Senator <>
Seanad Eireann,
Leinster House,
Dublin 2,

22nd April 2010

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Dublin 18, Ireland

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Dear Senator <>,

Re: Danger to growth of e-business in Ireland from excessive data retention requirements

The Communications (Retention of Data) Bill 2009, passed by the Dail in its fifth stage, is about to go through the Seanad. The Internet Service Providers Association of Ireland (ISPAI) is concerned that some of the Bill's proposals will seriously weaken the industry's competitive edge, deter innovative Internet based businesses from establishing here and hurt Ireland's reputation as an e-Commerce hub. As you, the members of the Seanad, begin your deliberations of the Bill the ISPAI would like to draw your attention to specific elements of the proposed legislation which we feel will seriously weaken our industry. In the accompanying memo we suggest how those concerns may be addressed.

Timescale too long: One year retention is required for Internet data. Countries such as Germany, Holland, Slovakia apply a six months retention period. The extra costs and resources required to meet the one year requirement will put many Irish ISPs at a distinct disadvantage.

Cost burden: There is no mention in the Bill about who will pay for data retention and more costly still, the servicing of data requests. Yet France, Germany and Holland cover certain operational costs and Britain, Finland and the Czech Republic reimburse capital expenditure. ISPs are business run to make a profit and so these costs will have to be passed on to business and residential customers.

Flawed procedure: A flawed Disclosure Request made under Section 6 is not necessarily invalid. This is unacceptable given, for example, that evidence secured by a search warrant is rendered invalid if the stipulations governing such a warrant are now followed. Why should it be any different for a disclosure request?

Unfair liability: Allowing oral requests creates the potential problem of documentation not arriving and no proof of a request ever having been made. This could open ISPs to civil law actions. Also, the Bill does not express immunity from liability of a service provider which in good faith discloses data under a request which purports to be in accordance with the law but in fact is not.

These are challenging times for any industry. Innovation, competitiveness and high value, service based exports are the keys to the economic recovery of this country. These businesses are intrinsically bound to the availability, quality and cost of the underling Internet infrastructure. We must not implement misguided legislative barriers that will raise the cost of the infrastructural base that will deter these highly mobile businesses from locating in Ireland and could well result in those who have set up here exiting to lower cost countries.

Yours sincerely,

Paul Durrant,
General Manager ISPAI

Internet Service Providers Association of Ireland Limited
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Main points developed (1)

TIMESCALE:

Luxembourg, Germany, Lithuania, Slovakia and Holland apply a six months retention period for Internet data. Therefore the one year requirement stipulated in the Irish Data Bill puts Irish ISPs at a distinct disadvantage. The ISPAI strongly suggest a six months Internet retention period. This is vital to insure that Ireland maintains its status as an e-commerce hub. The cost of doing business here must not be greater than overseas. For example, Holland with its six months retention period is an advanced e-commerce nation and a serious competitor to Ireland.

RECOMMENDED: We suggest the following amendment to Section 3(1) which deals with internet data: *in the case of the data in the categories specified in Part 2 of Schedule 2, a period of six months*.

COST BURDEN:

Although most of the EU member states do not reimburse costs incurred by operators to retain and retrieve data, there are those who do. France, Germany and Holland provide funds to cover certain operational costs. Lithuania covers the cost of retention if public authorities request that particular data be retained for more than six months. France and Germany have lists for the different kinds of data requests and their corresponding payments. In the Czech Republic, Finland and Britain money spent on equipment acquired to retain and retrieve data is reimbursed. Irish ISPs are placed at a disadvantage vis-*à-vis* those countries - including serious competitors like Holland - where some form of reimbursement is provided. Other services provided to law enforcement – equipment, fuel etc – are paid for. Why should ISPs be treated differently?

RECOMMENDED: That Section 6 (Disclosure Requests) includes a subsection which requires ISPs to be reimbursed in relation to both capital expenditure and operating costs.

Cont/…..

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Main points developed (2)

FLAWED PROCEDURES:

The provisions of Complaints Procedure, Section 10 (1), are flawed and would serve only to encourage sloppy work. For example, evidence secured by a search warrant is rendered invalid if the strict stipulations governing such a search warrant are not followed. Why should it be any different for a Disclosure Request? Indeed, why should the authorities bother to follow the rules if the end result is going to be valid anyway? Also, the options for redress are unacceptably limited.

RECOMMENDED: The provisions of Section 10 (1) be changed as follows:
A contravention of section 6 in relation to a disclosure request shall make that disclosure request invalid. Any such contravention shall be subject to an investigation in accordance with the subsequent provisions of this section and nothing in this subsection shall affect a case of action for the infringement of a constitutional right.

UNFAIR LIABILITY - Immunity:

The DR Bill does not express immunity from liability of a service provider which in good faith discloses data under a request which purports to be in accordance with the new regulations but in fact is not. An example would be if data is not requested for the "purposes of the detection, investigation and prosecution of serious offences" or an error is made in date and time, or the wrong subscriber identified.

RECOMMENDED: The ISPAI suggests that in Section 6 a subsection be written into the Bill on the following lines:
A service provider who in good faith discloses data under a request which purports to be in accordance with the provisions of the Bill and or who provides the wrong data, also in good faith, should be immune from civil action and or criminal prosecution.

UNFAIR LIABILITY - oral v. written request:

The ISPAI sees serious potential risks in subsection (5) of Section 6, Disclosure Request. There's the potential problem of documentation not arriving and therefore no proof that a request was ever made. It places ISPs in danger of falling into civil law traps.

RECOMMENDED: Subsection (5) should be dropped. Requests should be written or, a unique request numbering system should be used whereby when an oral request is made it is allocated a unique identifier (in the same manner as if it was written) which must then be placed on the subsequent written request. If the written request is not received the ISP would have this reference to prove the oral request was made.

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