Statewatch Analysis

The European Parliament and data retention: Chronicle of a 'sell-out' foretold?

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Introduction

The European Parliament (EP) plenary is next week (week of Dec 12 2005) due to adopt its first-reading vote on the Commission's proposed Directive on data retention. The question before the EP is whether it accepts the text agreed by the JHA Council of 1-2 December 2005, or adopts the report of its Civil Liberties committee, which would entail arguing for a number of key changes to the text as agreed by the Council.

The purpose of the following analysis is to set out a) how the Council's agreed text differs from the Commission's initial proposal; and b) how the EP committee report differs from both these versions. It will be seen that if the EP accepts the text as agreed in the Council last week, it would amount to a 'sell-out' of its position – and the civil liberties of the EU public.

The Council's agreed text

As compared to the Commission's proposal, the Council's agreed text includes a number of amendments to ancillary provisions, or new ancillary provisions. According to previous drafts of the Council's position, these ancillary provisions were included largely to satisfy the EP, although doubtless some of these amendments (particularly the first one) also accord with the Council's view.

These ancillary provisions concern the following:

- the list of data to be retained can no longer be amended by the Commission pursuant to a 'comitology' process;
- data security principles (Art. 7bis of the Council text; Art. 3b of the EP text);
- supervisory authorities (Art. 8bis of the Council text; Art. 9a of the EP text);
- sanctions for breach of the Directive (Art. 11bis(2) of the Council text; Art. 8a of the EP text); and
- a provision on remedies for individuals (Art. 11bis(1) of the Council text).

But these provisions do not concern the essential core issues concerning the Directive, which concern what personal data is kept on the EU public, for how long the data has been kept, and who has access to the data.

Compared to the Commission's proposal, the Council deletes the prospect of retaining data for the purpose of 'preventing' crime. It retains the limitation to 'serious crime' only, making reference to national law to determine what constitutes serious crime for the purposes of the Directive.

The proposed Article 3(2), which governed access to the data following its retention, has been amended by the Council (see Article 3bis) to make it clear that access to data is essentially a matter for national law, taking account of human rights obligations.

A new Article 3(2) specifies that data concerning unsuccessful call attempts must be retained in certain circumstances.

As for the period of data retention, the Commission had proposed a standard period of one year, with a separate standard period of six months for Internet data (Article 7). The Council agreed on a period between six months and two years, without drawing a distinction based on types of data.

Next, the Council differs from the Commission draft proposal as regards the possibility of Member States invoking *even longer* periods of data retention for data and purposes within the scope of the Directive than the two year maximum set out in Article 7. On this point, it should be recalled that the 'legal base' for the proposed Directive is Article 95 EC, the 'internal market' power. This Article provides for possible flexibility for Member States when adopting legislation as follows:

> 4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30 *[including 'public security'],* or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
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> 5. [concerns introduction of *new* national measures derogating from EC internal market law; but these are only permitted *automatically* as regards the environment and the working environment]
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> 6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. [concerns public health only]

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30 [including 'public security'], provisional measures subject to a Community control procedure.

It can be seen that Article 95(4) automatically authorises a Member State to apply to the Commission for authorisation to continue more stringent national rules that are already in force when EC legislation is adopted, *inter alia* on grounds of public security. There is no way to prevent the application of Article 95(4) to the data retention, as it is an inherent part of the legal base for the adoption of internal market law.

The biggest concern here is that the Commission apparently *cannot* take into account human rights concerns when approving or disapproving the existing national laws, but only internal market and business concerns. Furthermore, there is no transparent procedure for the Commission to take such decisions; indeed, according to the case law of the Court of Justice, there is no need to hold a hearing with the Member State applying for a derogation under Article 95 EC, never mind other Member States, affected businesses, civil society, the European Parliament, national parliaments or data protection bodies.

A Commission decision to authorise (or not) the existing national law can be challenged in the EU courts, but only directly by the Member States, the European Parliament or (improbably) the Council. Other parties who wish to challenge the Commission's decision to authorise existing law would have to do so through the national courts and request a reference to the Court of Justice, but it should be recalled that the Commission decision to authorise can only take economic considerations into account.

It is arguable that existing national laws authorised by the Commission *can* be challenged on human rights grounds, since the Court of Justice has held that it has jurisdiction to assess the compatibility of national measures derogating from EC free movement law with fundamental rights (for example, see the judgment in Case C-60/00 *Carpenter*). Procedurally, the only way to bring such a challenge would be to launch proceedings in the national courts of the Member States retaining such existing national laws and ask for a reference from the Court of Justice. Also, individuals affected by such laws would still be able, after exhausting domestic proceedings, to bring a dispute before the European Court of Human Rights.

As noted, there is nothing that can be done to remove or reduce the impact of Article 95(4) on this Directive. But at least, in the Commission's proposal, there was no clause implementing Article 95(10), which gives an *option* when the EC adopts a measure based on Article 95 EC to permit Member States to adopt *future* measures which derogate from the legislation, on specified grounds including again 'public security'.

However, the Council has included such a provision in its agreed text: Article X (in between Articles 11 and 11bis). This would allow the adoption of such *future* measures by Member States extending the data retention period in Article 7, albeit only for a 'limited period'. The Member States would have to request authorisation for this from the Commission, following the same procedural and substantive rules as set out in Article 95(4) EC, even though it should be noted that Article 95(10) refers to a Community 'safeguard procedure', not back to Article 95(4). Arguably this means that the EC legislators are not bound to follow the rules in Article 95(4) EC when setting up a procedure for authorisation of *future* Member State measures derogating from internal market legislation on public security grounds, but could instead have empowered the Commission to examine the compatibility of future national measures with human rights as well. But the Council obviously wishes to avoid Commission scrutiny of Member State measures on human rights grounds.

Since the procedure and grounds for review of future national measures extending data retention beyond the time limits in Article 7 copies the rules in Article 95(4) EC, all the comments above regarding the inadequacies of that procedure from a civil liberties and transparency perspective apply equally to 'Article X'.

Next, the Council's agreed text makes crucial changes to Article 11 of the proposal, which governs the relationship between this Directive and the 2002 Directive on telecoms data protection. Article 15(1) of the 2002 Directive provides as follows:

> 1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4) *[re: caller ID]*, and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention,

> investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

The other Articles of the Directive referred to concern: the content of calls and e-mails, etc. (Article 5); traffic data (Article 6), caller identification (Article 8); and location data (Article 9).

Since the 2005 proposal falls within the scope of Article 15 of the 2002 Directive, but does not address all of the same issues, then the relationship between the two Directives has to be set out. Article 11 of the proposal, in the Commission's version, specified that the 2002 Directive would not 'apply to obligations relating to the retention of data for the prevention, investigation, detection and prosecution of serious criminal offences, such as terrorism and organised crime, deriving from' the 2005 Directive. This meant that the 2005 Directive would take precedence as regards data retention for any law enforcement purposes concerning 'serious crimes'. On the other hand, it would leave Member States free to take measures concerning *less* serious crime.

The Council's version instead exempts from the 2002 Directive only data 'specifically required to be retained' by the 2005 Directive 'for the purposes referred to' in the Directive. So it leaves Member States free to adopt national data retention laws regarding less serious crime (as before), but also as regards *prevention* of crime (now outside the scope of the 2005 proposal) and as regards any type of data which Member States are not obliged to retain under the 2005 Directive. This would include unsuccessful calls, to the extent that they fall outside the Directive's scope, and (according to recital 12bis) inclusion of data for judicial purposes – although this recital appears to contradict the agreed text of the Directive, which plainly seems to cover data retention for judicial purposes pursuant to the scope of the Directive.

Finally, the Council text alters the deadline to apply the Directive to 18 months (rather than 15 months as proposed by the Commission), with a further 18 months for Member States that wish to delay the application of its obligations as regards Internet data.

The EP committee position

The EP committee position supported the deletion of 'prevention' of crime from the Directive. It also wants the limitation of the Directive's obligations to 'serious' crime only, albeit (unlike the Council) by reference to the list of crimes for which dual criminality is abolished pursuant to the European arrest warrant.

But the EP differs from the Council's position in retaining the Commission's initial Article 3(2) (moved to Article 3a), regarding access to data following its retention, and indeed further amending this paragraph to provide for greater detailed controls on access to data.

As for unsuccessful calls, the EP committee position left an option for Member States to require this data to be retained (Article 4(2) of EP text).

The EP's position regarding the length of the data retention obligation is a period of 6-12 months, with no distinction based on types of data, and with detailed rules on the erasure of data after that point. This compares with the Council position of retaining the data for 6 months to two years.

'Article X' of the Council's agreed text, regarding the application of Article 95(10) EC so as to permit Member States to introduce *new* laws extending the time for data retention pursuant to the Directive (following Commission approval), is not in the EP's position. The EP position does include a clause (Art. 7(1)(b)) requiring the Commission to keep the EP informed of the approval process as regards Article 95(4) EC; there is no similar provision in the Council's agreed text.

As for Article 11, the EP position retains the Commission's text regulating Member States' adoption of other data retention measures, and adds a further paragraph to require that Member States 'refrain from adopting legislative measures in the sectors covered by this Directive'. The scope of this provision is not clear, but it seems evident that the EP wants to strengthen the exclusion of data retention obligations on other grounds (such as crime prevention or as regards less serious crime).

The EP position also differs from the Council as regards several ancillary issues:

- the EP retains and enlarges Art. 10 of the Commission's proposal, dealing with reimbursement of costs for service providers;
- the EP wants more substantial amendments to the Article on statistics (Art. 9); and
- the EP wants amendment to the 'evaluation' clause in Art. 12, in particular to ensure that the future evaluation also takes account of human rights issues.

Comments

What has the EP won from the Council so far? It has ensured that the Council has agreed to introduce text concerning a number of ancillary points. But most of these are points already covered by the main EC data protection directive of 2005 and the telecom data protection directive of 2002; in fact, recital 15 of the Commission proposal stated explicitly that those other two Directives were applicable to data retention within the scope of this proposal. So the insertion of text copying the provisions of those Directives, or referring to the provisions of those Directives, is not a victory at all.

Nor is it a victory to eliminate the comitology procedure for amendment of the Directive. The Council was opposed to this idea anyway, and there is a strong argument that a comitology procedure to amend the types of data to be retained under the Directive would be illegal, since 'essential elements' of legislation cannot be the subject of comitology procedures and the types of data to be retained is surely an 'essential element' of the Directive.

This leaves us with the key issues: the purposes for which data must be retained, the types of data that must be kept, and the length of the retention period. On this issue, while the Council has agreed with the EP to remove data retention for prevention purposes from the text, Article 11 of the Council's agreed version would still leave *carte blanche* to Member States to adopt measures requiring data retention as regards crime prevention.

The EP has also succeeded in at least preserving the *status quo* of the Commission's proposal by limiting its scope to 'serious crime', although not as the EP would wish to define it. But again, the Council's version of Article 11 would give *carte blanche* to Member States to adopt measures requiring data retention as regards less serious crime.

Turning to the types of data retained, the EP does not appear to have been successful in its desire to leave it entirely to Member States to decide whether to include unsuccessful calls within the scope of data retention provisions, given the conditional inclusion of such calls within the obligations set in the Directive in the Council's text (Article 3(2)).

As regards rules on access to data, the Commission had proposed minimal rules and the Council essentially makes reference to national law. The EP's suggestion to insert detailed rules into the text of the Directive has not been successful.

As for the time period for retention of data, the EP agreed with the Commission that a period of between six months and one year should apply (although the details differed). The Council has doubled the maximum length to two years, although the six-month minimum has been retained. This issue should also be seen in light of Article 95(4) EC, which in any version would permit Member States to request the application of existing more stringent national laws, and the Council's Article X, which would permit them to request an extension to the two-year limit in *future* national laws.

Conclusion

It follows that if the EP accepts the Council's current position without amendments, it will clearly have 'sold out' its civil liberties principles. More data will be included than the EP had wished, and access to it will be essentially unregulated by EC law – the opposite of the EP's intentions.

Data will be retained for up to double the period that the EP wanted, and indeed Member States will be unconstrained in requesting (and probably getting authorisation for) longer periods of retention. While the purposes for which

data can be retained falling within the scope of the Directive will remain relatively constrained, the Council's text will give *carte blanche* to Member States to retain other data, or data for less serious crime or crime prevention purposes, as they wish.

In fact, taking together Article 95(4)EC and Articles X and 11 of the Council's version of the Directive, it is difficult to see what absolute constraints concerning data retention would be placed upon Member States by EC law at all. In principle, Member States could insist on (or at least request) the retention of any type of data for any type of security purpose for any period at all.

There would, in effect, be nothing to show from a human rights point of view regarding the core data protection issues, following the application of the co-decision process to this legislation.

The European Parliament now has to decide whether it has the courage of its civil liberties convictions or not.

References:

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