European debate on Data Retention

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Background

- Need to access telecommunication data came with the technological development
- For the EU the issue became important after the terrorist attacks in Madrid and London in 2005
- Call for an instrument to retain telecommunications data

Directive 2006/24/EC of the European Parliament and of the council of 15 march 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending directive 2002/58/EC

Directive

- Obligation to retain data
- Categories of data: subscriber information, telephone and Internet data
- Retention period from 6 to 24 months

Challenges

- Privacy issues
- Additional costs for the telecom sector
- Government compensation schemes
- Conditions and safeguards for accessing the data

ECJ Decision - Digital Rights Ireland

- 8 April 2014, Joined Cases C-293/12 and C-594/12
- Data retention not proportionate
- Lack of proper safeguards
- Wrong legal basis
- Directive was declared invalid

Follow-up to the judgment

- First reactions from EU MS, the Commission and the Council
- National legislation implementing the Directive was still considered valid
- Justice and Home Affairs Council was in the position that new instrument was needed
- No-follow up from the Commission
- National legislation was challenged in several MS
- Many MS dropped the data retention legislation

ECJ Decision – Tele2 and Watson

- 21 December 2016, Joined Cases C-203/15 and C-698/15
- Proportionality
- Conditions and safeguards
- Interpretation to Directive 2002/58/EC (e-privacy)
- Violation of the EU Charter of Fundamental Rights
- Precludes national legislation which provides for the general and indiscriminate retention of all traffic and location data of all users

Aftermath

- Confusion
- Problems regarding the interpretation of the judgment
- Conditions set by the ECJ impossible to follow
- Risk for even bigger discrimination
- Most MS have kept data retention legislation

Possible options for limited data retention

- Limited categories of data
- Geographical location
- Persons, users
- Devices
- Protocols used
- Etc

Debate at the EU level

- Justice and Home Affairs Council in favour for new instrument
- Special Working Party at the Council level to discuss data retention issues, best practices and propose solutions
- Discussions at expert level

- Negative impact to criminal investigations
- Cannot investigate without dat
- Data preservation or similar mechanism is not a substitute
- Problems at both national and international level
- Conclusion of the GENVAL 7th evaluation round on cybercrime: lack of common framework has a negative effect on both national and international criminal investigations

Challenges

- Privacy vs security
- Other tools to gather evidence
- Some of them might violate privacy even more
- Problems posed by encryption
- More data is needed, additional categories of data that were not covered by the Directive
- Problems related to the use of Carrier-grade NAT technology
- Voluntary cooperation
- Possible new legislative framework

Thank you!