



BT's response to Home Office Consultation on the  
Transposition of Directive 2006/24/EC

6 November 2008

## Introduction

1. BT responded to the Government's consultation in March 2007 and many of the comments we made at that time are equally valid on this occasion and are repeated in this response since they have not yet been addressed.
2. Experience with the transposition of the first part of Directive 2006/24/EC (the Directive) with regard to fixed and mobile telephony data, shows that data retention for law enforcement purposes presents complex technical and operational issues for businesses. There are also complexities in reconciling these and the aspirations of law enforcement agencies concerning data protection and privacy.
3. BT, therefore, welcomes the opportunity to evaluate and comment on the draft proposals that this consultation provides. We appreciate the Government's willingness to engage in dialogue with industry to elaborate on its approach to implementation and the clear recognition of the need for meaningful and continuing dialogue with industry to achieve balanced outcomes.
4. The Government's statements about the need to reimburse costs to businesses that retain data for law enforcement purposes are very welcome.
5. We also welcome the Government's recognition that data retention in relation to the internet is particularly challenging and complex and the statements that have been made which indicate a clear desire to understand what is practical and necessary before "plunging in" with requirements for data retention for the internet.
6. In addition to our responses to the specific questions raised in the Consultation, we also provide some observations on other general issues relating to implementation.

## General Issues

### *Revocation of S.I. 2007 No. 2199*

7. It is unfortunate that Regulations that only came into effect in 2007 are being superseded. There are changes to the wording in the existing Regulations pertaining to fixed and mobile telephony data and some new provisions that apply to all types of data. BT would welcome an explanation for the changes, including the introduction of new provisions that impact (or potentially impact) on the current obligations relating to fixed and mobile telephony data. Whilst BT can understand the attraction of trying to cover all data types under one set of Regulations as a "tidying up" exercise, the changes have an impact beyond that, and transposition does not require this.
  - An example of a new provision is the retention period and the power given to the Secretary of State to increase or decrease the retention period for each data type. It also allows for notices to be given to Public Communication Providers - including Internet Service Providers - (PCPs) requiring them to hold such data for different periods of time to each other. This is not simply new for internet data but also includes fixed and mobile data.
  - An example of wording changes is in the definition of fixed data where the current Regulations, the Directive and the new draft Regulations are all subtly different.

### *Due regard for EU dimension*

8. The purpose of the draft regulations is to transpose EU legislation into UK domestic law and the Directive itself is a single market and harmonising instrument.
9. The UK has to pay due regard to the implications of this in its proposals in order to ensure that the UK's transposition is not readily amenable to legal challenge.

10. Any such legal challenge could result in amending legislation, which would be disruptive to industry, costly (perhaps for both Government and industry) and create uncertainty in what is already a very complex area.
11. In addition, the Directive seeks to ensure that data generated or processed by a Public Electronic Communications Network (PECN) or Public Electronic Communications Service (PECS) are retained under conditions harmonised at a European Union level. Such data should be retained in such a way as to avoid them being retained more than once. The Regulations should confirm that a PECN or a PECS who retains the data required by the UK data retention Regulations in another Member State where the Directive has been transposed, is not required to retain them a second time in the United Kingdom. This would also ensure that such retention does not violate the principles of the Directive on privacy of electronic communications.
12. The question of what communications data is subject to retention in relation to networks and services provided to corporate and institutional customers is complicated by questions of ownership, joint responsibility and technology issues. The EU Commission has convened a forum to assist in the development of harmonised interpretation and application of the Directive and this matter has been identified as one requiring further work. It is important to BT as a provider of such networks and services, in which cross-border elements feature particularly highly, that implementation in the UK should take due account of the EU forum's discussions on this matter.

*Definition of "serious crime" and purpose limitation for disclosure*

13. There is a clear intention in the Directive – Article 1 and Recitals – to limit the retention purpose of investigating, detecting and prosecuting serious crime and this goes to the issue of proportionality and disparity. The Directive suggests that the definition of serious crime would be made by each Member State in its national law. There was no definition given in the Regulations for the retention of fixed and mobile telephony data but again, we urge that a definition is provided.
14. At the time of introduction of Anti-Terrorism Crime and Security Act (ATCSA) the issue of disparity between the purpose for which data is retained and the potential for such data to be accessed and disclosed for broader purposes was raised as a source of concern, including by the Information Commissioner. The Government was urged to address the disparity through primary legislation but this has still not been done, even though there was the opportunity to do so in relation to the earlier Regulations.
15. Similar disparity concerns are present in this new draft Regulation. Article 1 of the Directive provides that certain data is to be retained "to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime". Once retained, however, the data becomes amenable to disclosure for broader purposes. Thus there continues to be disparity over the purpose of data retention and requests for disclosure of such data. The draft Regulation again does not address this and so perpetuates a source of potential legal challenge.
16. When investigating serious crime, law enforcement investigators operating under the Regulation of Investigatory Powers Act (RIPA) are required to apply a proportionality test to ensure that any requests for access to and disclosure of such data are lawful. However, there is no requirement for the same standard of proportionality to be applied by those organisations that do not operate under RIPA e.g. non-police, civil litigation and the Department of Work and Pensions, should they request data retained under these Regulations.
17. BT would welcome further clarity, perhaps through guidelines which amend the RIPA Code of Practice, on the practical matters to be considered by authorities and PCPs when they access the data retained for the purposes of the Directive and the Regulations for disclosure. Comparable guidance would also be welcomed in relation

to the handling of similar requests for disclosure of data retained under the UK's implementing Regulation(s) which might arise under other legislation and through orders of the Courts.

18. Where data is intended to be retained only for the purpose of these Regulations, the Government must now consider further the need to provide an effective purpose limitation in order to reduce the potential for retained data to be the subject of wide ranging requests for disclosure. Without such a limitation, PCPs are likely to face an increase in the number of applications which could detract from a PCP's ability to meet requests as efficiently as they currently do.

#### *Oversight of disclosure of retained data*

19. It is not clear which regulator will regulate what is retained and the purposes for which the data may be disclosed, nor how that regulator would interact with others who have specific roles in respect of the disclosure of data (such as the Interception Commissioner and the Surveillance Commissioner). BT believes there should be a single regulator with oversight of what is retained and the purposes for which data may be disclosed. BT recognises the Information Commissioner's general role in regulating the use of personal data but notes that its role, in the Regulations, is specifically limited to monitoring the security of the stored data. BT suggests that the Information Commissioner could be the broader "single regulator" outlined above.

#### *Duration*

20. The current duration for retention of fixed and mobile data has been set at 12 months. BT is surprised that the retention period for internet data has also been set at 12 months, since this is considerably longer than many PCPs would retain internet data for business purposes. It is also double the retention period suggested for voluntary retention under the ATCSA. The examples given in the consultation document do not support any claim that internet data is required to be available for this length of time. BT does not consider that adequate consideration has been given to addressing this issue, either through stakeholder dialogue or in the regulatory impact assessment contained in the Consultation.
21. There is also concern that the draft Regulations do not implement the Directive properly in terms of periods of retention. Draft Regulation 8 now provides that:-
  - individual PCPs can be required to retain data for different periods of time from a 6 month minimum to up to 24 months; and
  - PCPs - individually or categories within them - can be required to retain data for different periods "for different cases or classes of case".

This could lead to disparity between PCPs, and potentially between customer segments or categories of individuals.

22. The Directive (Article 6) provides for Member States to be able to determine retention periods within their legislation. BT interprets this as enabling each Member State to set retention periods which might be different for each of the three categories of data set out in Article 5 and this was the approach adopted in the current Regulations applying to fixed and mobile data. However, BT does not interpret Article 6 to mean that a Member State could set different periods for retention within each category such that PCPs within a specific country would be required to retain the same category of data for different periods. In addition, BT cannot see a basis in the Directive which enables a Member State to "specify different periods for different cases or classes of case".

## **Consultation Questions**

These Consultation Questions were asked during the earlier consultation for fixed and mobile telephony data retention but we believe many of the issues raised were not adequately addressed in the Regulations. We are, therefore, responding again and including some additional points relating to internet data.

### **Question 1**

**Will individual public communications providers be able to interpret how the draft regulation would apply to their business, if not, why not?**

#### **BT Response:**

23. BT does not believe these Regulations provide sufficient clarity to PCPs, or to industry as a whole.
24. A key issue for business is certainty regarding the legal obligations that apply as a result of the Directive and any implementing Regulations. To this end, it is critical that every PCP knows exactly what data (and in respect of what services) they need to retain and whether the obligation is on them or whether they can reasonably rely on another PCP as retaining the data already. This was not made completely clear in the earlier Regulations for fixed and mobile data and is perhaps more confusing where internet data is concerned.
25. The data carried by a provider of PECNs or as a provider of a PECS is commonly distributed between many PCPs.
26. Insofar as the question arises as to which provider of a PECN or PECS is obliged to retain data under the Directive, BT's view is that the following interpretation satisfies the non-duplication principle in Recital 13 and Article 3 of the Directive:
  - The provider with a direct subscriber relationship who is generating or processing the subscriber's communication data will have the obligation to retain subscriber information (e.g. name and address) and traffic and billing data relating to these subscribers.
  - An upstream provider to the particular PECN or PECS may also generate data in the course of providing service to the particular PECN or PECS. Simply because an upstream provider retains such data for business purposes, it does not follow that it must be subject to the obligation to retain such data under the Directive in respect of such direct subscribers.
  - It is common for traffic and billing data to be processed by more than one PCP in the course of provision of a service to end-users and there may be circumstances where an upstream provider is required to retain traffic data.
  - The implementing Regulation must provide a practical and efficient method, which is fully consistent with the Directive, to enable any PCP to determine when it is under an obligation to retain particular data pursuant to the Directive. Overall, BT requires clarity and certainty on when it is appropriate for it to be subject to obligations in this regard.
27. Draft Regulation 13 says that a PCP does not need to retain data if that data are retained by another PCP until they receive a notice requiring them to do so. However, this will be a subjective decision by each PCP which could result in all or none holding the required data. The requirement should be clarified. This is especially true in the more complex area of internet data, where PCPs could be retailing, wholesaling, or simply providing network to another PCP.

28. Regulation 6(a) (new draft 9 (a)) requires that the retained data “shall be of the same quality and subject to the same security and protection as those data on the public electronic communications network”.
29. However, the quality of data kept for business purposes is, of course, tailored to suit business needs. For example, the frequency at which information is updated varies according to the business purpose at issue, and business practices in regard to data quality depend on the type of data in question and will also, for good reasons, vary from business to business.
30. The Government should, therefore, be clear that maintaining current business practice is sufficient to meet the requirements of the Directive (save for the duration of retention).
31. Similar issues arise in relation to the various standards of security and protection of the retained data described in Regulation 6 (a) (b) and (c) (new Regulation 9), and the storage requirements in Regulation 7 (new Regulation 11).
32. The draft Regulations are unclear as to the provision of any ‘grace period’ for PCPs to comply with the Regulations. PCPs will require time to scope the data to be retained and to procure the appropriate equipment to store such data. It will also be important to know how a PCP is to be deemed compliant with the provisions. This may be a role that an independent regulator could play.
33. In the circumstances the “do nothing” option set out at page 41 of the Consultation is a valid approach, especially since the envisaged stakeholder dialogue which would have led to greater clarity in this new and complex area has not yet taken place. If this approach is not taken then, at the least, transposition of the requirements for internet data retention should be minimal.

## **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?**

### **BT Response:**

34. BT does not favour “gold plating” when it comes to the question of implementing Directives into UK law. We believe the Government shares this view and effective engagement between industry and Government is essential. It is disappointing, therefore, that the Government has not used the 18 month derogation to explore more fully the complexities of retaining internet data, including internet access, internet email and internet telephone data.
35. In the year that has elapsed since the first Regulations relating to fixed and mobile data were implemented, BT has worked through what fixed telephony data it is obliged to retain under the Regulations and, along with other PCPs, has a working model which we believe satisfies the requirements.
36. More clarity is required in relation to internet Data. The language used in both the Directive and the draft Regulations does not reflect the reality of the internet world. For example, we do not know what an unsuccessful call attempt is in relation to internet data (Regulation 4. (2) (b)) (access, internet or telephone). Once logged on to a network a session could last for many days or weeks with one IP address assigned that would be used for a myriad of applications.

### **Question 3**

***Do you agree with the Government's approach to meet additional costs to reduce burden and meet requirements?***

#### **BT Response:**

37. The elements of cost reimbursement must cover capital investment including current and ongoing development costs, ongoing operational costs and opportunity costs. The nature of our industry is that technical and business developments are continually changing, e.g. services may be introduced and withdrawn and commercial relationships between PCPs are not static. Any arrangements must be flexible enough to cope with these business realities.
38. BT welcomes the commitment and intention expressed in the consultation document for the Government to meet the additional costs of retaining data over and above that needed for business purposes. However, Regulation 10 (new Regulation 14) does not amount to an obligation to do so. This leads to uncertainty with regard to business expenditure on data retention projects aimed at ensuring compliance with these Regulations. It might also lead to disparity between different PCPs.
39. Paragraph 5.8 of the Consultation sets out a declaration made by the European Commission. In view of this, the position should be made clear for industry and BT would welcome a clear statement that any such reimbursement has been approved by the European Commission.

### **Question 4**

***Do you agree the proposed approach will not have a detrimental effect upon competition?***

#### **BT Response:**

40. A view on the likely impact on competition of the proposed approach could only be offered following clarification on the key issues highlighted above, e.g. on whom the obligation falls (including a satisfactory model for establishing or allocating responsibility for retaining data), the nature and standards of the retained data and the cost reimbursement model.
41. In addition, the new approach to duration in the draft Regulations creates a source of competitive distortion.

### **Question 5**

***Do you think the draft regulations can provide a framework that will enable implementation of the Internet aspects of the Directive?***

#### **BT Response:**

42. Most of the issues raised in BT's response to the earlier Consultation have not been adequately addressed in these new draft Regulations. In particular, as indicated above, there is additional complexity in implementing the Directive in relation to internet aspects, such that technical and business realities in an area which is characterised by an even greater pace of change than in the fixed and mobile telephony are fully taken into account. For example:-
- to establish a common and shared understanding on the interpretation and scope of key terms used in the Directive such as "Internet access", "Internet telephony" and "Internet e-mail";
  - to establish a common and shared understanding on the interpretation and scope of Article 5 of the Directive in relation to internet aspects;
  - the need to implement the Directive in a way that avoids placing excessive requirements on PCPs, e.g. in terms of the duration of storage for retained

data, and is also realistic in terms of what is practicable is especially acute on internet aspects; and

- there are analogies between the services delivered to end-users through fixed and mobile telephony, and by internet methods. However, the approach to implementing the Directive in respect of internet must not be based on assumptions that what is practicable and appropriate in relation to the former can, should or must be “carried over” in relation to internet.

43. In summary, there are significant and important areas of concern that could lead to uncertainty and problems in the implementation of this Directive into UK law on internet aspects. If the “do nothing” approach (page 41 of the consultation) is an option, it is definitely one worth considering.

*British Telecommunications plc*  
*6 November 2008*