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NOTE

From:	Presidency
To:	Delegations
Subject:	Requirements of the Tele 2 judgement regarding data retention = Continuation of discussion

1. During the Maltese Presidency DAPIX - FoP held a first exchange of views on:

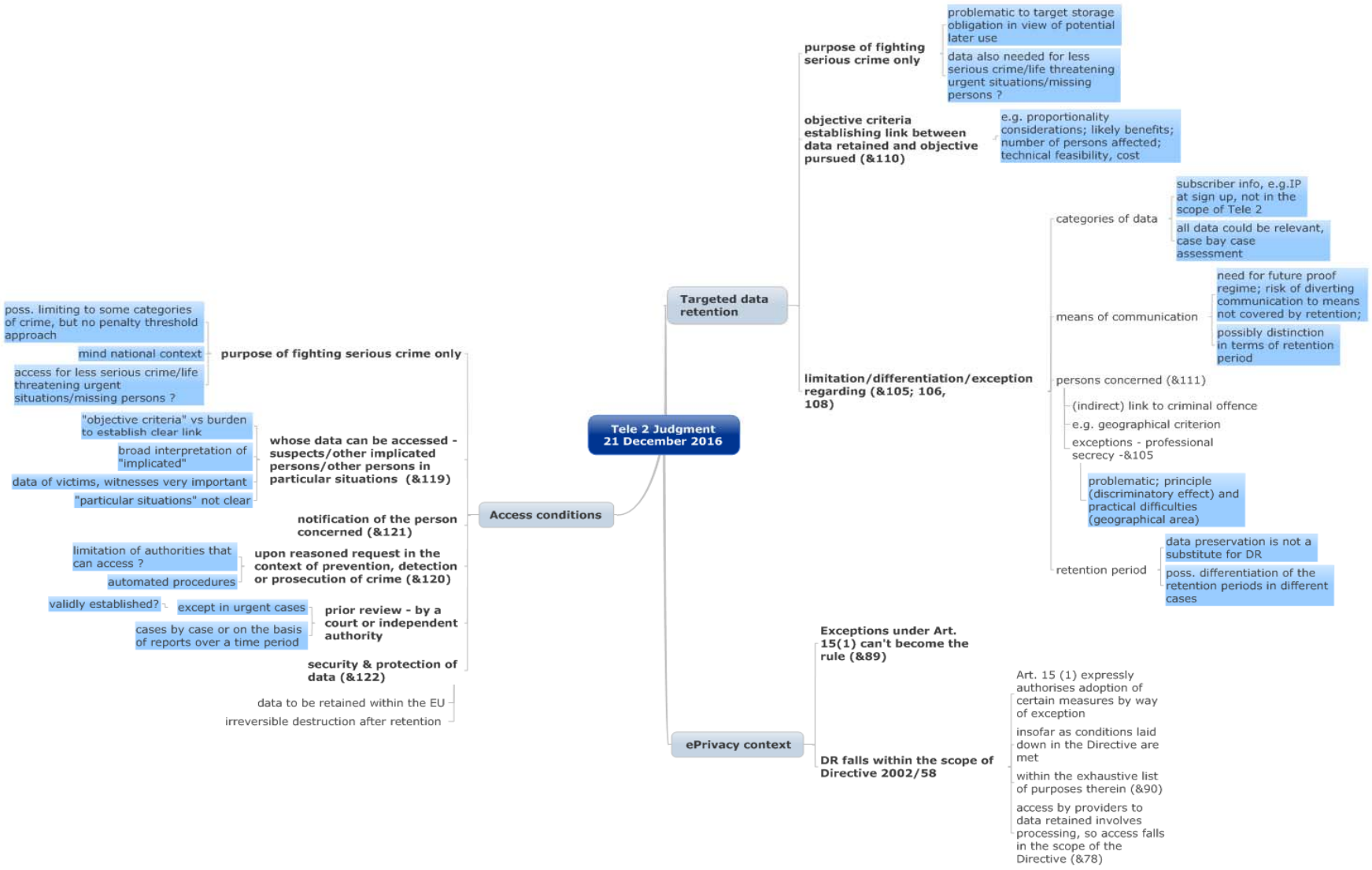
   - the requirements of the CJEU regarding the concept of targeted data retention for the purposes of prevention and prosecution of crime and
   - the access criteria for competent authorities, as defined by the Court.

   The practical needs of competent authorities to access data for the purposes of effective prevention and prosecution of crime were also extensively discussed, including in light of national experiences and the operational practice of Europol.

2. With a view to facilitating further reflection on these issues, a summary of the main aspects of the Tele 2 judgment with indication of some of the initial reflections on the various aspects (highlighted sections), as arising from the discussions of DAPIX- FoP thus far, is presented in the Annex (in a mind map form).

3. Delegations are invited to examine the mind map and to submit any further comments on the respective issues or suggestions for further development of the document, including any further reflections on the questions set out in doc. 9558/17 and 8798/17.

4. Delegations are further invited to indicate any specific suggestions, either legislative or non-legislative, that could facilitate the progress on the data retention issues in light of the requirements of the Court.


Tele 2 Judgment
21 December 2016
Targeted data retention
purpose of fighting serious crime only
problematic to target storage obligation in view of potential later use
data also needed for less serious crime/life threatening urgent situations/missing persons ?
objective criteria establishing link between data retained and objective pursued (&110)
e.g. proportionality considerations; likely benefits; number of persons affected; technical feasibility, cost
limitation/differentiation/exception regarding (&105; 106, 108)
categories of data
subscriber info, e.g.IP at sign up, not in the scope of Tele 2
all data could be relevant, case bay case assessment
means of communication
need for future proof regime; risk of diverting communication to means not covered by retention;
possibly distinction in terms of retention period
persons concerned (&111)
(indirect) link to criminal offence
e.g. geographical criterion
exceptions - professional secrecy -&105
problematic; principle (discriminatory effect) and practical difficulties (geographical area)
retention period
data preservation is not a substitute for DR
poss. differentiation of the retention periods in different cases
Access conditions
purpose of fighting serious crime only
poss. limiting to some categories of crime, but no penalty threshold approach
mind national context
access for less serious crime/life threatening urgent situations/missing persons ?
whose data can be accessed - suspects/other implicated persons/other persons in particular situations (&119)
"objective criteria" vs burden to establish clear link
broad interpretation of "implicated"
data of victims, witnesses very important
"particular situations" not clear
notification of the person concerned (&121)
upon reasoned request in the context of prevention, detection or prosecution of crime (&120)
limitation of authorities that can access ?
automated procedures
prior review - by a court or independent authority
except in urgent cases
validly established?
cases by case or on the basis of reports over a time period
security & protection of data (&122)
data to be retained within the EU
irreversible destruction after retention
ePrivacy context
Exceptions under Art. 15(1) can't become the rule (&89)
DR falls within the scope of Directive 2002/58
Art. 15 (1) expressly authorises adoption of certain measures by way of exception
insofar as conditions laid down in the Directive are met
within the exhaustive list of purposes therein (&90)
access by providers to data retained involves processing, so access falls in the scope of the Directive (&78)