Bloomberg BNA

WORLD DATA PROTECTION REPORT >>>

News and analysis of data protection developments around the world.
For the latest updates, visit www.bna.com

International Information for International Business

VOLUME 14, NUMBER 2 >>> FEBRUARY 2014

# ECJ Advocate General Finds EU Data Retention Directive Invalid, But Leaves Telecommunications Service Providers in Uncertainty

*By Claire François, of Hunton & Williams LLP, Brussels.*

On Dec. 12, 2013, Advocate General Cruz Villalón of the Court of Justice of the European Union ("ECJ") issued his opinion ("Opinion")[1] on the compatibility of the EU Data Retention Directive (2006/24/EC) ("Data Retention Directive")[2] with the Charter of Fundamental Rights of the European Union ("EU Charter").[3] The Opinion followed several opinions and reports[4] that had already expressed serious doubts as to the lawfulness of the Data Retention Directive.

Not surprisingly, the Advocate General found the Data Retention Directive incompatible with the EU Charter, but his Opinion raises more questions than it brings clarifications for telecommunications service providers on how to collect and retain data lawfully.

This article briefly outlines the Opinion and the context in which it was delivered, and discusses its potential implications for telecommunications service providers.

## Background

By way of background, the Data Retention Directive requires EU member states to ensure that providers of publicly available electronic communications services or of a public communications network ("telecommunications service providers") collect and retain traffic and location data specified in the Data Retention Directive for the purpose of investigating, detecting and prosecuting serious crimes as defined by national law.[5] The data must be retained for a minimum of six months and a maximum of two years.[6] The Data Retention Directive thus derogates from the general principle laid down in Article 6 of the e-Privacy Directive (2002/58/EC),[7] according to which telecommunications service providers must erase or make anonymous the traffic data they process and store relating to their subscribers and users when the data are no longer needed for the purpose of the transmission of a communication.[8]

The Advocate General delivered his Opinion in connection with four national cases, one brought by Digital Rights Ireland Ltd. against the Irish authorities and three cases pending before Austria's constitutional court. Digital Rights Ireland Ltd., a company whose object is to promote and protect civil and human rights and that is the owner of a mobile phone, brought an action against two ministers of the Irish government, submitting, in essence, that the Irish authorities have unlawfully processed, retained and exercised control over data related to its communications. In Austria, the Province of Corinthia, Michael Seitlinger and 11,130

applicants claimed that the Austrian law transposing the Data Retention Directive was contrary to the Austrian Constitution.

## Opinion of the Advocate General

In his Opinion, the Advocate General considered that the collection and retention, in large databases, of traffic and location data constitute a serious interference with the right to privacy contained in the EU Charter. The Advocate General emphasized that the data could be used to reconstruct a large portion of a person's conduct, or even a complete and accurate picture of his or her private identity. According to the Advocate General, the risk that the data might be used for unlawful purposes is increased by the following factors:

- the data are not retained by national public authorities, or even under their direct control, but by the telecommunications service providers; and
- the data may be stored at indeterminate locations in cyberspace, since the Data Retention Directive does not require the data to be stored in the territory of an EU member state.

In the light of this serious interference with the right to privacy, the Advocate General found that the Data Retention Directive should have defined a series of guarantees, at least in the form of principles, to regulate access to the data and their use, instead of assigning the task of defining and establishing those guarantees to the EU member states. According to the Advocate General, the Data Retention Directive should have included at least the following guarantees:

- a more precise description of the criminal activities justifying access of the competent national authorities to the data collected and retained;
- limitations on access to the data (access limited to judicial or independent authorities) or, failing that, a judicial/independent review of any request for access;
- the obligation to carry out a case-by-case examination of requests for access in order to limit the data provided to what is strictly necessary;
- the possibility for member states to adopt more stringent requirements when access may infringe fundamental rights (*e.g.,* the right to medical confidentiality); and
- the obligation for the authorities authorized to access the data to delete them once their usefulness has been exhausted and to notify the individuals concerned of that access.

In the absence of such guarantees in the Data Retention Directive, the Advocate General took the view that the directive does not comply with the requirement laid down by the EU Charter that any limitation on the exercise of a fundamental right must be provided for by law.

Further, the Advocate General found that the Data Retention Directive is incompatible with the principle of proportionality as laid down in the EU Charter, in that it requires EU member states to ensure that the data are retained for a maximum period of two years. In this respect, the Advocate General found no reason for not limiting this retention period to less than one year.

The Advocate General concluded that the Data Retention Directive is invalid, but recommended suspending the temporal effects of that finding until the EU legislature adopts, within a reasonable time period, measures necessary to remedy the invalidity. The Advocate General took into consideration the fact that the Data Retention Directive pursues a legitimate objective and that the absence of guarantees governing the access to the data and their use may have been corrected in the implementing measures adopted by the EU member states. The Advocate General also noted that the EU member states in general have exercised their powers with moderation with respect to the maximum period of data retention.

## Takeaways for Telecommunications Service Providers

Overall, the Advocate General's Opinion means that doubt will remain as to how telecommunications service providers should retain personal data to comply with data protection requirements.

According to the Advocate General, if the Data Retention Directive fails to define the minimum safeguards as to the processing of traffic and location data, it should remain applicable, pending the adoption of a new directive, which may take a long time.

Should the ECJ follow this Opinion,[9] a new directive will need to be adopted, and it remains to be seen how these safeguards will be defined in the new directive and how the EU member states will implement them. Currently, telecommunications service providers operating across the EU have to apply various national data retention laws,[10] and it is doubtful whether such laws fully comply with the rights to privacy and data protection.[11]

A new directive can provide only a more harmonized approach to data retention throughout the EU and a higher level of data protection. But the choice of a directive, instead of a regulation that would be directly applicable in member states, means that there will still be some room for diverging interpretation and implementation by EU member states in this respect.

### NOTES

[1] Opinion of Advocate General Cruz Villalón delivered on Dec. 12, 2013, in Joined Cases C-293/12, *Digital Rights Ireland*, and C-594/12, *Seitlinger et al.*, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=145562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=157288.

[2] 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, 2006 OJ (L 105) 54, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF.

   ISSN 1473-3579

[3] Charter of Fundamental Rights of the European Union, 2000 OJ (C 364) 1, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[4] *See* Opinion 3/2006 of the EU Article 29 Data Protection Working Party on the Data Retention Directive (WP 119), available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp119_en.pdf; Report 1/2010 of the Article 29 Working Party on "the second joint enforcement action: Compliance at national level of Telecom Providers and ISPs with the obligations required from national traffic data retention legislation on the legal basis of articles 6 and 9 of the e-Privacy Directive 2002/58/EC and the Data Retention Directive 2006/24/EC amending the e-Privacy Directive" (WP 172), available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp172_en.pdf; and Opinion of the European Data Protection Supervisor (EDPS) of May 31, 2011, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-05-30_Evaluation_Report_DRD_EN.pdf.

[5] *See* Articles 1, 3 and 5 of the Data Retention Directive. Article 5 of the directive makes it clear that the substantive content of the communications must not be collected and retained.

[6] *See* Article 6 of the Data Retention Directive.

[7] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), 2002 OJ (L 201) 37, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0058:20091219:EN:PDF.

[8] The only general obligation to store traffic data is set forth in Article 6(2) of the e-Privacy Directive to the extent that such data are necessary "for purposes of subscriber billing and interconnection payments".

[9] The Advocate General's Opinion is not binding on the ECJ, but the judges of the ECJ have often followed the main recommendations set out by the Advocate General.

[10] For a recent example of such legislation, see the new bill passed by the German Federal Council (Bundesrat) on May 3, 2013, regarding access to telecommunications users' data (*see WDPR, May 2013, page 27*).

[11] Some national laws require telecommunications service providers to retain the data for a longer period than one year. *See* Report from the European Commission, of April 18, 2011, to the Council and the Parliament — Evaluation report on the Data Retention Directive, COM (2011) 225 final, at page 14, available at: http://ec.europa.eu/commission_2010-2014/malmstrom/pdf/archives_2011/com2011_225_data_retention_evaluation_en.pdf. Some national laws even go beyond the requirements of the Data Retention Directive. *See, e.g.,* the Belgian Royal Decree published on Oct. 8, 2013, which contains a list of data to be retained longer than the list of data provided in the Data Retention Directive. *See* Hunton & Williams' privacy and information security law blog available at: https://www.huntonprivacyblog.com/2013/10/articles/belgium-transposes-data-retention-directive/. In comparison, the Article 29 Working Party's Report 01/2010 recommended that the list of data provided by the directive be regarded as exhaustive.

*The text of the Advocate General's Opinion is available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=145562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=157288.*

***Claire François is an Associate at Hunton & Williams LLP, Brussels. She may be contacted at cfrancois@hunton.com.***