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NOTE

from: Presidency
to: Working Party on Data Protection and Information Exchange
(DAPIX - Data Protection)
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Subject: Report from the Commission to the Council and the European Parliament
Evaluation report on the Data Retention Directive (Directive 2006/24/EC)
- Discussion paper

As announced by the Presidency earlier this year, a general discussion about the report on the review of the Data Retention Directive is scheduled for the DAPIX (Data Protection) Working Party meeting of 4 May 2010. The Presidency proposes to centre the discussion on the following issues:

Definition of serious crime (and other purposes) retained data are used for (Paragraph 4.1. of the Commission report)

According to the Commission's statement, data retention is a valuable instrument to maintain security in the European Union and plays a central role in the fight against serious crime. The permanent collection of traffic data constitutes an interference with the right to privacy and data protection, according to the practice of European courts. Such interference can be acceptable only if it is proportionate and necessary.

It seems that the EU legislator in this regard has failed to strike the right balance as it did not precisely define the cases when public (or private) interests prevail over the confidentiality of retained data. The missing definition (of serious crime) at EU level has led to diverging national practices and indeed, legal uncertainties. Therefore the Presidency submits the following questions:

- Do you share the opinion that the definition of serious crime (and other purposes for which retained data may be requested) is directly linked to the purpose limitation principle and thus is crucial in respecting data protection principles as anchored in European instruments?
- Do you agree that as long the purposes for which retained traffic data are not defined precisely, the data retention regime cannot be regarded as satisfactory from data protection point of view? In the affirmative case, do you think such definition should be decided upon at EU level?

Principles of necessity and proportionality – missing statistics (Paragraphs 4.1. and 5.4. of the Commission report)

Necessity and proportionality are the main elements of consideration when the value of a legal instrument is assessed in the light of fundamental rights and freedoms. Statistics on the provision and use of retained data may be used to establish whether or not these criteria are met. The Commission report on the Data Retention Directive is illustrated with tables of statistics provided by the Member States. The report intends to draw conclusions based on statistics. However, tables of statistics include generally more empty fields than filled in ones. Missing statistics continue to raise questions about the criteria statistical data should underpin – prominently necessity and proportionality. Therefore the Presidency submits the following questions:

- Is it only statistics that are able to demonstrate the value of the measures in place?
- Are there any other methods that allow demonstrating the necessity, proportionality and efficiency of data retention?

- Are the general statements by Member State law enforcement authorities on the usefulness or necessity (= indispensability) of data retention, sufficient from a data protection point of view?

Periods of retention (Paragraph 4.5. of the Commission report)

Providers of publically available electronic communications services or of public communications networks are obliged to retain traffic and location data for between six months and two years for the purpose of the investigation, detection and prosecution of serious crime. In this regard the Presidency submits the following question:

- Based on the experience of your respective country, do you consider the retention period as appropriate / longer or shorter than necessary?

Misuse of retained data

It is often reiterated that there is no evidence of any misuse of personal data. The Commission report also states that ‘there are no concrete examples of serious breaches of privacy...’.

In Hungary we have, however, information on a concrete case which is about misusing the data retention regime (police officers misused their power to request data and then passed the data on to unauthorised persons). In this regard the Presidency submits the following question:

- Do you have any similar experience in your respective country?
- How can /could have the misuse of data be/been avoided?

Use of unregistered (anonymous) SIM cards (Paragraph 5.5. of the Commission report)

Several Member States are of the opinion that anonymous SIM cards offer a loophole within the data retention regime to communicate without being observed. According to this approach, to fill this gap in the regime is a necessary step to harmonise. In this regard the Presidency submits the following questions:

- Do you agree that none of the publicly available communication tools should offer an anonymous use of any networks? or
- Anonymous SIM cards are available in several Member States. Are you of the opinion that legislators should not deprive citizens of the possibility to use prepaid services anonymously?

Data preservation shall complement (replace) data retention? (Paragraph 3.3. of the Commission report)

Recently, a type of data preservation has been developed, known as ‘quick freeze plus’. According to this model a judge may also grant access to data which have not yet been deleted by operators. In this regard the Presidency submits the following questions:

- Do you agree that data preservation, as a tool, possibly replacing data retention in the future, should be explored? or
- Do you rather think that data retention should not necessarily be replaced, since, if appropriate safeguards are in place, it can be carried out in line with common data protection principles.