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TURN YOUR WI-FI UP

LEGAL HANDBOOK

The response to the legal obligations imposed upon organisations which provide access to the internet to members of the public in the member states of the european union.



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1 | BACKGROUND

Offering an access to the Internet to members of the public is no trivial matter.

This paper is designed to inform the persons who, being unaware of the obligations by which they are bound, often offer their clients a connection enabling communication via the Internet without having taken care to implement beforehand a system that would enable them to transmit to whomsoever it may concern the information that they were however legally bound to retain.

Because any failure to comply with these various obligations might be liable to incur criminal punishment, it would seem useful to set them down here.

Directive 2006/24/EC dated 15 March 2006, which has recently been declared invalid by the Court of Justice of the European Union (CJEU), compelled all Member States of the European Union to adopt a law obliging providers of electronic communications services accessible to the public and public communications networks to retain data relating to communications for a period of between 6 and 24 months.

This paper indicates which pieces of national legislation have implemented this Directive, the periods for conservation that they impose and the internal consequences of the invalidation of this directed, pronounced by a CJEU judgement dated 8 April 2014.

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2 | Implementation of Directive 2006/24/EC, invalidation of this Directive by the CJEU and periods for conservation of data imposed by Member States of the European Union

Although France, via its decree no. 2006-358 dated 24 March 2006 concerning the retention of electronic communication records which followed on from France's law no. 2006-64 dated 23 January 2006 concerning anti-terrorist measures, did not need to transpose the Directive due to the fact that its internal law was already compliant, the 26 other European Union countries had to do so.

Directive 2006/24/EC of the European Parliament and of the European Council dated 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC defines the rules and

the procedures of retention of personal data as well as registers of telephone calls that providers of electronic communication services that are accessible to members of the public and public communication networks must comply with.

This Directive requires the retention of data concerning the traffic generated by the use of the electronic communication services during a period ranging from six months to two years¹.

It provides that the maximum period of retention of this data can be extended by a Member State if it "faces specific circumstances which justify an extension, for a limited period" and provided that this extension is notified to the Commission, which can, within six months

following the notification, approve or reject the extension. Whereas the maximum duration can be extended, there is no legal provision to provide for a shortening of the period of retention to under six months.

The retention obligation applies to the data concerning the traffic itself and to the location data of both legal entities and natural persons, as well as to related data that is necessary to identify the subscriber or the registered user. It does not apply to the content of the electronic communications, such as to the information viewed using an electronic communication network.

In accordance with article 5 of the Directive, the categories of data to be retained are:

- a) data necessary to trace and identify the source of a communication
- b) data necessary to identify the destination of a communication
- c) data necessary to identify the date, time and duration of a communication
- d) data necessary to identify the type of communication

- e) data necessary to identify users' communication equipment or what purports to be their equipment
- f) data necessary to identify the location of mobile communication equipment

This Directive was to be transposed mandatorily by 15 September 2007 by the Member States of the European Union.

The following table indicates the periods of retention of the data imposed by the countries of the European Union which, like France, had an obligation to transpose the Directive.

It also lists the countries in which court decisions have declared laws voted by national parliaments which implement the Directive to be unconstitutional.

We should point out that there are also laws on the retention of the data in a number of countries which are not part of the European Union but which are members of the European Economic Area (EEA), including Iceland, Liechtenstein and Norway².

² The Icelandic law is law no. 81/2003 on telecommunications as modified in April 2005. In Liechtenstein, the law is the 2006 law on telecommunications. In Norway, a law was passed on 5 April 2011.



¹ Article 6 of the directive provides that "Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication."



We shall therefore consider what Member States have decided in respect of the duration of the obligation to conserve data relating to traffic and location data which they were bound to impose on electronic communications providers operating in their territory.

An electronic communications operator wishing to supply Internet access to the public in any of the 27 Member countries of the European Union, and specifically in those which, have, currently, implemented Directive 2006/24/EC, must have the technical tools to enable data relating to traffic and internet users' location data to be collected, these tools must comply precisely with the law transposing the Directive into domestic law and operators must not forget that this data should only be communicated to a limited number of authorities empowered to collect it.

However, and as a reminder, on 8 April 2014, the Court of Justice of the European Union (hereafter CJEU) declared the whole of the Directive on the conservation of connection data (Directive 2006/24/EC) to be invalid, following two preliminary rulings on two joined cases, Digital Rights Ireland Ltd no. C-293/12 (Ireland) and Karntner Landesregierung no. C-594/12 (Austria).

The request presented by the High Court (case C 293/12) concerned a dispute between Digital Rights Ireland Ltd and the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland, as well as the Attorney General regarding the legality of national legislative and administrative measures on data retention relative to electronic communications.

The request presented by the Verfassungsgerichtshof (case C 594/12) relative to constitutional appeals brought before this jurisdiction respectively by Kärntner Landesregierung (government of the the Austrian State of Carinthia) as well as by Mr. Seitlinger, Mr. Tschohl and 11,128 other petitioners on the consistency of the law transposing Directive 2006/24 in Austrian internal law with federal constitutional law (Bundes-Verfassungsgesetz).

The Court of Justice of the European Union considered Directive 2006/24/EC contrary to Articles 7 and 8 of the Charter of Fundamental Rights of the European Union which has been binding since the Lisbon Treaty went into effect in 2009.

The CJEU does not contest the principle and utility of storing data strictly to allow judicial authorities to have access to it to defend the general interest, meaning to fight serious crime and guarantee public safety, but tempers it indicating that such interference should be foreseeable only provided that the measures set forth are determined proportionately.



The main pitfalls of the Directive highlighted by the CJEU in its decree are that:

1. The data retention obligation concerns any person, means of electronic communications as well as all data on traffic, without differentiating, limiting or making exceptions based on the objective of combating serious violations; (pt 59)
2. Open access to data collected is too broad and not outlined sufficiently. It is in fact generally confined to «serious violations» defined by each Member State in its internal laws; (pt 60)
3. Access is not subject to prior control by a jurisdiction or independent authority; (pt 61)
4. No specific retention period is imposed upon the States, only a period of 6 to 24 months is set forth without any distinction between persons or between the violations concerned (pt 63 and 64).
5. The Directive does not set forth sufficient guarantees to ensure effective production of data against the risk of abuse and illegal use (pt 66 and 67).
6. The Directive does not require that the data gathered be stored on the territory of the European Union in order to fully guarantee control of compliance with the requirements of protection and security by an independent authority as required by the Charter of Fundamental Rights of the European Union (pt 68).
7. The Directive does not guarantee the permanent destruction of data at the end of the conservation period by the electronic communications departments (pt 67).

Concerning the consequences of this important decree from the CJEU, it should be noted that the invalidity of the Directive does not directly impact the national legislation of the Member States, but that national jurisdictions may be called to rule upon the compliance of national laws with respect to fundamental rights based on the analysis thus issued by the Court of Justice of the European Union.

The invalidity of the Directive does not systematically render national provisions contrary to the law of the European Union.

The European Commission and Parliament will undoubtedly have to rewrite the Directive, this time taking into account the comments highlighted by the CJEU on the invalidated Directive.

We thus see in the table below that certain Member States of the European Union have already taken this into account by declaring the unconstitutionality of their national legislation and others are at the stage where they are proposing a new law to their governments that would draw on the findings of the Decree from the CJEU dated 8 April 2014.

Remember that French legislation concerning storing data is found in Decree no. 2006-358 dated 24 March on the retention of electronic communications, following law no. 2006-64 dated 23 January 2006 relative to fighting terrorism.

The French provisions provided for in Articles L. 34-1 of the Postal and Electronic Communications Code (hereinafter, the "CPCE") concerning judicial inquiries and L. 34-1-1 of the CPCE concerning administrative inquiries regarding data storage as well as Article R. 10-13 et seq. of the CPCE are thus still applicable, even if the invalidation of the Directive implies that Member States have been questioned regarding the impact of such invalidation on their national legislation.

It must be acknowledged that certain criteria expressed against the Directive are also applicable to French legislation.

The data retention obligation is general and applies to all individuals.

Criminal offenses are set out without any other specifics on the scope of obligations or the seriousness of the offense.

As national legislation has not yet been modified, there are therefore several consequences.

- Operators of electronic communications who collect data could validly oppose requests from the police and judicial authorities to send stored data;

- Defendants or suspects, based on information obtained from operators based on the current legislation, could invoke in their favour the inconsistency of the criminal proceedings brought due to the invalidity of French law with respect to the Decree from the CJEU dated April 8, 2014.

- The Prime Minister may also, as a matter of course or upon request from a third party, change the regulatory provisions of the Postal and Electronic Communications Code governing data retention to bring it in line with the reasons the Directive was suppressed.

- Users of online public communications services may claim the destruction of data collected by the person responsible for processing due to a legitimate reason for not appearing in said files.

Country	Laws which transpose the Directive	Periods of retention of the data stipulated by the national laws	Comments
Austria	<p>The 2003 federal law amending the law on telecommunications</p> <p>Publication date: 18/05/2011 Date on which the law came into force: 19/05/2011</p>	6 months as of the date of the communication	<p>The judgement of the CJEU of 8 April 2014 found in favour of the invalidity of the 2006/24/CE Directive on the basis of a preliminary ruling from the Austrian Constitutional Court.</p> <p>On 27 June 2014, the Austrian Constitutional Court declared most sections of the Austrian law on data conservation to be unconstitutional.</p>
Belgium	<p>The law of 30 July 2013 amending Articles 2, 126 and 145 of the law of 13 June 2005 relating to electronic communications, from Article 90i of the Code of Criminal Procedure and the Royal Order of 19 September 2013, implementing Article 126 of the law of 13 June 2005, relating to electronic communications.</p>	<p>Traffic and location data are conserved for twelve months from the date of the communication.</p> <p>The King may, by an Order deliberated in the Council of Ministers and after the opinion of the Institute and the Commission for the Protection of Privacy, modify the conservation period of data for certain categories of data, without this ever exceeding 18 months.</p>	<p>This law was subject to two annulment appeals brought before the Constitutional Court by the Order of French and German speaking Bars on 24 February 2014 (roll no. 5856) and by the League of Human Rights, on 25 February 2014 (roll no. 5859).</p> <p>The Belgian Constitutional Court, in a decision of 11 June 2015 (no. 84/2015) indicated that: "By identification of the reasons with those that led the Court of Justice of the European Union to judge the "conservation of data" Directive to be invalid, it is notable that, by adopting Article 5 of the law being challenged, the legislator exceeded the limits imposed by the respect of the principle of proportionality with regard to Articles 7, 8 and 52.1 of the Charter of Fundamental Rights of the European Union. The above-mentioned Article 5 violates Articles 10 and 11 of the Constitution read in conjunction with these provisions. The sole ground in matter No. 5856 and the first ground in matter No. 5859 are well-founded. B.12</p> <p>Since they are inseparable from Article 5, Articles 1 to 4, 6 and 7 of the challenged law of 30 July 2013 were also invalidated and, therefore, the entirety of that law. B.13. Given that they could not lead to a wider invalidation, the other grounds in matter No. 5859 were not considered."</p>

Bulgaria	<p>Electronic Communications Act</p> <p>Publication date: 02/03/2010</p> <p>Date on which the law came into force: 10/05/2010</p> <p>Regulation # 40 dated 7 January 2008 on the categories of data and the procedure under which they would be retained and disclosed by companies providing publicly available electronic communication networks and/or services for the needs of national security and crime investigation</p> <p>Publication date: 29/01/2008</p> <p>Date on which the law came into force: 01/02/2008</p>	<p>12 months as of the date of the communication. The data to which access is provided may be retained for six more months on request</p>	<p>Action relating to data conservation was brought before the Supreme Administrative Court of Bulgaria (Decision no. 13627 of 11 December 2008)</p> <p>This led to a revision of the implementing law.</p> <p>On 12 March 2015, the Bulgarian law on data conservation was, once more, declared to be incompatible with the Constitution, based, in part, on the CJEU Judgement of 8 April 2014.</p>
	<p>The law on the retention of telecommunications data for the prevention of serious crimes.</p> <p>Publication date 31/12/2007</p> <p>Date on which the law came into force: 31/12/2007</p>		<p>6 months as of the date of the communication</p>
Czech Republic	<p>Law no. 247/2008 Coll. amending law no. 127/2005 Coll. on electronic communications and amending certain related laws</p> <p>Publication date: 04/07/2008</p>	<p>Between 6 and 12 months as of the date of the communication.</p> <p>Declared unconstitutional, it must now be transposed again</p>	<p>A ruling of the Czech Constitutional Court on 22 March 2011 declared that law no. 127/2005 and decree no. 485/2005 were unconstitutional. The Czech Republic is currently examining ways of proceedings with a new transposition of the Directive.</p>

Czech Republic (suite)	<p>Decree no. 485/2005 Coll. on the measurement of traffic and periods of retention of location data and its transmission to the bodies that are empowered to use them</p> <p>Publication date: 15/12/2005</p>		<p>The Czech Republic is currently examining how to proceed with a new implementation of the Directive and will no doubt do so in the light of the conclusions of the CJEU Judgement of 8 April 2014.</p>
Denmark	<p>The first, second and third orders on providers of electronic communication networks and electronic communication services concerning the recording and storage of traffic-related information</p> <p>Publication date: 13/10/2006</p> <p>Date on which the law came into force: 15/09/2007</p>	<p>12 months as of the date of the communication</p>	<p>The Danish Parliament ordered a study of the legality of orders on data conservation, taking into account the CJEU Judgement of 8 April 2014.</p>
Estonia	<p>The law on electronic communications and public health</p> <p>Publication date and date on which the law came into force: 07/12/2007</p>	<p>12 months as of the date of the communication</p>	
Finland	<p>The law on the obligation to identify and store data / the law on the privacy of electronic communications</p> <p>Date on which the law came into force: 05/06/2008</p>	<p>12 months as of the date of the communication</p>	<p>Finland does not impose upon small operators the obligation to retain data on the grounds that the costs that this would imply both for the provider and for the State would exceed the benefits for the forces of law and order and the criminal justice system</p>

France	The anti-terrorism law n° 2006-604 dated 23 January 2006	12 months minimum	France's law no. 2006-604 dated 23 January 2006 concerns measures to combat terrorism, cafés, hotels, cybercafés, restaurants, airports and anyone who offers to members of the public a connection enabling communication online via an access to the network, even free of charge, are legally bound to retain a number of traffic-related data.
Germany	<p>The law revising the means of surveillance of the telecommunications sector and introducing other investigative measures as well as implementing Directive 2006/24/EC</p> <p>Publication date: 31/12/2007 Date on which the law came into force: 01/01/2008</p>	<p>12 months as of the date of the communication.</p> <p>Pending the introduction of a new law transposing Directive 2006/24/EC which might set a different duration</p>	<p>In a ruling delivered on 2 March 2010, the German Federal Constitutional Court declared that certain provisions of the German law which transposes the Directive were unconstitutional</p> <p>On 27 October 2011, the Commission formally urged Germany to adopt, within two months, measures designed to ensure full compliance with the rules of the EU concerning the retention of data</p> <p>Considering the lessons to be learned from the CJEU's judgement of 8 April 2014, a new draft German law, presented in 2015, provides that data shall be conserved in Germany only and for mandatory conservation of data from mobile telephones and IP addresses of computers for 10 weeks.</p> <p>This proposed German law on data conservation will be presented to the German Federal Government (Bundestag) in June 2015.</p> <p>Germany is, with Luxemburg, one of the first countries in the European Union to submit a new law on the conservation of data since the Court of Justice of the European Union invalidated the 2006 Directive.</p>

Greece	<p>The law on the retention of data generated or processed in partnership with the public communication networks, the use of surveillance systems, audio or video reception or recording in the public places and related provisions</p> <p>Publication date: 21/02/2011</p>	12 months as of the date of the communication	
Hungary	<p>The 2003 law on electronic communications</p> <p>Publication date: 13/12/2003</p> <p>The 2007 law amending the law on electronic communications</p>	6 months for unsuccessful telephone calls and 12 months for all other data	A challenge was brought on 2 June 2008 by the Hungarian civil liberties union before the Hungarian Constitutional Court. It is currently pending.
Ireland	<p>Communications (Retention of Data) Act 2011</p> <p>Publication date: 28/01/2011</p>	<p>24 months for land-line and mobile telephony data</p> <p>12 months for data concerning access to the Internet, e-mail via the Internet and telephony over the Internet</p>	The CJEU's reply came within the framework of the now famous Judgement of 8 April 2014 which led to the invalidation of the Directive.

Italy	<p>The law implementing Directive 2006/24/EC on the retention of the data generated or processed as part of the provision of electronic communication services or public communication networks and amending Directive 2002/58/CE</p> <p>Publication date: 18/06/2008</p> <p>Legislative Decree no. 7 of 18 January 2015 confirmed by law no. 43 of 17 April 2015.</p>	12 months as of the date of the communication	
Latvia	<p>The amendments to the law on electronic communications of 17/11/2004 Publication date: 24/05/2007</p> <p>Date on which the law came into force: 07/06/2007</p> <p>The procedures compelling operators of electronic communication services to gather and to retain statistical information about the data and to deliver it on request to the investigating authorities before a trial, to the emergency services, to the national security authorities and to the public prosecutor pursuant to court orders</p>	18 months as of the date of the communication	

Latvia (suite)	<p>Publication date: 07/12/2007</p> <p>Date on which the law came into force: 08/12/2007</p>		
Lithuania	<p>Lithuania's law on electronic communications</p> <p>Publication date: 29/11/2008</p> <p>Date on which the law came into force: 15/03/2009</p>	6 months as of the date of the communication	
Luxembourg	<p>The Grand Ducal Regulation of 24 July 2010 setting the categories of personal data generated or processed as part of the provision of electronic communication services or public communication networks.</p> <p>Publication date: 29/07/2010</p> <p>The law of 24 July 2010 amending articles 5 and 9 of the law (now modified) of 30 May 2005 on the protection of privacy in the electronic communications sector and article 67-1 of Luxembourg's Code d'instruction criminelle [criminal investigation code]</p> <p>Publication date: 29/07/2010</p>	6 months as of the date of the communication	<p>Following the CJEU decision of 8 April 2014, the Luxembourg Minister for Justice asked for the opinion of the National Commission for Data Protection (hereafter NCDP), the authority governing data protection in Luxembourg, with a view to assessing the conformity of the Luxembourg legislation with the points raised by the CJEU. On 13 May 2014, the NCDP published its opinion with the main recommendation that the condition for combatting serious and organised crime and terrorism be redefined by a more suitable classification and criminalisation of the facts which are the subject of the enquiry.</p> <p>On 7 January 2015, Minister for Justice of Luxembourg introduced bill no. 6763 modifying the Code of Criminal Procedure and the amended law of 30 May 2005 regarding the protection of privacy in the electronic communications sector, so as to comply with the judgement of the CJEU and to fill the gap left by the invalidation of the above Directive.</p>

Malta	<p>The 2008 amended law on data protection (LN. 198) Publication date: 29/08/2008</p> <p>The law on the regulation of electronic communications (LN. 198) (CAP 399) Publication date: 29/08/2008</p>	<p>12 months for any data concerning fixed, mobile and Internet telephony</p> <p>6 months for any data concerning access to the Internet and to e-mail via the Internet</p>	
Poland	<p>The Regulation of the Minister of Infrastructure of 28 December 2009 on a detailed specification of data and types of operators of public telecommunications networks or providers of publicly available telecommunications services obliged for its retention and Storage.</p> <p>The law of 24 April 2009 amending the law on telecommunications of 16 July 2004</p> <p>The decree of 22 March 2010 on the procedure for transmitting and sharing data in case of bankruptcy of an operator of a public telecommunications network or of a provider of telecommunications services accessible to members of the public.</p>	24 months as of the date of the communication	
Portugal	<p>The transposition into national law of Directive 2006/24/EC of the European Parliament and of the European Council dated 15 March on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks</p> <p>Publication date: 17/07/2008</p>	12 months as of the date of the communication	

Romania	<p>The law on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks amending law no. 506/2004 on the processing of personal data and privacy in the electronic communications sector.</p> <p>(law no. 298/2008)</p> <p>Publication date: 21/11/2008</p>	6 months as of the date of the communication	<p>On 8 October 2009, the Romanian Constitutional Court held that law no. 298/2008 transposing the Directive was unconstitutional.</p> <p>On 27 October 2011, the European Commission formally called upon Romania to adopt, within two months, measures designed to ensure full compliance with the rules of the EU concerning the retention of data</p> <p>On 8 July 2014, the Romanian Constitutional Court, indicated once more that the new Romanian law implementing the Directive was unconstitutional.</p>
Slovakia	<p>Law no. 654/2007 modifying and complementing law no. 610/2003 on electronic communications</p>	12 months in the case of data relating to land-line and mobile telephony, 6 months for data concerning access to the Internet, e-mail via the Internet and telephony over the Internet	<p>On 23 April 2014, the Slovak Constitutional Court suspended application of the Law on Data Conservation.</p> <p>The law remains valid, therefore, but has no legally binding effect.</p> <p>Electronic communications operators are no longer, for the moment, obliged to conserve traffic data.</p>
Slovenia	<p>The rules governing the method of transmission of the traffic data held by mobile telephony services and fixed electronic communications networks</p> <p>Publication date: 14/12/2009</p> <p>Date on which the law came into force: 13/01/2010</p> <p>The law amending the law on electronic communications</p> <p>Publication date: 12/12/2006</p>	8 months in the case of data relating to the Internet. 14 months in the case of telephony data	<p>On 3 July 2014, the Slovenian Constitutional Court cancelled the national legislation on data conservation because of its unconstitutional nature, based, in particular, on the conclusions on the judgement of the CJEU of 8 April 2014.</p>

Spain	<p>Law no. 25/2007 on the retention of data on electronic communications and public communication networks</p> <p>Publication date: 19/10/2007</p> <p>Date on which the law came into force: 08/11/2007</p>	<p>12 months as of the date of the communication</p> <p>A competent authority may, after consultation with electronic telecommunications operators, reduce this conservation period to 6 months, or, on the contrary, increase it to 24 months for certain data or categories of data.</p>	
Sweden	<p>The Directive has not been transposed</p>		<p>Sweden has been declared guilty of failing in its EU obligations by the Court of Justice (C-185/09).</p> <p>In April 2011, the Commission brought a second action against Sweden before the Court for failing to execute the judgment given in matter C-185/09.</p> <p>Sweden exposed itself to a financial sanction under Article 260 of the Treaty on the Functioning of the European Union, following a decision by its Parliament to delay adoption of the implementing law by a year.</p> <p>On 21 March 2012, the Swedish Parliament passed Law 2012/278 concerning the collection of data on electronic communications, applying the Intelligence Act.</p> <p>This law implements Directive /24/ EC.</p> <p>On 12 June 2014, a group of experts appointed by the Swedish Minister for Justice concluded that the Swedish legislation is lawful, unlike the Directive of 2006 invalidated by the Directive under the judgement of 8 April 2014.</p>

The Netherlands	<p>The law of 18 July 2009 amending the law on telecommunications and economic crimes in connection with the implementation of Directive 2006/24/EC of the European Parliament and the Council of the European Union on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (law on the retention of the data from telecommunications)</p>	<p>12 months as of the date of the communication</p>	<p>A decision of the Court in the Hague on 11 March 2015 (C/09/48009/KG) Z1 14/1575), made following an appeal based on the judgement of the CJEU on 8 April 2014, declared the data conservation law to be unconstitutional.</p>
United Kingdom	<p>The Data Retention (EC Directive) Regulations 2007</p> <p>Date on which the regulations came into force: 01/10/2007</p> <p>The Data Retention (EC Directive) Regulations 2009</p> <p>Date on which the regulations came into force: 06/04/2009</p> <p>Law of 17 July 2015 on Data Conservation</p>	<p>12 months as of the date of the communication</p>	<p>The United Kingdom does not impose upon small operators the obligation to retain data on the grounds that the costs that this would imply both for the provider and for the State would exceed the benefits for the forces of law and order and the criminal justice system.</p>



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