Représentant les avocats d'Europe
Representing Europe's lawyers

# CCBE COMMENTS ON THE DRAFT FRAMEWORK DECISION ON THE RETENTION OF DATA

**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**
*association internationale sans but lucratif*
Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

# CCBE COMMENTS ON THE DRAFT FRAMEWORK DECISION ON THE RETENTION OF DATA

The Council of Bars and Law Societies of Europe (CCBE) represents through its member bars and law societies more than 700,000 lawyers.

In this paper, the CCBE expresses its concerns regarding the draft Council 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 (8958/04).

The CCBE supports the fight against terrorism and crime. However, it is worried by the growing initiatives taken at the European level which, under cover of the fight against terrorism, are serious infringements to fundamental freedoms and rights.

This new initiative aims at harmonising laws of Member States on the retention of data processed or stored by publicly available communications services providers or providers of a public communications network.

Its obliges all Member States to have a legal framework providing for retention of traffic data as well as localisation data for a fixed period of at least twelve months.

It should be noted that until now Community law aimed at protecting natural persons with regard to processing of personal data (Directive 95/46/EC). This Directive forbids storage of communications and related traffic data by persons others than the users or at least sets as a preliminary condition the obligation to make the data anonymous (Directives 95/46/EC and 2002/58/EC) when they are stored for a limited period of time, notably for invoicing. Under this Directive, the retention of data is, in any case, an exception and is strictly limited by the provisions of Article 15 of the Directive 2002/58/EC[1].

From now on, and under the terms of this new draft framework decision, the retention of data would become standard, and no longer remain an exception.

The CCBE is opposed to this draft framework decision which, on the one hand, infringes professional secrecy and on the other hand, includes numbers of gaps and uncertainties, as follows:

**1**/ The legal profession is concerned by the consequences of the framework decision which, departs from the principle of respect for privacy and confidentiality of communications (infringements of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and of Article 8 of the European Convention on Human Rights[2]). The draft decision ignores as well the right to the protection of personal data (Article 8 of the Charter of Fundamental Rights of the European Union). It denies the confidential character of the lawyer-client relationship and in general professional secrecy. Everyone has the right to consult a lawyer in order to ask advice which can be provided on the basis that the citizen is assured that what is said to the lawyer remains confidential. This right is part of fundamental

[1] *"Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction "constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system". "To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph."*

[2] ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

freedoms and rights and derives from the principle of the rule of law. Denying this right would lead to serious infringement of the rights of defendants. The obligation of a lawyer to professional secrecy serves the interest of judicial administration and in general of the State. Professional secrecy is a right for the client and a duty for the lawyer. Without ensuring confidentiality, there cannot be trust and the lawyer cannot play his/her specific role in society. The European Court of Justice expressly mentioned in its decision in the AM&S[3]case: "*that confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it*" It added that "*the principle of the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law and that the rights of the defence must be respected"*. The duty of the lawyer to respect "*strict professional secrecy*" was asserted again by the Court in the Wouters[4] case as being a generally recognised principle in all Member States and an "*essential rule to ensure the proper practice of the legal profession*" that bars try to keep to.

Information obtained through traffic and localisation data are important matters, hence the interest of such legislation for governments. The fact of being able to know when, where, how and how many times a person consults his/her lawyer seriously challenges confidentiality of the lawyer-client relationship and even the exercise of the right of defence itself. It is expressly mentioned in the preamble of this draft framework decision that data retention enables governments to trace the source of illegal matters such as child pornography and racist and xenophobic material. Therefore, confidentiality should benefit from protection by the State, and increased protection should be expected from a European law.

**2**/ Furthermore, the draft decision includes serious gaps and a number of uncertainties.

In the draft, retention is generally authorised for the prevention as well as the prosecution of criminal offences, "*including terrorism*" without any further details (Article 1(1)). This shows that terrorism is only a pretext.

Article 6 on "*Data Protection*" does not contain any protection measures. On the contrary, Member States have latitude, and no parameter is set despite what is mentioned in the preamble of the decision.

There are no safeguards for persons concerned by data retention but only a vague reference to Directive 95/46/EC and the opportunity to have judicial remedies.

Nothing is foreseen for judicial proceedings to be respected as far as access to data is concerned, but there is only the requirement of "*specified, explicit and legitimate purposes*" which is vague and subject to numerous interpretations. There should be in any case an authorisation given by a judge for the extension of the period for the retention of data.

There are no provisions on the conditions under which the retention is operated, nor on the supervising authorities. Data can be accordingly stored for "*no longer than is necessary for the purpose for which the data were collected or for which they are further processed*". This general and ambiguous wording leaves the door open to abuse.

There are no limitations on duration. Article 4 provides that although the maximum duration is 36 months, Member States may have longer periods for retention of data. Article 7 sets out that all data shall be destroyed at the end of the period for retention "*except those data which have been accessed and preserved*" and this "*in anticipation that they might be required for a future criminal investigation or judicial proceedings*".

[3] Judgement of the Court of 18 May 1982, AM & S Europe Limited v Commission of European Communities, case C-155/79
[4] Judgement of the Court of 19 February 2002, Wouters, Case C-309/99

Conditions set out in Article 15 of the Directive 2002/58/EC, which contain the provisions of Article 8(2) of the European Convention for Human Rights, are only mentioned in the preamble to the current draft, and not in the draft decision in itself. The draft only provides that Member States have to deal with respect for the existing rules on the protection of privacy but that in any case they must legislate on the possibility to retain data "*for the purpose of judicial cooperation in criminal matters*".

For all the reasons above, the CCBE is against the current draft framework decision.