

22 July 2019

By email:

President-elect von der Leyen

First Vice-President Timmermans

CC:

Commissioner Avramopoulos

Commissioner Jourová

Commissioner King

Dear President-elect von der Leyen,

Dear First Vice-President Timmermans,

The undersigned organisations represent non-governmental organisations working to protect and promote human rights in digital and connected spaces. We are writing to put forward suggestions to ensure compliance with the EU Charter of Fundamental Rights and the CJEU case law on data retention.

EU Member States (and EEA countries) have had different degrees of implementation of the CJEU ruling on 8 April 2014 invalidating the Data Retention Directive. EDRi's 2015 study reported that six Member States¹ have kept data retention laws which contained features that are similar or identical to those that were ruled to be contrary to the EU Charter. Other evidence pointed in the same direction.² While personal data of millions of Europeans were being stored illegally, the European Commission had not launched any infringement procedures. On 21 December 2016, the CJEU delivered its judgment in the Tele2/Watson case regarding data retention in Member States' national law. In the aftermath of this judgment, the Council Legal Service unambiguously concluded that "a general and indiscriminate retention obligation for crime prevention and other security reasons would no more be possible at national level than it is at EU level, since it would violate just as much the fundamental requirements as demonstrated by the Court's insistence in two judgments delivered in Grand Chamber."³

On 6 June 2019 the Council adopted "conclusions on the way forward with regard to the retention of electronic communication data for the purpose of fighting crime" which claim that "data retention is an essential tool for investigating serious crime efficiently". The Council tasked the Commission to "gather further information and organise targeted consultations as part of a comprehensive study on possible solutions for retaining data, including the consideration of a future legislative initiative."

1 <https://edri.org/edri-asks-european-commission-investigate-illegal-data-retention-laws/>

2 See, for example. Privacy International, 2017, *National Data Retention Laws since Tele-2/Watson Judgment*: https://www.privacyinternational.org/sites/default/files/2017-12/Data%20Retention_2017.pdf

3 Council document 5884/17, paragraph 13

While the concept of blanket data retention appeals to law enforcement agencies, it has never been shown that the indiscriminate retention of traffic and location data of over 500 million Europeans was necessary, proportionate or even effective.

Blanket data retention is an invasive surveillance measure of the entire population. This can entail the collection of sensitive information about social contacts (including business contacts), movements and private lives (e.g. contacts with physicians, lawyers, workers councils, psychologists, helplines, etc.) of hundreds of millions of Europeans, in the absence of any suspicion. Telecommunications data retention undermines professional confidentiality and deters citizens from making confidential communications via electronic communication networks. The retained data is also of high interest for criminal organisations and unauthorised state actors from all over the world. Several successful data breaches have been documented.⁴ Blanket data retention also undermines the protection of journalistic sources and thus compromises the freedom of the press. Overall, it damages preconditions of open and democratic societies.

The undersigned organisations have therefore been in constructive dialogue with the European Commission services to ensure that the way forward includes the following suggestions: :

- The European Commission commissions an independent, scientific study on the necessity and proportionality of existing and potential legislative measures around data retention, including a human rights impact assessment and a comparison of crime clearance rates;
- The European Commission and the Council ensure that the debate around data retention does not prevent the ePrivacy Regulation from being adopted swiftly;
- The European Commission tasks the EU Fundamental Rights Agency (FRA) to prepare a comprehensive study on all existing data retention legislation and their compliance with the Charter and the CJEU/European Court of Human Rights case law on this matter;
- The European Commission consider launching infringement procedures against Member States that enforce illegal data retention laws.

We look forward to your response and remain at your disposal to support the necessary initiatives to uphold EU law in this policy area.

⁴ A recent example can be found here: <https://techcrunch.com/2019/06/24/hackers-cell-networks-call-records-theft/>

Signatories:

