

# The Initial Transposition of Directive 2006/24/EC

## Government Responses to the Consultation

June 2007

### Introduction

1. In March 2007, the Home Office published a consultation paper inviting the public to comment on draft Regulations for the transposition of Directive 2006/24/EC 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.

2. The consultation paper provided an opportunity to engage formally with the public to ensure that the consequences of the Government's plan to ensure certain data remains available to support public authorities in protecting the public are understood. Much of the consultation paper covered issues that were considered during the 2003 consultation on the code of practice for voluntary retention of communications data under Part 11 of the Anti-Terrorism, Crime and Security Act 2001. The significant change represented by the draft Regulations presented as part of the March 2007 consultation paper is that retention of communications data will move to a mandatory, rather than voluntary, framework.

3. This paper outlines the cumulative response to the six specific questions posed and the other issues that prompted comment from more than 10% of all who responded.

### Summary of responses

4. A total of 18 responses were received and are tabulated below. The general reception of the draft Regulations was positive – in particular, UKCTA, a trade association promoting the interests of competitive fixed-line telecommunications companies, acknowledged the Home Office's "pragmatic approach to implementing the Directive in the UK, both in terms of its approach that the need to retain data only applies where it is needed and for its model of cost recovery". Full analysis of the responses, considering each question in turn and additional issues raised, is provided below.

	Number of respondents who agree	Number of respondents who disagree	Number of respondents who neither agreed nor disagreed
Question 1	8	6	4
Question 2	7	4	7
Question 3	13	2	3
Question 4	8	1	9
Question 5	15	1	2

Question 6	4	9	5
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**Question 1: will individual public communications providers be able to interpret how the draft regulations would apply to their business. If not, why not?**

5. The majority of respondents interpreted the draft Regulations correctly, in that they apply to all public communications providers of fixed line and mobile telephony and do not apply to the retention of any internet based communications data. Whilst a significant number of respondents disagreed that it was possible to interpret how the draft Regulations applied to their businesses, this mainly arose from confusion surrounding the accompanying stakeholder engagement where the draft Regulations were discussed alongside early thoughts on how the transposition might be completed.

6. Discussion with legal advisors has confirmed that the draft Regulations clearly apply to all providers, and so we have agreed to address any uncertainty by inviting those public communications providers with concerns to write to the Home Office requesting formal notification of whether any action is required of them in relation the draft Regulations.

7. Draft regulation 3 enables Government to arrange for communications data to be stored in the most efficient manner so that – unless there are business reasons to do so – duplicative storage of data can be avoided. Some respondents suggested that there should be a more rigid regime whereby the responsibility to ensure communications data is retained lies either with the public communications provider with a direct subscriber relationship or with the “upstream” provider. Because business practice differs between public communications providers, a more flexible approach is required to ensure appropriate expenditure of public money. One respondent raised concern that this regime may result in duplication as Public Communications Providers would all retain the data to be sure of compliance; we believe that this is risk is provided because all reimbursement must be agreed in advance with Government and so unnecessary expenditure can be avoided and duplication can be minimised.

**Question 2: Is the data required to be retained specified clearly in the draft regulations? If not, why not and can the specification be clearer?**

8. The majority of respondents who had a view on this question were content that the data required to be retained is specified clearly in the draft Regulations. Some respondents suggested that more detail should be provided, however, the Government’s experience of working with public communications providers under the voluntary code of practice suggests that it is unhelpful to provide too much technical detail in the legislation as terms that might be meaningful to one business, may be completely inappropriate for another. Instead, the Home Office has developed a practice of providing that level of detail through specific agreements with individual public communications providers (in cases where the public communications provider’s own business practices do not already meet Government’s needs).

9. Some respondents observed that “unsuccessful call” is defined in the draft Regulations whilst “unconnected call” is not. This is in line with the text of the Directive itself and our legal advisors have assured us that “unconnected call” does not require definition in addition to unsuccessful call.

**Question 3: Do you agree with the Government’s approach to meet additional costs to reduce burden and meet requirements?**

10. The vast majority of respondents agreed with the Government’s general approach of meeting additional costs. Those who did not agree shared a presentiment that Government would somehow use the drafting of the Regulations to avoid paying costs. This is not the case: the drafting of the Regulations is intended to ensure that Government maintains the flexibility to arrange for communications data to be retained in the most efficient manner and to ensure that Government is able to demonstrate that these arrangements are cost neutral for industry to avoid distortion of the market.

**Question 4: Do you agree the proposed approach will not have a detrimental effect on competition?**

11. Many respondents observed that it will not be possible to determine the effect on competition until the scheme has been in place for some time. Ensuring that there is no distortion of the market is a primary aim of the reimbursement policy and many respondents agreed that the provisions in the draft Regulations will enable Government to monitor the impact and ensure that there is no effect on competition.

**Question 5: Do you agree that because the issues around retention of IP are different from traditional telephony, it is appropriate to maintain the voluntary code under ATCSA and to extend the sunset clause relating to Section 104 of the ATCSA?**

12. The vast majority of respondents (83%) agreed that there are significant differences around retention of IP CD. Many consequently agreed that the current voluntary arrangements should be maintained as this will allow the Government to continue work to understand the most appropriate manner in which to complete the transposition.

**Question 6: Do you think the draft Regulations can provide a framework that will enable implementation of the internet aspects of the Directive?**

13. Many respondents felt that the complexity surrounding the internet make the draft Regulations an inappropriate framework for implementation of the internet aspects as this would present particular technical and resourcing issues. The Internet Service Provider Association (ISPA) which represents over 190 members (corresponding to around 95% of the UK internet access market by volume) commented that “the draft regulations as they stand would not enable implementation of the internet aspects of the Directive”. The respondents cited specific examples such as the increased difficulties in

replicating the “end-to-end” picture of communications data, the difference in the cost profile for storage and retrieval of Internet communications and the need for a strong business case, if the retention period for IP data is set at 12 months.

### Other concerns

14. Several respondents raised concern that Regulation 6(d) of the draft Regulations published in the March consultation document would prevent public communications providers from retaining data for longer than 12 months, if their business practice required it. Our legal advice suggested that this was not the case, but to ensure clarity, Regulation 6(d) has been amended to read:

*‘in the case of data retained solely in accordance with regulation 4(1), the data shall be destroyed by the public communications provider at the end of the period of retention.’*

15. Several respondents observed that “refused” was an inappropriate word to use in the draft Regulations with respect to recording the number of requests that could not be met because Public Communications Providers are unable to lawfully refuse to respond to a RIPA request. This concern has been noted and the draft Regulations amended to reflect this.

16. The Information Commissioner’s Office (ICO) welcomed the proposal to continue with a retention period of 12 months for communications data and recognised that the Directive provided a basis for a maximum retention period of 2 years. However, the ICO also registered concern that their inability to “audit” data controllers without consent leaves them vulnerable to the description of “toothless”. The Home Office acknowledges the difficulty created by the need for “consent”, although the transposition does not provide an opportunity to address this point, which is a general issue for the ICO.

17. A significant number of respondents stressed the need for continued engagement between the Home Office and industry with respect to completion of the transposition. The Government fully recognises the need to remain engaged with industry with respect of our plans for completing the transposition.

### **Summary**

18. The Home Office is very grateful to all the respondents for their comments – it is clear that much time and effort was spent in preparing them. As with previous consultations in this area, it is clear that there is a great appreciation amongst our partners in industry of the importance of communications data in supporting public authorities to undertake their lawful activities to investigate, detect and prosecute crime and protect the public and the responses have indicated broad support for the draft Regulations.

19. This consultation has also provided invaluable comments regarding retention of IP communications data. It is clear that completing the transposition of the Directive to ensure retention of communications data will necessitate continued close and detailed working with partners in industry.

20. Several useful points have been reflected in the revised draft Regulations which the Government intends to lay before Parliament in time to meet the European Commission's implementation deadline of 15 September 2007.

## **HOME OFFICE**

**JUNE 2007**

### **List of respondents**

BT

Cable & Wireless

Crisp Thinking

E-business Regulatory Alliance (ERA)

Information Commissioner's Office (ICO)

Internet Services Providers' Association (ISPA)

Internet Telephony Services Providers' Association (ITSPA)

O2 (UK)

Orange UK

Symantec

The Telecommunications United Kingdom Fraud Forum Limited (TUFF)

THUS plc

T-Mobile (UK)

UK Competitive Telecommunications Association (UKCTA)

Viatel (UK)

Virgin Media

Yahoo UK & Ireland

One respondent wished to remain anonymous.