To retain or not to retain…a decision up to each Member State?

Fanny Coudert, 27 July 2016, https://www.law.kuleuven.be/citip/blog/to-retain-or-not-to-retaina-decision-up-to-each-member-state/

Abstract: *On July, 19, Advocate General Saugmandsgaard Øe gave his Opinion in the Tele2 case. The CJEU is asked to clarify whether the blanket data retention obligation imposed on ISPs is compliant with the EU Charter. The matter has been the focus of heated debates between civil society and public authorities. This Opinion gives us a first hint on the interpretation that should be given to the Digital Rights Ireland judgement as regard mass collection of traffic data. In a context of repeated terrorist attacks, the issue is of utmost importance.*

The data retention directive: a general absence of limits

The Data Retention Directive harmonised Member States' provisions concerning the obligation made to ISPs to retain traffic and location data to enable law enforcement authorities to trace back suspects' activities, "to examine the past". This measure has been controversial from the start. Supporters of the measures argued that it would play a crucial role in criminal investigations. Its opponents considered it to be an excessive interference into the right to privacy (see e.g. Article 29 Working Party Recommendation 3/99).

Madrid and London bombing attacks were the detonator for its adoption in 2006. But civil society kept on fighting the measure and brought national legislation before the courts. All these challenges succeeded and the subsequent provisions were annulled based on the lack of clarity of the law in scope and purpose and insufficient safeguards; insufficient limitation of circumstances in which law enforcement authorities could access the data; and insufficient security measures.

In 2012, the Irish Supreme Court and the Austrian Constitutional Courts referred the matter to the CJEU. The Court found that the interference into EU citizens' privacy was wide-ranging and particularly serious. It affected, indiscriminately, the entire EU population for all their communications. It was further likely to generate, amongst EU citizens, a feeling of being under constant surveillance amongst individuals.

The CJEU ruled that the Data retention Directive failed to implement acceptable democratic safeguards. It used similar arguments as national courts. There was no criterion that would allow to limit, to some extent, data collection (a suspicion, a particular period of time, a geographical zone, etc.). Further, access to and the subsequent use of the retained data by law enforcement authorities was not regulated, nor was it subject to a prior review carried out by a court or by an independent administrative body. In that regard, the CJEU decision follows the case-law of the ECtHR under Article 8 on secret measures of surveillance (see e.g. *Zakharov*).

But wait…which limits?

The ruling was applauded by civil society as a great victory that would ban State mass surveillance of electronic communications. It detonated as a bomb in the hands of the EU legislator and the Member States. However, they quickly recovered from the shock and opted for a "pragmatic interpretation". The CJEU could not have meant to forbid or limit the scope of data retained as this would defeat the main purpose of the measure (see e.g. in Luxemburg or in Sweden). Rather, the ruling of the Court

must be understood as to allow a general retention regime provided it is accompanied by sufficient safeguards to protect citizens' rights set out in Articles 7 and 8 of the Charter.

Civil society stood their ground and continued the fight. Tele2, a Swedish ISP, refused to comply with the data retention obligation imposed by the law. In the UK, three citizens challenged the UK provisions installing a general obligation for ISPs to retain traffic data. The Swedish and the UK courts referred the matter to the CJEU for clarification.

The Opinion of the AG: it is compatible….

In his greatly anticipated Opinion, the AG supports the "pragmatic approach". Blanket data retention obligations only go beyond the bounds of what is strictly necessary where it is not accompanied by stringent safeguards concerning access to the data, the period of retention and the protection and security of the data. The requirements identified by the CJEU in Digital Rights Ireland are however minimum and cumulative requirements.

The position of the AG is not really surprising. The ECtHR has also been keen on accepting mass surveillance measures provided they are accompanied by sufficient safeguards to prevent against an "unfettered exercise of power". In Szabó, the ECtHR wrote that "it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in pre-empting such attacks".

…but is it proportionate?

The AG has however heard the arguments of civil society and they pervade his Opinion. He first considers that data retention measures are only justified in the context of the fight against serious crime. The data should not be used in the context of ordinary offences. He then recalls that it should be assessed whether other measures or combination of measures, such as targeted data retention obligations, which are less intrusive, could be as effective ("strict necessity test"). He points to several studies that have put into question the necessity of blanket data retention in the fight against serious crime. Finally, he reminds that the measure should pass the proportionality test *stricto sensu*. In other words, the advantages for the fight against serious crime should be weighed against the serious risks which arise from the power to catalogue the private lives of individuals and to catalogue a population in its entirety.

But the AG does not go as far as asking the CJEU to take position on the proportionality of blanket data retention obligations. Instead, he passes the hot potato back to national courts. He asks them to perform the strict necessity and proportionality tests in the light of the overall assessment of the surveillance regime installed by the national legislation. He rightly recalls though, that this assessment opens a debate about the values that must prevail in a democratic society, and ultimately about what kind of society we wish to live in. These societal choices become urgent in light of recent events.