

EUROPEAN COMMISSION

Cabinet of Commissioner Cecilia Malmström
Head of Cabinet

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Brussels, 31 January 2012

07. 8/2

Your Excellency,

I would be grateful if you could kindly convey enclosed letter from Commissioner Cecilia Malmström to Minister Spies and Minister Opstelten at your earliest convenience.

Yours sincerely,

His Excellency Mr Tom J.A.M. DE BRUIJN
Permanent Representative of the Netherlands
Avenue de Cortenbergh 4-10
1040 Bruxelles

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Ares 119249

Dear Minister,

As you are aware, the Commission is currently carrying out an impact assessment to prepare a reform of the Data Retention Directive in the light of the conclusions of the Commission's evaluation report published in April 2011.

Statistics on the number of requests for access by competent authorities to retained data and case studies on the application of the Directive, along with stakeholder consultations held this year, suggest that traffic and location data are, at least, an important tool for criminal investigation. However, some stakeholders and in particular the telecommunications industry and data protection authorities continue to question the need for obligatory retention of such data. Meanwhile many Member States appear to be unsure as to what specific quantitative and qualitative evidence to provide so as best to assist the Commission's work.

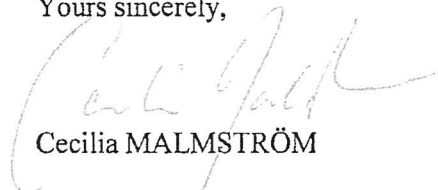
I am therefore writing to offer some more detailed guidance.

For those Member States which have not transposed the Directive, I would ask for an evaluation of whether and if so to what extent the absence of data retention affects the efficiency and effectiveness of criminal investigations and prosecutions, with reference to specific cases.

For those Member States which have transposed the Directive, I would be grateful if you could supply the information requested in the attached note by 30 April 2012, so that it can be taken into account in the impact assessment.

I understand that this may involve some additional work for hard-pressed police forces and courts. However, stakeholder consultations this year have clearly shown the importance of evidence from all Member States for the preparation of a legislative proposal on a new EU approach to data retention.

Yours sincerely,



Cecilia MALMSTRÖM

Mrs Liesbeth SPIES
Minister van Binnenlandse Zaken en Koninkrijksrelaties
Den Haag

Mr Ivo OPSTELTEN
Minister van Veiligheid en Justitie

Evidence of the necessity of data retention

Given that the Directive has an impact on the right to privacy, the Commission needs to assess whether data retention is necessary for criminal justice and security in the EU on the basis of credible and comparable information. Both statistics and case studies can help inform this assessment.

1. Quantitative evidence

In order to assist Member States in complying with the provisions of Article 10 of the Directive, which requires certain statistics on implementation, a template was produced by the Data Retention Expert Group (which includes representatives from law enforcement from 10 Member States¹) and presented to Member States in 2009. Some Member States have been able to provide information based on this template, though only 12 have so far provided any statistics for 2010.

For many Member States, it has not been possible to provide global, aggregate statistics on the number and type of requests by competent authorities for access to retained data, nor on the number or type of cases in which the use of such data affected the criminal justice outcome of the case. I would therefore request that, where such a global figure is not possible, each Member State monitors, for a period of **at least one month**, criminal investigations and prosecutions in the whole or a part of the national jurisdiction, whether data retained under the Directive is used, and, if so, its necessity to progress in those cases. If only part of the jurisdiction is chosen please also provide a short description of that area, including population and crime levels. Specifically this monitoring should address the following questions:

1. In how many individual criminal investigations or prosecutions were retained data requested?
2. What type of data - with reference to Article 5 of the Directive - was requested?
3. For what purpose were the data requested and under what authorisation?
4. How old were the data when they were first requested?
5. Which authorities used the data?
6. For each of these investigations or prosecutions, were these data considered necessary and if so why?

2. Qualitative evidence

So far, 11 Member States have provided examples of specific cases where communications data have been important or essential to specific outcomes in criminal investigations. This includes certain Member States where the absence of mandatory data retention has meant that individual investigations remain unsolved or have resulted in loss of police time.

I therefore also request **at least 10 case studies** from each Member State of where data retained under the Directive played an essential role in an investigation or a prosecution,

¹ See http://ec.europa.eu/home-affairs/policies/police/police_data_electronic_en.htm. Currently, the group includes members nominated by Belgium, Cyprus, Denmark, France, Germany, Ireland, Italy, Poland, Sweden and United Kingdom.

particularly for cross-border cases. Please also state, if possible, whether these data were indeed retained because of the mandatory retention requirement, rather than for business or other purposes. In addition, please provide examples of investigations which you consider to have been adversely affected due to an insufficient data retention period.

Contact for questions or assistance

If your officials wish to discuss or clarify this request, DG Home Affairs would be very happy to assist; please contact [REDACTED].