EU Privacy Regulators Call for Clarification of Consequences of ECJ’s Invalidation of Data Retention Directive

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Not surprisingly, the Working Party welcomed the ECJ’s judgment, but urged EU member states and the European Commission to take action to provide clear guidance on the consequences of the ECJ’s judgment for national data retention laws and practices in the European Union (EU).

In its judgment, the ECJ followed the December 2013 opinion of the Advocate General and considered that the obligation imposed on telecommunications service providers to retain traffic and location data, as well as the access of the competent national authorities to such data, constitutes a “wide-ranging and particularly serious interference” with the rights to privacy and the protection of personal data guaranteed by the EU Charter of Fundamental Rights (UE Charter).

The ECJ recognized that the Data Retention Directive serves a legitimate objective of general interest (i.e., the fight against serious crime and, ultimately, the safeguarding of public security). However, the ECJ found that the interference with the rights to privacy and protection of personal data was not properly circumscribed by provisions to ensure that it was limited to the purpose of investigating, detecting, and proceeding against serious crimes, as defined by national law. The data had to be retained for a minimum of six months and a maximum of two years.

In conclusion, the Working Party stated: “The consequences of the ECJ’s judgment are vast, and member states and the Commission must take decisive action to provide clear guidance to telecommunications service providers on how to proceed in the wake of the ECJ’s judgment.”

Background

Background, the Data Retention Directive required EU member states to ensure that providers of publicly available electronic communications services or public communications networks (“telecommunications service providers”) collect and retain traffic and location data specified in the Data Retention Directive for the purpose of investigating, detecting, and proceeding against serious crimes, as defined by national law.

In April 2014, the High Court of Ireland and Austria’s Constitutional Court referred questions to the ECJ for a preliminary ruling. In its judgment, the ECJ followed the December 2013 opinion of the Advocate General and considered that the obligation imposed on telecommunications service providers to retain traffic and location data, as well as the access of the competent national authorities to such data, constitutes a “wide-ranging and particularly serious interference” with the rights to privacy and the protection of personal data guaranteed by the EU Charter of Fundamental Rights (UE Charter).
...bulk retention of all categories of data, effective protection is provided against the risk of un...

...detected. However, this emphasis is quite surprising, because any re...

...reproduced. At a time when Russia's new localization requirements...

...have force and may still be maintained on the basis of Article...

...of the ECJ's judgment on data transferred to, and thus stored in, a country outside the...

...2014 By The Bureau of National Affairs, Inc., Washington, D.C. WDPR ISSN 1473-3579

...analysis at WDPR, October 2014, page 9

...the Working Party emphasized that the ECJ's judgment was also motivated by the fact that the Data Retention Directive did not require that data be retained within the EU.

...the Provision gives member states the possibility to ex...

...EU, but instead the data are subject to appropriate differen...

...the Working Party called on the Commission to 'provide without further delay clear guidance on the consequences of the Court's judgment, both at European and at Member State level.' So far, whenever a member of the European Par...

...the Working Party stressed that, when doing so, national states and EU in...

...In light of the foregoing, the ECJ declared the Data Retention Directive invalid. However, a concern is what the Advocate General had recommended. The effect of the ECJ's judgment applied, notwithstanding and cross-coun...

...the Working Party did not elaborate on that in its statement.

...Consequently, the Working Party urged member states to review the circumstances of the data retention measures they had adopted and to...
The Working Party's statement confirms that telecommunications service providers subject to national laws implementing the Data Retention Directive should still collect and retain data in accordance with those national laws only if the laws reflect the ECJ's judgment.

In other member states, the telecommunications service providers' data retention obligations have not been removed or suspended, but rather have clearly been maintained. This is the case, e.g., in the United Kingdom, where an assumption of a challenge to the existing data retention law before national courts, the U.K. government deferred to replace that legislation (the Data Retention (EC Directive) Regulations 2009) with emergency data retention legislation ('DRIP') on July 30, 2014.

In Sweden, where the Post and Telecom Authority (PTS) decided to replace that legislation (the Data Retention (EC Directive) Regulations 2009) with emergency data retention legislation ('DRIP'), which came into force on July 17, 2014, PTS renewed data retention obligations from length similar to those in the Data Retention Directive (EC Directive) Regulations 2009 (see analysis at WDPR, August 2014, page 9). As a result, judicial review of DRIP is currently being undertaken by civil rights campaigners.

In Denmark, where the government reviewed the Danish data retention law in light of the ECJ judgment, a Working Party on the national law was set up to determine whether the national law was preliminarily affected by the judgment, but announced that the government would propose a revision of the Danish data retention law in the next parliamentary session, 2014-2015. Until then, telecommunications service providers are obliged to retain data in accordance with that law, which was deemed lawful.

In Austria, where the Constitutional Court (Constitutional Court of Austria) invalidated the national data retention law in the light of the ECJ judgment, the government ordered service providers to delete the data they had retained, but they now have an obligation not to collect data on customers, to return deleted data, and to destroy all such data as a result.

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4 See Articles 1, 3 and 5 of the Data Retention Directive. Article 5 of the Data Retention Directive made it clear that the substantive content of the communications must not be collected and retained.

5 See Article 6 of the Data Retention Directive.


14 See the press release of the Swedish foundation, 5th of July Foundation, available (in English) at: https://5july.org/2014/09/12/we-urge-eu-to-act-against-swedens-illegal-data-retention/.

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