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AMICUS BRIEF

CASE REFERENCE NR. III./537/2015.

National data retention legislation's compatibility with EU Law

We, the undersigned hereby submit an amicus curiae brief to the attention of the Hungarian Constitutional Court in the case *Dojcsák v Telenor* that was referred pursuant to Article 25 (1) of Act CLI of 2011 on the Constitutional Court.

In this amicus brief we, the undersigned, set out the legal requirements that member states' national data retention legislation has to meet in order to comply with European Union (EU) law.

On 8 April 2014, the Court of Justice of the EU invalidated the EU Data Retention Directive (2006/24)[1] on grounds of its incompatibility with articles 7 and 8 of the EU Charter on Fundamental Rights.[2] This effectively restitutes the legal situation before this Directive was passed.

The e-Privacy Directive (2002/58)[3] explicitly applies to member states' national data retention legislation. Its article 15 (1) allows Member States to adopt data retention measures for a limited period only "when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security...".

[1] Directive 2006/24, [2006] OJ L105/54
[2] *Digital Rights Ireland and Seitlinger v Minister for Communications, Marine and Natural Resources* (C-293/12 and C-594/12) [2014] E.C.R. I-238; [2014] 2 All E.R. (Comm) 1
[3] Directive 2002/58, [2002] OJ L201/37

Moreover, also the EU Charter on Fundamental Rights applies to member states when they "implement" EU law (article 51(1) CFR). Implementation has been interpreted broadly to include domestic measures when they derogate from EU law.[4] This was explicitly recognized in the judgment of 11 March 2015 by the Rechtbank Den Haag which annulled the Dutch data retention legislation.[5]

Member states' data retention legislation must therefore comply with the rights of privacy and data protection guaranteed by the Charter. From a legal point of view, it is irrelevant whether the legislation in question transposed the now void Data Retention Directive into national law or is a new legislative initiative of the member state to introduce mandatory data retention.

In *Digital Rights Ireland* the CJEU provides judicial instructions to the legislators on the requirements for data retention legislation's compatibility with articles 7 and 8 of the EU Charter on Fundamental Rights. In short, these requirements are:

- Indiscriminate data retention in the field of law enforcement is disproportionate. Data collection must thus be confined to situations which pose a threat to public security by restricting the measure to a time period, to a geographical zone, or to groups of persons likely to be involved in a serious crime or, more broadly, to persons whose communications data can otherwise contribute to law enforcement.
- Data retention periods must be determined on the basis of the data's potential usefulness and should remain as short as possible.
- While personal data is retained, there should be effective mechanisms ensuring a very high level of protection and security; in particular, data retention should be under the control of an independent authority and reside within the European Union.
- Retroactive access to and use of retained data should be restricted to what is "strictly necessary", and must respect procedural and substantive conditions:
    - The legislation should clearly specify the competent national authorities that have access to the data.
    - Access and use by the competent national authorities should be limited to the purposes of preventing, detecting, and prosecuting precisely defined serious offences.
    - Requests for access to retained data should be reasoned, and subjected to prior review by a court or an independent administrative body charged with ensuring compliance with legislative limits to data access and use.
    - There should also be safeguards that authorise only a limited number of persons to access and subsequently use the data in line with a specific request.

We would like to ask the Hungarian Constitutional Court to abolish the domestic legislation mandating indiscriminate mandatory data retention, on the grounds that it violates EU law.

[4] *Robert Pfleger* et al (C‑390/12) ECLI:EU:C:2014:281

[5] *Stichting Privacy First et al, v de Staat der Nederlanden* (KG ZA 14/1575), available at http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2498

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