



To All Senators  
Seanad Eireann  
Leinster House  
Dublin 2

19<sup>th</sup> January 2011

Dear Senator,

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**Re: Data Retention Bill requirements likely to place Ireland at a competitive disadvantage**

The Communications (Retention of Data) Bill 2009 comes before the Seanad on Thursday 20<sup>th</sup> January for its final stages. This Bill is to transpose the European Directive 2006/24/EC on retention of telephony and Internet data.

ISPai is very concerned that measures within the Bill put Internet enterprise in Ireland at a competitive disadvantage relative to other EU Member States. Other States have, or are in the process of, transposing the Directive with less onerous obligations on Internet Service Providers (ISPs). We call upon the Senate to block passage of the Bill until the modifications outlined below are made.

Unfortunately this highly controversial Directive (found unconstitutional in one EU country and under legal challenge in some others) is flawed in its objective of harmonisation by allowing latitude to Member States in the data retention parameters specified. The chosen level for these parameters in national legislation has a direct bearing on the costs incurred by the ISP industry that must provide data retention capability and service subsequent data requests. Irish ISPs will have no option but to pass on to our customers the additional costs created by this legislation. Many customers are international companies generating large export revenues from the Internet businesses they operate from this country.

E-business services which rely on the Internet represent huge employment and revenue growth opportunities today and more so for the future. These businesses are highly mobile and cost sensitive. Ireland's economic recovery is inextricably bound to the Internet and having an attractive Internet cost environment is vital to our future.

As the country is in economic crisis, do not jeopardise these opportunities by allowing anything but **the absolute minimum requirements of the Directive** to be written in to the Irish data retention legislation. ISPai calls for the following modifications to be applied.

- **Minimise the retention period:** That is, six months for Internet data. This is the minimum stipulated in the Directive and is the duration being adopted by Germany, Netherlands, Slovakia and others. (*Amend Section 3(1) which deals with Internet data ..... "for a period of six months in respect of the data referred to in Part 2 of Schedule 2.."*)
- **Cost recovery:** The State pays market rates for other services supplied by the private sector, why should services required under this legislation be different? A reasonable fixed fee (index-linked) for data requests must be stipulated. These costs and more are being reimbursed by our direct competitors, e.g. UK, France, Finland, Germany, Netherlands, and most States who have so far transposed. (*Amend Section 6, Disclosure Requests, to include a subsection which requires ISPs to be reimbursed in relation requests made for disclosure of retained data.*)
- **Flawed procedures:** ISPs fear costly litigation for disclosing data to a requesting authority (Garda, Revenue or State Security) if subsequently a disclosure request is

found to have been flawed but which under Section 6 is not necessarily rendered invalid. This is not the case with search warrants. This loophole must be fixed to discourage sloppy request practices and to remove the possibility of litigation against ISPs acting in good faith. (Amend Section 10(1) to read... A contravention of section 6 in relation to a disclosure request shall make that disclosure request invalid.)

- **Unacceptable liability:** This legislation allows for urgent data requests to be made orally by a requesting authority but has no protection for an ISP providing such data in good faith where the oral request is not followed up by the necessary valid documentation. This opens a considerable threat of litigation against the ISP. This uncertainty must be removed. (Amend Section 6(4)&(5) to either a) request must always be written and can not be made orally, or, b) that a request identification system will be maintained whereby requests whether made in writing or orally, will have unique identification code allocated, which must be subsequently communicated by the requesting authority for the data to be disclosed. When an oral request is made the subsequent written request must have the same identifier).

As a Senate member, Thursday's reading is probably the last chance for you to try to ensure that the Internet business environment generated in Ireland, at least by this Data Retention Bill, does not put us at a disadvantage to our European neighbours.

Yours sincerely,



Paul Durrant  
General Manager, ISPAI

## About ISPAI

The Internet Service Providers Association of Ireland represents enterprises that are located in Ireland and supply publicly available Internet services to business and residential customers both in Ireland and overseas. The services provided by our members include: access connection to the Internet; e-mail; website hosting and, Internet-based communication services. Our members are:

