WORKING DOCUMENT

From: Europol
To: DAPIX (Friends of the Presidency - Data Retention)
Subject: Proportionate data retention for law enforcement purposes
Proportionate data retention for law enforcement purposes

Data Protection Function

18 September 2017
DAPIX FoP meeting on data retention
“(…) the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest. (…) Article 6 of the Charter lays down the right of any person not only to liberty, but also to security. (…) It must therefore be held that the retention of data for the purpose of allowing the competent national authorities to have possible access to those data (…) genuinely satisfies an objective of general interest.”

Very similar most recently in PNR Canada!
Data retention for LE is **not** blocked by ECJ

There is an essential need to incorporate data retention rules for law enforcement purposes into the upcoming ePrivacy Regulation or other European legislative act.

Data retention for LE must be defined as specific purpose.
Need and possibility for proportionate LE data retention regime

Need to overcome fragmented national legislation

Lack of EU data retention legislation for LE prevents Member States from adopting effective data retention law

Not all Tele2-criteria bind the EU legislator

Data retention must not be the exception, it must only be proportionate!
Structure

Relationship between ePrivacy Regulation and the EU Charter of Fundamental Rights

Legal capacity of the legislator to adopt proportionate data retention measures

Interference levels (retention vs. access)

“Restricted data retention” and “targeted data access”
Different background of ECJ’s judgements

**Digital Rights**

- Charter
- EU Primary Law
- Data Retention Directive
- EU Secondary Law
- Member States Law

**Tele2**
Different background of ECJ’s judgements

Digital Rights:

- “link between retained data and the pursued purpose” and/or

- additional safeguards as regards storage and access

-> DRD was not proportionate
Different background of ECJ’s judgements

Digital Rights

Tele2

EU Law

Charter

EU Secondary Law

Data Retention Directive

ePrivacy Directive

Art. 15

Member States Law

National Data Retention Legislation

Europol Unclassified - Basic Protection Level
Different background of ECJ’s judgements

Digital Rights:

- “link between retention and the pursued purpose” and/or
- additional safeguards regarding storage and access

Stricter criteria of Tele2:

- general data retention on level 1 is *per se* unlawful, irrespective of safeguards on level 2
- data retention must not “become the rule”
Different background of ECJ’s judgements

Digital Rights:
- “link between retention of data and the pursued purpose” and/or
- additional safeguards regarding storage and access

Stricter criteria of Tele2:
- general data retention is *per se* unlawful, irrespective of safeguards regarding access
- data retention must not “become the rule”
status proposed

status envisaged

EU Law

Charter

ePrivacy / other

Data Retention for LE

EU Secondary Law

ePrivacy Regulation

Art. 11

Member States Law

National Data Retention Legislation
Interference Levels

Level 1: Initial Retention

Meta Data

Retention

Data stored by Providers

Level 2: Storage, Access and Use

Access

Law Enforcement

fighting

Serious Crime/Terrorism

“wide-ranging, particular serious interference”

Europol Unclassified - Basic Protection Level
Clearly non-compliant with Charter

Level 1: general retention

Meta Data

Retention

Data stored by Providers

• all traffic and location data
• all subscribers and users
• all means of communication

Level 2

Law Enforcement fighting

Serious Crime/Terrorism

no / link
Clearly compliant with Charter – but not fit for LE reality

Level 1: targeted retention

Level 2

Meta Data

Targeted retention and subsequent use

- impossible, potential relevance cannot be foreseen in advance

Law Enforcement

fighting

Serious Crime/Terrorism
Restricted retention and targeted access

Level 1:
• Not only targeted data retention, but also restricted data retention is compliant with the Charter according to *Digital Rights* and Tele2.

Level 2:
• Access to metadata must be targeted according to *Digital Rights* and Tele2.
Compliant with Charter – and fit for LE reality!

Level 1: restricted retention

Level 2: targeted access

Meta Data → Retention → Data potentially relevant

Access

- based on evidence and
- prior judicial review and
- safeguards against misuse and ...

Law Enforcement fighting

Serious Crime/Terrorism

Europol Unclassified - Basic Protection Level
Restricted data retention

Limitation of retention only as far as possible

Only exclusion of irrelevant data categories is necessary

-> required link between retained data and the purpose of fighting crime is provided
Targeted access

Compensation of wide-ranging level 1 interference

Reduces “feeling of constant surveillance”

Feasible without losing additional value (“examining the past” still possible)
Conclusion

• Some “stricter” Tele2 criteria only derive from EU secondary law, not from the Charter.

• Currently, Member State’s legislative capacities are curtailed more than necessary.

• EU legislation can remedy this by adopting data retention law.
Conclusion

• The initial retention of data has to be restricted in order to be compliant with the Charter.

• Such restriction can be achieved through exclusion of data not even potentially relevant.

• To compensate the strong interference as regards retention, the data access must be strictly targeted.