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WORKING PAPER

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	DAPIX (Friends of the Presidency - Data Retention)
Subject:	European Judicial Cybercrime Network (EJCN) on the effects of the CJEU judgement

Delegations will find attached a questionnaire addressed to the European Judicial Cybercrime Network (EJCN) on the effects of the CJEU judgement of 21 December 2016 on data retention on Member States and judicial cooperation.



Questionnaire to the EJCNC

on the effect of the CJEU judgement of 21 December 2016 on data retention on Member states and judicial cooperation

For the sake of this questionnaire, the term 'data retention' applies to non-content data (subscriber information, traffic, location and other transactional data) retained prior to any investigation or court process.

1. Current legal framework.

Please detail/describe in brief the current domestic laws/regulations governing the mandatory retention of electronic/digital data for the purposes of national security, prevention, detection, investigation and prosecution of criminal offences, and access to such retained data by criminal law enforcement authorities.

Please provide the references in your law(s), preferably in English.

2. Scope and safeguards (the principles of proportionality and necessity) on mandatory data retention.

2.1. **General/mass indiscriminate retention** - Do your domestic laws/regulations on data retention provide for the mass and indiscriminate retention of electronic/digital data?

2.2. IF NOT, does your legislation:

- 2.2.1. stipulate clear and precise rules governing the extent/scope of data retention measures?
- 2.2.2. detail/describe the circumstances and the conditions under which a data retention measure may be adopted?
- 2.2.3. require objective evidence that makes identification of a suspect whose data is likely to reveal a link with a criminal activity possible?
- 2.2.4. differentiate between categories of i) data (location/traffic), ii) users/subscribers and iii) means of communication (telephone/internet) or use other targeting criteria (e.g. geographic) to narrow the scope of data collection ('targeted preventive data retention')?.
- 2.2.5. If **yes** to any of the above, please elaborate, identifying relevant statutory provisions.

3. Safeguards related to access to retained data by relevant/competent national authorities.

3.1. Does your legislation:

- 3.1.1. require prior review by a court or an independent administrative authority to grant access to data? If so, please specify.
- 3.1.2. detail/describe other conditions, substantive and/or procedural, under which competent national authorities can have access to data?

- 3.1.3. provide a mechanism for the waiver of such a prior review in the case of validly established urgency?

4. Developing initiatives regarding safeguards (sections 2 and 3)

In circumstances in which any of the above safeguards are not currently provided within your domestic legislation, are you aware of any initiatives being undertaken to legislate/provide for such safeguards?

5. Collection and admissibility of evidence.

- 5.1. Do circumstances exist in which data retained in contravention of your domestic legislation is admissible as evidence in a criminal trial?
- 5.2. Has any immediate impact of the judgment been experienced in relation to the:
- 5.2.1. unavailability of data for the purposes of investigation?
 - 5.2.2. discontinuation of ongoing investigations/prosecutions?
 - 5.2.3. admissibility of data retained in contravention of the terms of the judgement of the CJEU?
 - 5.2.4. appeals of convictions based on retained data?
- 5.3. Please specify any practical solutions/best practice that you might have identified to deal with any of the abovementioned issues.
- 5.4. Has any judgement of a domestic court determined the admissibility of data retained (either before or after 21/12/2016) in contravention of the terms of the judgement of the CJEU?
- 5.5. In addition to the possible reply to question 4, has any immediate impact of the judgment been experienced, by way of amendment of national legislation or administrative policy/instructions on the application of criminal procedural law, or are any planned?
- 5.6. Is data retained by electronic service providers legitimately, for their own purposes, admissible as evidence in a criminal trial?

6. Judicial cooperation perspective in cross-border situations.

6.1. Does the judgement have any direct impact on:

- 6.1.1. the ability of your authorities to provide retained data as evidence to another Member State?
- 6.1.2. the ability of your law enforcement authorities to receive, and subsequently present as evidence, retained data from another Member State?

- 6.2. Please describe any examples in which the terms of the judgement have already affected international cooperation in criminal matters, such as the unavailability of data for the purpose of the investigation.

7. General

Do you anticipate other consequences, are aware of any domestic reports/judgements or have any other comments regarding the impact the judgement of the CJEU may have on your work?