access to (Acquisition) of communications data. His office conduct regular inspection visits of public authorities who obtain communications data. There is a process to record any errors that occur within the process which are outlined in a published annual report. We do not propose to change the oversight mechanisms. The Investigatory Powers Tribunal exists for anyone to bring a complaint about how their communications data has been accessed. We do not propose to change this.

4.9 We consider that the measures deployed maintain an effective check against disproportionate interferences with individuals’ right to respect of their privacy to ensure protection of the public. The implementation of this Directive does not alter the balance in that debate.

## Enforcement, sanctions and monitoring

5 Under RIPA the monitoring of access to communications data is conducted by the Interception of Communications Commissioner, this will continue. The proposed regulations make provisions for any audit that may be reasonably required to monitor a claim for reimbursement.

5.1 The Directive makes no provisions for imposing sanctions on those public communications providers who do not comply with the requirements. However, by adopting a cooperative approach whereby additional costs are paid to ensure that no public communications provider is disadvantaged by complying with our proposed Regulations, we believe that our measures will be sufficiently enforced. This assumption is supported by our experience of working

cooperatively with industry under ATCSA and the Data Retention (EC Directive) Regulations 2007.

5.2 As part of our monitoring mechanisms to inform the annual reports to the Commission on the effectiveness of the implementation, we will seek to identify cases where requests for data could not be met. This data will inform the plans for completing the implementation of the Directive. If the statistics provide sufficient indication of non-compliance, we will review the need to introduce primary legislation to allow for the introduction of sanctions.

## Implementation and delivery plan

6 We need to have appropriate legislation in place to take account of internet-related data by 15 March 2009. The draft Regulations will replace the Data Retention (EC Directive) Regulations 2007 and will incorporate the requirement for the retention of communications data in relation to fixed line telephony, mobile telephony, internet access, internet email and internet telephony.

6.1 The Home Office plans an incremental approach building on the current retention within communications companies involved with ATCSA and progressively working to cover the data required by the directive. The implementation will be guided by a "Experts Group" to be made up of a representatives of law enforcement, police, government and the communications industry.

6.2 During the implementation of this directive opportunities will be taken, where appropriate, to maximise efficiencies within the existing processes. This will include automating workflow processes for companies that deal with large volumes of RIPA notices, in this way reducing the administrative overhead within those companies.

6.3 The proposed Regulations will apply throughout the United Kingdom.

## Post-implementation review

7 Included in the Directive is a requirement to report annually to the Commission on the cases in which information was provided to the competent authorities in accordance with applicable national law,

- the number of occasions when data retained in accordance with these Regulations have been disclosed in response to a request;
- the time elapsed between the date on which the data were retained and the date on which transmission of the data were requested; and
- the number of occasions when a request for lawfully disclosable data retained in accordance with these Regulations could not be met.

7.1 The arrangements that we propose to put in place with industry will include the provision of statistics. Additionally, we will continue to record - on an exception basis - evidence from law

enforcement and intelligence agencies to demonstrate both difficulties and benefits arising from these regulations.

## Summary and recommendation

8 In the Government's assessment, the cost of imposing these requirements is justified by the benefits to society and our legal commitment to implement the EU Directive. By reimbursing industry for the burden that this would otherwise impose, the Government hopes to mitigate any potential competition and small business impacts and aims to ensure that it is funded in an equitable fashion.

8.1 On this basis, we recommend Government intervention to transpose the internet-related aspects of the Directive using Regulations under the European Communities Act of 1972.

These Regulations should:

- allow the Government to work cooperatively with the industry to ensure that appropriate
- retrieval mechanisms are in place;
- make provisions to avoid duplicative retention of communications data and
- require communications data to be retained for a period of 12 months;

9 The proposed regulations have been drafted in accordance with this option and have been subject to public consultation.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

## Annexes

The Regulatory Impact assessment that published at the time of the