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WP 69**

Opinion 1/2003 on the storage of traffic data for billing purposes

Adopted on: 29 January 2003

The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent European Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 14 of Directive 97/66/EC.

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THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995¹,

having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive, and Article 14 paragraph 3 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997

having regard to its Rules of Procedure and in particular to Articles 12 and 14 thereof,

has adopted the present Opinion:

1. Introduction:

1.1 This Opinion is concerned with the storage period during which the traffic data, which arises from the provision of electronic communications, may be processed for billing.

In its Opinion 7/2000 on the proposal of the Commission that led to the adoption of Directive 2002/58/EC², the Working Party noted that this draft directive did not propose any harmonisation of the period during which the bill may lawfully be challenged. The present opinion intends to revisit Recommendation 3/99³ which already provided some guidance on this issue, in particular in cases where the bill has been paid and is not being challenged and so contribute to the uniform application of the EC data protection directives, as an aid to telecommunications companies, national authorities⁴ and data subjects.

1.2 Within the European Union, Directive 95/46/EC harmonises the conditions governing the protection of individuals with regard to the processing of personal data.

¹ Official Journal no. L 281 of 23/11/1995, p. 31, available at:
http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm

² European Commission Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector of 12 July 2000 COM (2000) 385.

³ Recommendation 3/99 on the preservation of traffic data by Internet Service Providers for law enforcement purposes - http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wpdocs_99.htm

⁴ The present opinion should help the data protection authorities when monitoring the application of the provisions adopted by the Member States pursuant to the data protection directives or when they are consulted when Member States are drawing up administrative measures or regulations relating to the processing of traffic data. It should also help Member States when drafting national measures implementing Directive 2002/58/EC.

Article 6 of this directive provides:

- “1. A Member State shall provide that personal data must be
- (a) processed fairly and lawfully...
 - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.”

2. Application of EC directives on telecommunication and data protection

2.1 Directive 97/66/EC provides for the harmonisation of the national legislation of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms and in particular the right to privacy with respect to the processing of personal data in the telecommunications sector and to ensure the free movement of such data and of telecommunications equipment and services in the Community. Article 6 of this directive provides:

- 1. *“Traffic data relating to subscribers and users processed to establish calls and stored by the provider of a public telecommunications network and/or publicly available telecommunication service must be erased or made anonymous upon termination of the call without prejudice to the provisions of paragraphs 2, 3, and 4.*
- 2. *For the purpose of subscriber billing and interconnection payments data indicated in the Annex may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment may be pursued”.*

2.2 This directive will be replaced in November 2003 by Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector⁵.

Article 6 of Directive 2002/58/EC confirms the choice made in the Directive 97/66/EC and extends its scope to the more general context of electronic communications. It provides:

« 1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection

⁵ OJ L 201, 31 July 2002.

payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued ».

2.3 In its Recommendation 3/99, the Article 29 Working Party recalled the obligation under Article 6 of Directive 97/66/EC to erase traffic data or make them anonymous as soon as the communication ends (Article 6 (1)). The Working Party explained that "this is motivated by the sensitivity of traffic data revealing individual communication profiles including information sources and geographical locations of the user of fixed or mobile telephones and the potential risks to privacy resulting from the collection, disclosure or further uses of such data." Finally, the Working Party recalled that Article 6(2) provides an exception to the effect that processing of traffic data for the purpose of subscriber billing and interconnection payments may "only be processed up to the end of the period during which the bill may lawfully be challenged or payment may be pursued".

2.4 Article 6(2) of Directive 97/66/EC (and Article 6(2) of Directive 2002/58/EC) must be interpreted in conformity with the objectives of the general and specific Directives. In that regard Recital (10) of the Preamble to Directive 95/46/EC provides:

"(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the protection of human rights and fundamental freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary seek to ensure a high level of protection in the community;"

2.5 Article 6 (4) of Directive 97/66/EC (6(5) of Directive 2002/58/EC) states that 'Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, (...) must be restricted to what is necessary for the purposes of such activities'. Recital (17) of the Preamble to Directive 97/66/EC assists in the particular construction of Article 6(2) (*see also Recital (26) of Directive 2002/58/EC*):

*"(17) Whereas the data relating to subscribers processed to establish calls contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons; whereas **such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time**; whereas any further processing which the provider of the publicly available telecommunications services may want to perform for the marketing of its own telecommunications services may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available telecommunication services about the types of further processing he intends to perform;"*

2.6 It is clear from these Recitals that the data stored for the purpose of billing and for interconnection payments should be stored for a limited period only and not

routinely held for extensive periods as recalled also in Recommendation 3/99 of the Working Party.

That being so, the question arises as to how long personal traffic data may be retained for "billing and interconnection purposes" **specifically in cases where the bill has been paid and is not being challenged.**

- 2.7 The different legal systems of the Member States make various provisions regarding the length of time during which actions may be initiated in contract law. These time periods are sometimes used to set the outside limit during which data may be stored when a bill is being challenged or payment is being pursued. However this must be applied in conformity with the principle that the processing of personal data must be restricted to what is necessary for the purpose for which the data were collected and further processed. In the vast majority of cases a bill is paid within the prescribed period.

In the opinion of the Working Party, the application of the proportionality principle and the fact that, in accordance with Article 6(2) of Directive 97/66/EC (and 6 (2) of Directive 2002/58/EC), traffic data may "only be processed up to the end of the period during which the bill may lawfully be challenged or payment may be pursued" should ordinarily be understood to mean that -

Traffic data should be kept for as long as necessary to enable bills to be settled, and disputes resolved. Ordinarily this involves a maximum storage period of 3-6 months and no longer in cases where bills have been paid and do not appear to have been disputed or queried (having regard to the privacy right of individual subscribers)⁶.

In particular cases of dispute or query, the data may be stored for a longer period to facilitate the settling of the bill. Even where a bill has been paid, a longer storage period might possibly be justified in particular, exceptional cases where there are concrete indications that a dispute or query is to arise. In any such situations, the storage periods must be considered having regard to the particular circumstances of each case, to enable on-going disputes to be resolved. The outer limit of these longer periods is the limitations period provided in national law⁷.

The reference period should start running from when the traffic data is no longer needed for the purpose of transmission of a communication, in accordance with Article 6 of Directive 97/66/EC (or of Directive 2002/58/EC)⁸. The exact moment

⁶ See in particular the Greek situation on this issue. According to a decision of the Greek National Committee for Telecommunications and Post (EETT) (followed by a positive decision of the Greek data protection authority), subscribers can make use of the possibility to ask the provider to delete the traffic data referring to them, on the condition that the subscriber cannot challenge the payment after that. In that case the provider is obliged to delete the traffic data independent of the time period foreseen by the law.

⁷ In countries such as Ireland and the United Kingdom, the period is six years.

⁸ The formulation used in Directive 97/66/EC has been modified in Directive 2002/58/EC in order to take into account the various types of electronic communication services.

*of the completion of the transmission of a communication may depend on the type of electronic communication service that is provided*⁹.

- 2.8. The Working Party want to emphasise that, as already said, in accordance with Article 6 of Directive 95/46/EC and Article 6 (4) of Directive 97/66/EC (and Article 6 (5) of Directive 2002/58/EC), the stored traffic data must be limited to the « necessary » data. Only data that are adequate, relevant and not excessive in relation to the billing and interconnection payments purposes may be processed (principle of proportionality of the processed data). This implies inter alia that if there is no billing for certain types of communications, no traffic data may be processed for these purposes.

The Working Party underlines that Directive 2002/58/EC has provided a unified regime for all data falling under the definition of "traffic data" (see Article 2, §2, letter b of Directive 2002/58/EC). In accordance with the principle of proportionality of the processed data referred to in the previous paragraph, it will be the responsibility of Member States and, as the case may be, of national supervisory authorities within their competence, when implementing Directive 2002/58/EC, to take the necessary measures in respect of the different categories of traffic data. In this context, particular attention should be paid to the prevention of long-lasting storage of traffic data that are not necessary to either billing or interconnection payments. Specific attention should also be paid to the implications of communication systems entirely based on flat rates.

3. Processing of personal data for taxation purposes

The Working Party is aware that controllers with the objective of justifying long storage periods sometimes invoke taxation purposes. Taxation purposes are indeed linked to billing purposes. However, while it may be necessary for data controllers to keep proof of payments for several years including aggregate billing amounts for taxation purposes, this requirement should not be extended to the underlying traffic data on which telephone bills are based. In line with Article 6 of Directive 97/66/EC (and Article 6 of Directive 2002/58/EC), this requirement may only justify the processing of aggregate billing amounts but not the processing of traffic data on which communications bills are based.

4. Recommendation

- 4.1 There have been some indications that divergences exist in practice between the electronic communications companies in the Member States with regard to storage periods of traffic data. The Working Party is of the opinion that any practices which are inconsistent with the principles set out in Paragraph 2.7 and 2.8 above, and which are not clearly authorised by legislative provision under the conditions of Article 14 of Directive 97/66/EC (and Article 15 of Directive 2002/58/EC)¹⁰ are, *prima facie*, incompatible with the requirements of EC Data Protection Law.

⁹ See Recital 27 of Directive 2002/58/EC.

¹⁰ Article 14 of Directive 97/66/EC authorises Member States to adopt legislative measures to restrict the scope of the obligations and rights provided for in different provisions of the Directive, including Article 6 related to traffic data. However, the provided restrictions must be « necessary » to safeguard one of the listed interests (national security, defence, public security, the prevention, investigation,

- 4.2 It is important therefore that steps be taken to interpret in a harmonised way, **the limited period** during which telecommunications service providers are authorised to process traffic data for billing and interconnection purposes. In line with the principle set out in Paragraph 2.7, the Working Party considers that a reasonable interpretation of the directives on data protection is that this should ordinarily involve a routine storage period for billing of maximum 3-6 months, **with the exception of** particular cases of dispute where the data may be processed for a longer period. In addition, only traffic data that are adequate, relevant and non-excessive for billing and interconnection purposes may be processed. Other traffic data must be deleted.

Done at Brussels, 29 January 2003
For the Working Party
The Chairman
Stefano RODOTA

detection and prosecution of criminal offences or of unauthorised use of the telecommunications system). Article 15 does not alter this provision in substance. It states that the restrictions must be « necessary, appropriate and proportionate » « within a democratic society » and adds also that Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in Article 15, §1 and that the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6, §1 and § 2 of the Treaty on European Union.

See on this issue Opinion 5/2002 of the Working Party on the Statement of the European Data Protection Commissioners at the International Conference in Cardiff (9-11 September 2002) on mandatory systematic retention of telecommunication traffic data where it is stated that systematic retention of all kinds of traffic data for a period of one year or more would be clearly disproportionate and therefore unacceptable in a democratic society.