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Outcome of national implementation of the data retention directive - CCBE recommendation -

OUTCOME OF NATIONAL IMPLEMENTATION OF THE DATA RETENTION DIRECTIVE - CCBE RECOMMENDATION -

Introduction

During the legislative passage of the Data Retention Directive, the CCBE vigorously expressed its concerns regarding, inter alia, professional secrecy of communications between lawyer and client, prior judicial authorisation before data is accessed, duration and purpose of data retention. The directive has been in force since 3 May 2006, and had to be implemented by the Member States into national law by 15 September 2007, with the possibility to postpone the application regarding internet traffic data until 15 March 2009.

Questionnaire

In order to exchange experiences of implementation of the directive among the CCBE's national delegations, and to inquire into whether they have used the CCBE recommendation for implementation, the CCBE's IT Law Committee circulated a Questionnaire on the Data Retention Directive. The CCBE IT Law Committee has compiled the information received in a report. The report also contains the CCBE recommendations for the implementation of the data retention directive outlining in detail the CCBE's concerns (please see Annex).

In its conclusion, the report states that most of the countries that replied to the questionnaire are in the process of implementing the Directive. The majority of the national bar associations and law societies have not participated in the consultation process with their national legislators, although a few have.

Approximately **half of the countries** that responded have provisions for lawyers' professional secrecy in their national legislation. Only one country (Iceland) stated that the national legislation does not ensure that access to retained data is granted only with prior judicial authorisation. The national legislation of most countries contains a provision stating that once the data has been accessed, it should be used and stored only for as long as it is necessary for its original purpose. Some countries have provisions stating that the data must be kept for 6 months or one year, and must then be destroyed. **The countries were again split on whether their national legislation ensures protection for privacy and confidentiality of communications.**

Recommendations

Considering the outcomes of this report, the IT Law Committee now recommends that the CCBE should take appropriate action as follows:

If the national legislation does not comply with the CCBE's concerns on

- professional secrecy of communications between lawyer and client,
- prior judicial authorisation before data is accessed,
- duration and purpose of data retention,
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it is proposed:

- (1) that the CCBE members should take the following actions:
 - a) Identify strategies to initiate a change in national legislation where it is necessary (e.g. lobby parliamentarians, launch a public-awareness campaign, etc.)
 - b) Publicise any individual cases where clients/lawyers are negatively affected by the non-compliance and seek legal advice on possible remedies with reference to the Directive
 - c) Bring non-compliance to the attention of the Ministry responsible for data protection

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- d) Make specific reference to the Directive in any document, public statement and letter to government and elected officials which is sent regarding the issue of data protection in the context of data retention
- e) Bring the concerns to the attention of the Commission (DG Information Society and Media, Directorate B - Electronic Communications Policy) and the Working Group established under Article 29 of Directive 95/46/EC¹, the National Data Protection Commissioner or the European Data Protection Supervisor²
- f) Inform the CCBE about the state of implementation of the Directive in the respective Member State and let the CCBE know how it can support the CCBE member's actions towards a change in national legislation where it is necessary
- g) Consider possible claims challenging the directive or its implementation law before the relevant constitutional body (e.g constitutional court or other relevant constitutional body)

(2) that the CCBE should at the same time invite the European Commission:

- a) In its evaluation foreseen by Article 14³ of the directive, to take into account the impact of national laws implementing the data retention directive as they relate to professional secrecy of communications between lawyer and client, prior judicial authorisation before data is accessed and the duration and purpose of data retention.
- b) To ensure in the member states a more explicit and consistent protection of professional secrecy of communications between lawyer and client, prior judicial authorisation and requirements on purpose and duration of data if it is decided to review the data retention directive after 15 September 2010.

¹ European Commission, DG Information Society and Media, Directorate B – Electronic Communications Policy, Bernd.Langeheine@ec.europa.eu, +32-2-2991855 for the contact details of the Art.29 Working Group, please see: http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/secretariat_en.htm

² For contact details of the National Data Protection Commissioner, please see : http://ec.europa.eu/justice_home/fsj/privacy/nationalcomm/index_en.htm; Contact details of the European Data Protection Supervisor: Rue Wiertz, 60, B - 1047 Bruxelles/Brussel, Office: rue Montoyer, 63, 6th floor, Tel: + 32-2-283.19.00, Fax: + 32-2-283.19.50, Website: <http://www.edps.europa.eu>, E-mail: edps@edps.europa.eu

³ Article 14

Evaluation

1. No later than 15 September 2010, the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers, taking into account further developments in electronic communications technology and the statistics provided to the Commission pursuant to Article 10 with a view to determining whether it is necessary to amend the provisions of this Directive, in particular with regard to the list of data in Article 5 and the periods of retention provided for in Article 6. The results of the evaluation shall be made public.

2. To that end, the Commission shall examine all observations communicated to it by the Member States or by the Working Party established under Article 29 of Directive 95/46/EC.

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