CONTENT

In a ruling of 8 April 2014 (‘Digital Rights Ireland’), the Court of Justice of European Union (CJEU) annulled the directive 2006/24/EC 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. The Court considered that the directive ‘entails a wide-ranging and particularly serious interference with the fundamental rights to the respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary’.

During the debates held in the aftermath of the ruling, and through specific written questions, the Members of the European Parliament (EP) called on the Commission to state whether it intended to put forward a new proposal for a directive on data retention. During the meeting of the Justice and Home Affairs Council of 12 March 2015, the Commissioner for Migration, Home Affairs and Citizenship announced that the Commission does not plan to present a new legislative initiative on data retention. Instead, it intends to launch a public consultation on the issue.

Considering the possible impact of the decision on other legislation with data retention implications, the European Parliament’s Committee on Civil Liberties (LIBE) asked for an opinion on the matter from the Parliament’s Legal Service. According to the opinion, the CJEU ruling did not, in itself, invalidate the other EU instruments that are based on data retention, these enjoying a presumption of legality.

In many member states having a national data retention regime, this has been challenged before the respective Constitutional Courts (in some cases upholding the existing rules, while in other invalidating them). Some member states, like UK, decided to adopt new regulation.

In a 2016 ruling (Tele2 Sverige), while recalling the Digital Rights Ireland Judgement, the CJEU, on the one hand clarified that in that case it was considering the validity of Directive 2006/24 and not the validity of any national legislation (on data retention) and, on the other, stressed that the EU law (namely e-Privacy Directive 2002/58/EC) “must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication”. However, Member states may adopt legislation permitting “targeted retention of traffic and location data for the purpose of fighting crimes”, if the retention is limited to what it is strictly necessary.
In November 2017, the European Commission announced that it will finalise its guidance on the way forward on data retention as it considered that "the exchange of information and data is an essential feature of our societies and increasingly a cross-border phenomenon", but it was not released so far.

At the Council level, a common reflection process on data retention issues was launched, within its working groups TELE and DAPIX, under the Maltese Presidency and continued under the Austrian Presidency, with the aim to analyse the possible legislative and non legislative options to ensure the availability of data for the purposes of prevention and prosecution of crimes. This seems to include the context of the reform of the e-Privacy rules and the need to maintain a certain degree of flexibility in it, in particular though the public interest exception (see file on e-privacy reform). According to some criticisms, however, this may introduce minimum storage periods for all categories of data, that is, indiscriminate retention of data.

At the JHA Council meeting of 6-7 December 2018, members exchanged view on the state of play on data retention, after expert discussions and focusing on some aspects, including: ensuring coherence with the e-Privacy rules, restricting the scope of data retention framework (e.g. to traffic and location data), establishing a strong framework of safeguards for access to retained data.

In particular, issues related to the 'restricted data retention', according to the ECJ ruling (first level of interference) such as limited data categories, data retention period, storage and security measures were discussed together with aspects related to the concept of 'targeted access' to retained traffic and location data (second level of interference).

As for the first aspect, a matrix of limited data categories has been developed under Europol coordination; regarding the length of the retention period, most of member states consider 12 months as necessary for law enforcement purposes; rules on erasure of data at the end of the retention period are also considered necessary; as for data security (e.g. in encrypted way or pseudonymisation) member states' practices and positions vary; the need for a review of compliance with data protection safeguards by an independent authority is commonly shared among member states. As for the aspect of targeted access to retained data for the purpose of preventing crimes (that, according to the ECJ should be sufficiently serious to justify interference with rights and can only partially justify a data retention regime) organized crime and terrorism are commonly considered by member states as unambiguously serious, for which access to retained data is necessary; member states also claim that they need to have discretion when defining in their national laws which crimes are to be considered as serious crimes. They agree that access of competent authorities to retained traffic and location data requires a prior review by a judicial or administrative independent authority, taking into account proportionality and necessity in the specific case (not necessary for subscriber data).

In that occasion, member states also discussed about the possible exemptions for persons subject to professional secrecy, about the limits to access data of persons other than suspects (that should not apply if there is a connection to the investigations) as well as about the notification to affected persons and legal remedies. Finally, the presidency concluded that the Council is in favour of carrying on the work at experts' level to explore avenues to develop a concept of data retention within the EU.
At the end of March 2019, the Council presented to member states its conclusions on improving retention of data for the purpose of fighting crime effectively (then discussed in the DAPIX WP on 11 April). The text stresses the importance of data stemming from telecommunication operators and service providers for law enforcement activities and the need to lay down additional data retention obligations for telecom operators and service providers, while preserving fundamental rights. To this aim, the Council, while announcing that its work will continue in the DAPIX WP on data protection, also called the Commission to launch a series of consultations with relevant stakeholders and to prepare a “comprehensive study” on possible solutions for telecom data retention for law enforcement purposes.

Relevant case law at the EU and national level are ongoing on issues related to the limits of retention of e-communications data (also in view of the current e-Privacy directive, art 15(1)). In particular, requests for a preliminary ruling to the CJEU have been submitted by the Belgian Constitutional Court (C-520/18), the Conseil d'Etat in France (Case C-511/18), and the Supreme Court of Estonia (Case C-746/18), which will give the occasion to the CJEU to clarify the rules on data retention obligations and their limitations.

References:

- Court of Justice of European Union, Judgment of 8 April 2014 (Digital Rights Ireland, Joined Cases C-293/12 and C-594/12)
  - Court of Justice of European Union, Judgement of 21 December 2016 (Tele2 Sverige/ Watson, Joined Cases C203/15 and C698/15)
  - EP Legislative Observatory, Procedure file of European Court of Justice judgment of 8 April 2014 concerning data retention (C293/12 and C-594/12), 2014/2698(RSP)

Further reading:

- Eurojust Report of on data retention regimes in Europe, November 2017
- Council of the EU, outcome of the JHA Council meeting, 6-7 December 2018
- EDRI (and others) Open letter to European member states on the ePrivacy reform, 23 April 2018
- European Law blog, Reconsidering the blanket-data-retention-taboo, for human rights' sake?, October 2018
- Council of the EU, Conclusions on improving retention of data for the purpose of fighting crime effectively, 27 March 2019

Author: Shara Monteleone, Members’ Research Service, legislative-train@europarl.europa.eu
As of 20 November 2019.