AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Brussels, 5 March 2012

AmCham EU's position on the data retention directive review

The American Chamber of Commerce to the EU (AmCham EU) believes that the EU's current legal framework for communications data retention (the Data Retention Directive) raises several concerns:

- It creates significant obstacles to the European single market due to lack of harmonisation in many areas – data access, security, storage, categories etc. – which is particularly burdensome for businesses that have pan-European operations and creates uncertainty and confusion both for users and businesses;
- It acts as a disincentive for industry to launch new and innovative online communications services in Europe due to the potential extension of retention rules beyond traditional electronic communications services; and
- It has an impact on privacy and data protection compliance due to inconsistent implementation and vagueness in scope, as well as a clear disconnect between two main pieces of EU legislation (95/46 and 2006/24) dealing with privacy and data retention respectively, and their current review process.

The European Commission is conducting a comprehensive review of the Data Retention Directive, which is expected to include significant changes in scope and requirements of the Directive. An initial legislative proposal is expected in summer 2012.

As part of this review, the European Commission should focus on harmonisation and defining a clear and conclusive scope of the directive.

Implementation of the Data Retention Directive has resulted in an inconsistent patchwork of national laws, not least because some Member States have implemented the directive in ways that expand the scope beyond electronic communication services. The Directive also allows Member States to impose different data retention requirements, thereby increasing the technical burden of retaining data across EU national borders and potentially creating conflicts with privacy rules. This is a particular problem for Internet, telephone and email services, which, unlike traditional electronic communication services, can be offered in many jurisdictions with little or no local presence. Differences in cost reimbursement have led to competitive disadvantages in those Member States where costs are not entirely reimbursed.

POSITION STATEMENT

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium
Telephone 32-2-513 68 92 Fax 32-2-513 79 28
Email: info@amchameu.eu
European Transparency Register: 5265780509-97

Secretariat Point of Contact: Roger Coelho; roger.coelho@amchameu.eu +32 2 289 1018

There are many examples of how the patchwork nature of the current regime causes unnecessary cost and complexity for providers. Many Member States require Internet-related communications traffic data to be retained for 12 months. However, a significant minority have proposed other retention periods - such as Belgium, which has proposed a retention period of 24 months, and Germany, which has proposed that such data should be retained for no more than 6 months. In addition, requirements about the specific data elements to be kept and the format in which they are stored vary from country to country. This makes it very difficult for data to be stored centrally, and be governed by clear and consistent internal policies, which is far more efficient and cost-effective for some providers. Member States also have different rules on access and hand-over to law enforcement authorities of retained data.

This patchwork regime creates conditions for unfair competition, especially for pan-European business operators that are faced with 27 different sets of requirements and absorb far more cost than competitors as proportionally they are subjected to more law enforcement requests for retained data. It also results in higher prices for consumers who suffer as increased costs are likely to be passed on to the end user. This should be at the forefront of the Commission's thinking when it seeks to modify the Directive.

Companies that want to offer communications services in more than one country in Europe are at a particular disadvantage. In addition, an extension of scope to cover any Information Society Services would create a huge challenge in terms of applicable law because such services do not fall under national telecommunication regulation. For example, a service provider based in Ireland that provides services to users located across Europe might be faced with the following questions:

- If the provider only processes and stores data in Ireland, should it follow Ireland's 12-month data retention period and retain the specific data elements required under Irish law?
- Alternatively, must it be ready to provide traffic data related to a Belgian user for up to 24 months if requested by the Belgian authorities? Is the longer retention period of Belgian data compatible with Ireland's data protection law?
- Would German privacy law be infringed if the Irish provider held German communications data for longer than 6 months?
- Can law enforcement elsewhere in Europe claim a direct access to thus retained data, or must the request come through the Irish authorities (e.g. via mutual legal assistance) and be in accordance with Irish access rules?
- If a country requires the storage of extra sets of communications data, must the provider keep this data even if it is not explicitly required nor even permitted under Irish law?
- Must the provider support the different dataset requirements, storage formats and handover mechanisms in each country where it has users?

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
Telephone 32-2-513 68 92 – Fax 32-2-513 79 28 – info@amchameu.eu – www.amchameu.eu

There has been contentious debate as to whether the Directive is proportionate given the impact on citizens' privacy. Among other stakeholders, the European Data Protection Supervisor (EDPS) has recommended the possible use of less privacy intrusive alternatives.

Against this background, we strongly believe that there should be no extension of scope but rather a focus on limiting the current Directive to what is necessary by concentrating on:

1. Clarification of scope

The scope of the Directive should be clarified so as to explicitly exclude information society services and prohibit the extension of scope. The current scope focusing on e-communications providers and their related traffic data is not only already very far reaching but so far has not been indisputably justified. Against this background it is clear that the review should consider adjusting the scope to the data that is really useful. Moreover, key terms like 'Internet email' must be clarified and linked to established legal definitions.

The Directive should be amended to clarify that data related to information society services, including data about Internet use, may not be retained under any circumstances. Indeed such data may not be subject to retention obligations as they relate to the content of communications, and not to the traffic or location in electronic communications services. Likewise, stored content itself (such as emails, text, images and other material stored by Internet users) should explicitly be excluded from blanket retention obligations.

2. Full harmonisation

Retention requirements and law enforcement cooperation obligations should be fully harmonised. Through a combination of flexible provisions in the Directive and the use of Article 15(1) of the e-Privacy Directive, there are significant variations in the measures adopted by Member States. The Directive should focus on:

- Harmonisation: for the sake of efficiency and proportionality, the review must focus on harmonisation. Indeed besides the harmonisation of the principle at EU level, so far there is no harmonisation on its implementation in practice. Further harmonisation should focus on the retention period, on the type and format of data to be retained, on cost reimbursement, etc. The Commission's evaluation report of April 2011 indicated that the vast majority of requests are made for data less than 6 months old and only 2% for data older than 12 months.
- Flexibility: while further harmonisation is essential on what needs to be achieved, industry should retain the flexibility on how to implement these goals. For example: data storage (centralised or not).
- Cost reimbursement: The law should require reimbursement of both capital investment (e.g. storage servers and retrieval systems) and operating costs (e.g. extracting and transmitting requested data), leveraging the best practice examples of the UK and Finland.

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
Telephone 32-2-513 68 92 – Fax 32-2-513 79 28 – info@amchameu.eu – www.amchameu.eu

AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

POSITION STATEMENT

- Differentiation between large and small operators: the review should further reflect that there are important differences between operators covered by the directive (e.g.: small operators, business operators etc.).

3. Free movement of data across the single market

National retention laws should not create obstacles to the storage of communications traffic data in another country. Where data is stored should be a business decision for the communications provider with the retention obligation. It should be understood that for industry, in global comparison, this would constitute a distinctive competitive advantage of the single European market. Communications providers should be free to take advantage of the cost efficiencies of centralisation, provided they comply with applicable data protection laws. The Directive should clarify that a Member State cannot require communications traffic data to be stored within its borders.

4. Applicable law

An extension of scope to cover any Information Society Services would create a huge challenge in terms of applicable law because such services do not fall under national telecommunication regulation. The Directive would need to provide clear guidance about which national retention obligations apply when a single communications provider in one Member State makes services available in one or more other Member States. The Commission should envisage alignment with the forthcoming privacy and data protection regulation, in order to avoid new inconsistencies between related EU instruments.

* * *

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.

* * *

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
Telephone 32-2-513 68 92 – Fax 32-2-513 79 28 – info@amchameu.eu – www.amchameu.eu

AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

POSITION STATEMENT