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Committee on Industry, Research and Energy

2005/0182(COD)

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OPINION

of the Committee on Industry, Research and Energy

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a European Parliament and Council directive on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005)0438 – C6-0239/2005 – 2005/0182(COD))

Draftswoman: Angelika Niebler

PA_Leg

SHORT JUSTIFICATION

Background

On 21 September 2005 the Commission published a proposal for a directive on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC. In so doing the Commission has presented, on the basis of Article 95 of the EC Treaty, a deliberate counter-proposal to the Council's Draft Framework Decision on data retention drafted in 2004 by France, Ireland, the UK and Sweden.¹

This development is a welcome one from the European Parliament's point of view. The Commission has chosen a legal basis which allows Parliament the right of codecision on this issue of great importance both for citizens and businesses. By contrast, the Framework Decision, based on Articles 31(1)(c) and 34(2)(b) of the EU Treaty, gives Parliament only the right to be consulted.

In terms of substance, the Commission's proposed directive and the Draft Framework Decision tend in the same direction. Both seek to improve the fight against terrorism and serious crime by requiring the providers of public communication networks to retain certain data in accordance with harmonised provisions.

The data covered are traffic and location data within the meaning of Article 2 of Directive 2002/58/EC, including user and subscriber data. This means that the data to be retained are the following: all information about place, time, duration and number called in telephone conversations, faxes, e-mails, text messages and Internet protocols. The content of conversations is specifically excluded.

Evaluation

The Member States currently have different regulations governing retention times for individual items of communications data. From the point of view of effective cross-border action against terrorism and crime this is undoubtedly a disadvantage, since criminals increasingly operate across borders and use modern means of communication to do so. The proposed directive may accordingly become an important instrument in the fight against crime.

Your draftsman considers, however, that it raises a number of serious issues which should be addressed by the Committee on Industry, Research and Energy in particular so as to take account of the specific aspects of the communications and information society on which the directive touches.

Like the Council in its above-mentioned Draft Framework Decision, the Commission uses a very broad brush to demonstrate that the proposed measures will actually lead to an improvement in the fight against crime and terrorism. It is, however, essential for this to be proved in order to justify the significant effects and burdens on citizens and businesses. It appears, however, that the data requested by the prosecuting authorities in practice are not

¹ DOC. 8958/04 of 28 April 2004.

normally more than 3 months old. The legal retention times should therefore be adapted to take account of actual needs.

For telecoms firms the proposal would mean having to retain an inconceivably large amount of data. To store, archive and make available this volume of data would require expensive system adjustments. Calculations within the industry estimate that these adjustments would entail costs in the hundreds of millions of euro for some companies, not counting the follow-on costs for system maintenance and servicing.

As well as reducing retention time, then, it is also necessary to cut down the number of types of data to be retained (as set out in the Annex). Calls which fail to establish a connection, which are covered by the Commission proposal and would lead to major additional costs especially in fixed network telephony – without yielding any crime-fighting benefits, are an obvious candidate for the axe, as are data relating to the mobile phone identity, the MAC address or the location during or at the end of a mobile communication.

It causes your draftswoman serious concern that under Articles 5 and 6 of the proposal, the Annex and thus the substantive provisions of the directive governing the types of data to be retained, may be altered using the comitology procedure. This would mean that Parliament was entirely excluded from decisions on this sensitive issue. The provisions to this effect should therefore be deleted.

The requirement, in Article 9 of the proposal, for Member States to submit statistics relating to data retention, should not lead to extra bureaucratic demands on businesses, though in fact these statistics could also be used to provide evidence of the number of cases in which the requests actually led to successful investigations.

Finally, on this issue of great public sensitivity, Parliament should not allow itself to be hustled into action. Understandable though the desire is to conclude this legislative procedure as quickly as possible, stress must be laid on the importance of thoughtful debate. Furthermore, in the interest of the credibility of the European Union we must avoid a situation where work is under way simultaneously on two legal acts trying to achieve the same objective. In your draftswoman's view, the Council should therefore in future concern itself exclusively with the directive proposed by the Commission.

AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1 RECITAL 12

(12) The categories of information to be retained reflect an appropriate balance between the benefits for the prevention, investigation, detection, and prosecution of the serious offences involved and the level of invasion of privacy they will cause; the applicable retention period of *one year*, respectively *six months* where data relate to electronic communications taking place using solely the Internet Protocol, also strikes a reasonable balance between all the interests involved.

(12) The categories of information to be retained reflect an appropriate balance between the benefits for the prevention, investigation, detection, and prosecution of the serious offences involved and the level of invasion of privacy they will cause; the applicable retention period of *six months*, respectively *three months* where data relate to electronic communications taking place using solely the Internet Protocol, also strikes a reasonable balance between all the interests involved.

Justification

A maximum period of six months is in keeping with the proportionality principle, given that almost all investigations are dealt with using data less than six months old.

Amendment 2 RECITAL 13

(13) Given the fact that retention of data **generates** significant additional costs for electronic communication providers, whilst the benefits in terms of public security impact on society in general, it is appropriate to foresee that Member States reimburse demonstrated additional costs incurred in order to comply with the obligations

(13) Given the fact that retention of, **and affording access to**, data generates significant additional costs for electronic communication providers, whilst the benefits in terms of public security impact on society in general, it is appropriate to foresee that Member States **fully** reimburse **all electronic communication providers for**

¹ Not yet published in OJ.

imposed on them as a consequence of this Directive.

demonstrated additional costs incurred in order to comply with the obligations imposed on them as a consequence of this Directive.

Justification

The additional costs arising from a procedure intended to strengthen the security of the Member States must not be borne by operators.

Amendment 3
RECITAL 14

(14) Technologies relating to electronic communications are changing rapidly and the legitimate requirements of the competent authorities may evolve; to advise on these matters the Commission envisages *to create* a platform composed of representatives of the law enforcement authorities, associations of the electronic communications industry and data protection authorities.

(14) Technologies relating to electronic communications are changing rapidly and the legitimate requirements of the competent authorities may evolve; to advise on these matters the Commission envisages *creating* a platform composed of representatives of the law enforcement authorities, associations of the electronic communications industry and data protection authorities. ***The Commission undertakes to consult the European Parliament on any possible revision of this Directive.***

Justification

It is essential for Parliament to be involved in any revision of the directive, given the potential risk that fundamental freedoms and rights might be violated.

Amendment 4
RECITAL 16

(16) It is essential that Member States provide legislative measures to ensure that data retained under this Directive are only provided to the competent national authorities in accordance with national legislation in full respect of the fundamental rights of the persons concerned; such measures include in particular appropriate conditions, limits and safeguards in order to ensure the conformity of the provision of the

(16) It is essential that Member States provide legislative measures to ensure that data retained under this Directive are only provided to ***and used by*** the competent national authorities in accordance with national legislation in full respect of the fundamental rights of the persons concerned; such measures include in particular appropriate conditions, limits and safeguards in order to ensure the conformity of the

data retained with fundamental rights as guaranteed in particular in the European Convention for the Protection of Human Rights and Fundamental freedoms.

provision of the data retained with fundamental rights as guaranteed in particular in the European Convention for the Protection of Human Rights and Fundamental freedoms.

Justification

Respect for fundamental freedoms and rights demands that national authorities alone be allowed to make use of the data concerned.

Amendment 5
RECITAL 17

(17) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

deleted

Justification

The comitology procedure proposed by the Commission, whereby representatives of the Commission and the Member States may add to the list of the data to be retained without any participation by the European Parliament or by businesses affected, is unacceptable. Any extension of the types of data to be retained is an interference in fundamental rights which should be subject to review by Parliament. Accordingly this recital should be deleted.

Amendment 6
RECITAL 19 A (new)

19a. The Member States should ensure that the implementation of this Directive takes place following consultations with the business sector, particularly as regards feasibility and cost of retention. In view of the fact that retention entails a practical and financial effort from businesses, the Member States should guarantee full compensation for additional costs incurred by businesses as a result of obligations or commitments relating to the transposition of this Directive.

Justification

Combating crime and guaranteeing public security are core duties of the modern state: accordingly, such measures must be fully funded from the public purse, and not at the expense of business, otherwise the attractiveness of Europe as a business location will be diminished. The full (investment and operational) costs of all obligations arising out of this Directive must therefore be entirely borne by the Member States. The same applies to the compilation of statistics, which should primarily be the task of the Member States.

Amendment 7 ARTICLE 1, PARAGRAPH 2

2. This Directive shall apply to traffic and location data of both private and legal persons, as well as the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.

2. Since this Directive provides for derogations, its implementation shall be regularly reviewed under the supervision of the European Parliament. The European Parliament must have the information required to enable it to establish that enforcement of this Directive does not contravene respect for the Charter of fundamental rights of the European Union, especially as regards the processing of personal data and the protection of privacy in the electronic communications sector.

This Directive shall apply to traffic and location data of both private and legal persons, as well as the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.

Justification

It is essential for Parliament to be involved in any revision of the directive, given the potential risk that fundamental freedoms and rights might be violated.

Amendment 8 ARTICLE 3, PARAGRAPH 1

1. By way of derogation to Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that data ***which*** are generated or processed by

1. By way of derogation to Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that, ***in cases where a connection was successfully***

providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying communication services **are retained in accordance with the provisions of this Directive.**

established, data for the purpose set out in Article 1(1) are retained in accordance with the provisions of this Directive where they are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying communication services.

Justification

The amendment to paragraph 1 makes it clear that data retention can only be required when it is generated or processed in the course of the provision of communications services, since such a requirement might otherwise mean that services which do not generate certain types of data (e.g. prepaid telephony services) could no longer be supplied. Rendering such services impossible to supply or placing them under a disproportionate burden would reduce the attractiveness of the whole of Europe as a location for business, and would be in conflict with the Lisbon objectives.

Amendment 9

ARTICLE 3, PARAGRAPH 1 A (new)

1a. The Member States may provide, having regard to necessity and proportionality, that paragraph 1 shall not apply to providers of publicly available electronic communications services and operators of a public communication network, taking into account their market share, number of their subscribers, and the size of the networks in question in proportion to the size of the market.

Justification

Small service providers would be unable to comply with the proposed comprehensive data retention obligation even given full compensation for costs, since they would be forced to alter their systems and business procedures as well having to field regular queries from the authorities. This would not be affordable and would kill off small and medium-sized service providers, which in turn would have serious negative consequences for the attractiveness of Europe as a business location, since a large proportion of Europe's innovative power resides with SMEs.

Amendment 10
ARTICLE 3, PARAGRAPH 2

2. Member States shall adopt measures to ensure that data retained in accordance with this Directive are only provided to the competent national authorities, in specific cases and in accordance with national legislation, for the purpose of the prevention, investigation, detection and prosecution of serious criminal offences, such as terrorism and organised crime.

2. Member States shall adopt measures to ensure that data retained in accordance with this Directive are only provided to ***and used by*** the competent national authorities, in specific cases and in accordance with national legislation, for the purpose of the prevention, investigation, detection and prosecution of serious criminal offences, such as terrorism and organised crime. ***The competent national authorities must be in a position to give reasons for their transmission requests on the understanding that the contractual relationship between the provider and its customer must not be undermined and respect for the Charter of fundamental rights of the European Union must not be contravened, especially as regards the processing of personal data and the protection of privacy in the electronic communications sector.***

Justification

The contractual relationship between an operator and its customer must not be altered by these data retention measures. The authorities concerned have to be able to prove that their requests will be of use from the point of view of preventing, investigating, detecting, or prosecuting serious criminal offences such as terrorism and organised crime.

Amendment 11
ARTICLE 4, INTRODUCTORY PART

Member States shall ensure that the following categories of data are retained under this Directive

Member States shall ensure that, ***in cases where a successful connection was established***, the following categories of data are retained under this Directive ***for the purpose described in Article 1(1), provided that they are generated or processed in the course of the provision of communications services by providers of publicly available electronic communications services or of a public communications network:***

Justification

Telecoms firms already retain many of the types of data called for in the proposed directive. The extended data retention requirement would, however, entail significant costs, since existing data banks would have to be expanded and adjusted. The retention requirement should therefore apply only where a connection was successfully established.

Amendment 12
ARTICLE 4, POINT (A)

(a) data necessary to trace and identify the source of a communication;

(a) data necessary to trace and identify the source of a communication;

(1) Concerning fixed network telephony:

(a) The calling telephone number;

(b) Name and address of the subscriber or registered user;

(2) Concerning mobile telephony:

(a) The calling telephone number;

(b) Name and address of the subscriber or registered user;

(3) Concerning Internet access:

(a) The Internet Protocol (IP) address, whether dynamic or static, allocated by the Internet access provider to a communication;

(b) The User ID of the source of a communication;

(c) Name and address of the subscriber or registered user to whom the IP address, Connection Label or User ID was allocated at the time of the communication.

Amendment 13
ARTICLE 4, POINT (B)

(b) data necessary to *trace and* identify the destination of a communication

(b) data necessary to identify the destination of a communication:

(1) Concerning fixed network telephony:

(a) The called telephone number or numbers;

(2) Concerning mobile telephony:

(a) The called telephone number or numbers;

(3) Concerning Internet access :

(a) The Connection Label or User ID of the intended recipient(s) of a communication;

Amendment 14
ARTICLE 4, POINT (C)

(c) data necessary to identify the date, time and duration of a communication

(c) data necessary to identify the date, time and duration of a communication:

(1) Concerning fixed network telephony and mobile telephony:

(a) The date and time of the start and end of the communication.

(2) Concerning Internet access:

(a) The date and time of the log-in and log-off of the Internet sessions based on a certain time zone.

Amendment 15
ARTICLE 4, POINT (D)

(d) data necessary to identify the type of communication

(d) data necessary to identify the type of communication:

(1) Concerning fixed network telephony:

(a) The telephone service used, e.g.

voice, fax and messaging services.

(2) Concerning mobile telephony:

(a) The telephone service used, e.g. voice, Short Message Service (SMS).

Amendment 16
ARTICLE 4, POINT (E)

(e) data necessary to identify the communication device or what purports to be the communication device

(e) data necessary to identify the communication device or what purports to be the communication device:

(1) Concerning mobile telephony:

(a) The International Mobile Subscriber Identity (IMSI) of the calling party;

(2) Concerning Internet access:

(a) The calling telephone number for dial-up access;

(b) The digital subscriber line (DSL) or other end point identifier of the originator of the communication.

Justification

Mobile telephone serial numbers are issued more than once by the manufacturers and can be manipulated by users .

The machine ID number of a computer's network card cannot be reliably identified, since it may also be issued more than once by the manufacturers and can subsequently be easily manipulated by the user. The retention of these two types of data will not bring about a perceptible improvement in the fight against crime.

Amendment 17
ARTICLE 4, POINT (F)

(f) data necessary to identify the location of mobile communication equipment.

(f) data necessary to identify the location of mobile communication equipment:

(1) The location label (Cell ID) at the start of the communication;

Justification

The proposal that the Cell ID should be retained at the end as well as at the start of a call would entail significant additional costs. At present, only the location at the start of the call is retained in some Member States. In any case the Cell ID retained at the beginning of each new call makes it possible in retrospect to form a sufficiently accurate movement profile.

Amendment 18
ARTICLE 4, PARAGRAPH 2

The types of data to be retained under the abovementioned categories of data are specified in the Annex. **deleted**

Amendment 19
ARTICLE 5

Article 5 **deleted**

Revision of the annex

The Annex shall be revised on a regular basis as necessary in accordance with the procedure referred to in Article 6(2).

Justification

The comitology procedure proposed by the Commission, whereby representatives of the Commission and the Member States may add to the list of the data to be retained without any participation by the European Parliament or by businesses affected, is unacceptable. Any extension of the types of data to be retained is an interference in fundamental rights which should be subject to review by Parliament. Accordingly the provisions to this effect should be deleted.

Amendment 20
ARTICLE 6

Article 6 **deleted**

Committee

1. The Commission shall be assisted by a Committee composed of representatives of the Member States and chaired by the representative of the Commission.

2. Where reference is made to this paragraph, Article 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The period laid down in Article 5(6) of Decision 1999/468/EC shall be three months.

Justification

The comitology procedure proposed by the Commission, whereby representatives of the Commission and the Member States may add to the list of the data to be retained without any participation by the European Parliament or by businesses affected, is unacceptable. Any extension of the types of data to be retained is an interference in fundamental rights which should be subject to review by Parliament. Accordingly the provisions to this effect should be deleted.

Amendment 21 ARTICLE 7

Member States shall ensure that the categories of data referred to in Article 4 are retained for a period of **one year** from the date of the communication, with the exception of data related to electronic communications taking place using wholly or mainly the Internet Protocol. The latter shall be retained for a period of **six months**.

Member States shall ensure that the categories of data referred to in Article 4 are retained for a period of **six months** from the date of the communication, with the exception of data related to electronic communications taking place using wholly or mainly the Internet Protocol. The latter shall be retained for a period of **three months**. **At the end of the retention period, the data must be erased or made anonymous, in accordance with Directive 2002/58/EC.**

Justification

A maximum period of six months is in keeping with the proportionality principle, given that almost all investigations are dealt with using data no more than six months old.

Amendment 22 ARTICLE 8

Member States shall ensure that the data are retained in accordance with this Directive in such a way that **the data retained and any other necessary information related to such**

Member States shall ensure that the data are retained in accordance with this Directive in such a way that **they** can be transmitted **in due course** upon **written** request, **stating**

data can be transmitted upon request to the competent authorities **without undue delay**.

reasons, to the competent authorities.

Justification

The provisions of the proposed directive constitute a derogation from Articles 5, 6 and 9 of Directive 2002/58/EC. Consequently the data to be transmitted should be definitively specified. A procedure should also be provided for their transmission, in the interest of legal certainty and data protection. Past experience shows that transmission may cause delays for technical reasons, so that transmission without delay is not always possible.

Amendment 23 ARTICLE 9, PARAGRAPH 1

Member States shall ensure that statistics on the retention of data processed in connection with the provision of public electronic communication services are provided to the European Commission on a yearly basis. Such statistics shall include

- the cases in which information has been provided to the competent authorities in accordance with applicable national law,
- the time elapsed between the date on which the data were retained and the date on which the competent authority requested the transmission of the data;
- the cases where requests for data could not be met.

Member States shall ensure that statistics on the retention of data processed in connection with the provision of public electronic communication services are provided to the European Commission **and the European Parliament** on a yearly basis **by the competent authorities**. Such statistics shall include

- the cases in which information has been provided to the competent authorities in accordance with applicable national law,
- the time elapsed between the date on which the data were retained and the date on which the competent authority requested the transmission of the data;
- the cases where requests for data could not be met
- **the cases in which requests for specific types of data led to, or significantly contributed to, successful investigations.**

Justification

The requirement set out in Article 9 of the proposal for Member States to submit statistics in connection with data retention should not lead to extra bureaucratic demands on businesses. However, such statistics could also be used as evidence of the number of cases in which requests actually led to successful investigations.

Amendment 24 ARTICLE 10

Member States shall ensure that providers

Member States shall ensure that **all**

of publicly available electronic communication services or of a public communication network are reimbursed for demonstrated additional costs they have incurred in order to comply with obligations imposed on them as a consequence of this Directive.

providers of publicly available electronic communication services or of a public communication network are **fully** reimbursed for **all** demonstrated additional costs they have incurred in order to comply with obligations imposed on them as a consequence of this Directive

Justification

The fact that the Commission proposal provides for the reimbursement to businesses of investment and operating costs is to be welcomed. The proposed amendment is purely for purposes of clarification. At the same time the reimbursement of costs is an important regulatory instrument for reducing requests by the prosecuting authorities to the minimum necessary, and preventing distortions of competition on the basis of differing reimbursement procedures.

Amendment 25 ARTICLE 12, PARAGRAPH 1

1. Not later than three years from the date referred to in Article 13(1), the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers, taking into account the statistical elements provided to the Commission pursuant to Article 9 with a view to determining whether it is necessary to modify the provisions of this Directive, in particular with regard to **the period of retention provided for in Article 7.**

1. Not later than three years from the date referred to in Article 13(1), the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers, taking into account the statistical elements provided to the Commission pursuant to Article 9 with a view to determining whether it is necessary to modify the provisions of this Directive, in particular with regard to **the types of data set out in Article 4.**

Justification

In line with the proposed deletion of the comitology procedure in Article 5, an evaluation of all provisions of the directive, without distinction, should take place. Since the requirement of data retention is imposed on businesses and will entail significant costs for them, these costs should be taken into account in an evaluation of the directive.

Amendment 26 ARTICLE 12, PARAGRAPH 2

2. To that end, the Commission shall examine all observations communicated to it by the Member States or by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC.

2. To that end, the Commission shall examine all observations communicated to it by the Member States, ***by the commercial sector*** or by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC, ***together with the report to be drawn up by the European Parliament in accordance with Article 1 of this Directive.***

Justification

It is essential for Parliament to be involved in any revision of the directive, given the potential risk that fundamental freedoms and rights might be violated.

Amendment 27
ANNEX

This annex deleted

Justification

The Annex should be deleted in its entirety and placed in Article 4. The list of data constitutes the substance of the proposed directive and not merely a technical detail. The nature of the data to be retained determines the usefulness, feasibility, cost and proportionality of data retention. Accordingly the data list should not form part of an Annex separate from the operative text of the directive but should appear directly in Article 4.

PROCEDURE

Title	Proposal for a European Parliament and Council directive on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC
References	COM(2005)0438 – C6-0293/2005 – 2005/0182(COD)]
Committee responsible	LIBE
Opinion by Date announced in plenary	ITRE 15.11.2005
Enhanced cooperation – date announced in plenary	0.0.0000
Drafts(wo)man Date appointed	Angelika Niebler 5.10.2005
Previous drafts(wo)man	
Discussed in committee	22.11.2005 23.11.2005
Date adopted	23.11.2005
Result of final vote	+: 37 -: 4 0: 1
Members present for the final vote	Ivo Belet, Jan Březina, Philippe Busquin, Jerzy Buzek, Joan Calabuig Rull, Pilar del Castillo Vera, Jorgo Chatzimarkakis, Giles Chichester, Den Dover, Lena Ek, Nicole Fontaine, Adam Gierek, Norbert Glante, Umberto Guidoni, András Gyürk, Fiona Hall, David Hammerstein Mintz, Ján Hudacký, Romana Jordan Cizelj, Werner Langen, Anne Laperrouze, Nils Lundgren, Eluned Morgan, Angelika Niebler, Reino Paasilinna, Umberto Pirilli, Miloslav Ransdorf, Vladimír Remek, Herbert Reul, Mechtild Rothe, Paul Rübig, Britta Thomsen, Patrizia Toia, Catherine Trautmann, Claude Turmes, Nikolaos Vakalis, Alejo Vidal-Quadras Roca, Dominique Vlasto
Substitute(s) present for the final vote	Avril Doyle, Erna Hennicot-Schoepges, Vittorio Prodi, Hannes Swoboda
Substitute(s) under Rule 178(2) present for the final vote	
Comments (available in one language only)	