

Impossible to Ensure Legality of EU Communications Data Retention Directive Says German Parliament

April 26, 2011 -- Today the Working Group on Data Retention published an opinion prepared in February 2011 by the Legal Services of the German Parliament on "The Compatibility of the EU Data Retention Directive with the EU Charter of Fundamental Rights". The Bundestag's legal experts write that "it is impossible to rephrase the Directive in such a way that it would ensure compliance with the Charter of Fundamental Rights". The opinion observes that "it has become clear that the success of blanket communications data retention is very limited", and that data retention increases the crime clearance rate only "marginally". It concludes with the finding that: "In any case, the relationship between ends and means is disproportionate."

"The Bundestag's opinion supports our conviction that the EU Court of Justice will not uphold the Data Retention Directive once the Irish High Court's request to examine its legal validity takes place", says Uli Breuer of the Working Group on Data Retention. "The EU must abort this experiment immediately and replace the completely disproportionate blanket collection of the entire population's communications records with an instrument for preserving the data of suspects."

"The principle of proportionality is binding on any state governed by the rule of law", Kai-Uwe Steffens of the Working Group adds. "The Legal Services of the German Parliament have found that data retention is irreconcilable with this principle. The Federal Republic of Germany must therefore work towards outlawing data retention within the EU."

The Working Group on Data Retention calls on the governments and parliaments of Austria, Germany, Romania, Sweden and the Czech Republic to:

1. refrain from imposing or permitting the indiscriminate collection of information on all telephone calls, text messages, e-mails and Internet communications, even if fines are imposed, particularly as the EU Court of Justice has yet to rule on the validity of the Data Retention Directive,
2. request permission from the Commission and, if necessary, from the EU Court of Justice, to be exempted from transposing the EU Data Retention Directive 2006/24/EC under Article 114 (4) TFEU,
3. lobby for the withdrawal of the failed Data Retention Directive and for a European ban on laws requiring blanket and indiscriminate collection of telecommunications data on citizens who have never been suspected of any wrong-doing.

Excerpts from the opinion prepared by the German Parliament's Legal Services:

"This marginal increase in the clearance rate by 0.006% could raise doubts about whether the provisions in their current form would stand their ground under a proportionality review. In any case, the relationship between ends and means is disproportionate."

"There are doubts about whether Directive 2006/24/EC and the obligation to retain data without cause that it compels are in conformity with the community principle of professional and economic freedom. From an abstract and general point of view, the provisions can be said to be effective. Likewise, they could be said to be necessary, considering that blanket storage is more extensive and therefore more reliable and effective than a preservation order based on reasonable suspicion. What is likely to be problematic, however, is the proportionality of the scheme with regard to the relationship between the ends and means. Notwithstanding the pending evaluation by the Commission, which, presumably, will yield reliable data concerning the prospects of success of data retention, the provisions in their present form could interfere disproportionately with telecoms operators' fundamental right to professional and economic freedom. With respect to the current state of debate about Directive 2006/24/EC and interpretation of the EU Charter of Fundamental Rights as well as to the Member States' scope of implementation it is impossible to rephrase the Directive in such a way that it would ensure compliance with the Charter of Fundamental Rights."

Download the full opinion prepared by the Legal Services of the German Bundestag here (in German):
http://www.vorratsdatenspeicherung.de/images/rechtsgutachten_grundrechtecharta.pdf

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