

Data Retention Directive: government loses data protection case

Last February the Irish government lost a case in the EU's highest court over a European directive on the retention of data by telecoms and internet providers. The Data Retention Directive was agreed by EU member states in 2006. It legally requires internet providers and telecommunications companies to hold on to data relating to e-mails and phone calls for a period of up to two years.

The directive gives police access to data which relates to the maker and recipient of mobile calls, e-mails and website visits of every person in Europe which will be stored under these sweeping new powers. Privacy campaigners warn that the information would be used by the authorities to create a giant 'Big Brother' super-database containing a map of everyone's private life.

The new retention powers will show details such as IP addresses, web addresses, date, time and user telephone numbers. In Britain, Phil Booth of the civil rights campaign group, NO2ID said: 'Unless we speak out and stop this, what used to be private – details of your relationships and personal interests – will end up in the ever-widening control of the stalker state.' Last week the London *Independent* reported that millions who use social networking sites such as Facebook could soon have their every move monitored by the Government and saved on a 'Big Brother' database.

Hundreds of public bodies and quangos, including local councils, will be able to access the data. Simon Davies, director of Privacy International, said: 'I don't think people are aware of the implications of this move. It means that everything we do online or on the phone will be known to the authorities. They are using this to produce probably the world's most comprehensive surveillance system. This is a disgraceful example of the covert influence that Brussels has across our freedoms and liberties. The entire episode has been marked by a litany of secret dealings, vicious political games and a complete absence of transparency.'

Phil Noble of privacy group NO2ID, said: 'This is the kind of technology that the Stasi would have dreamed of. We are facing a co-ordinated strategy to track everyone's communications, creating a dossier on every person's relationships and transactions'.

Sweden has decided to ignore the directive completely. While the first German court, the Administrative Court of Wiesbaden, has found the blanket recording of the entire population's telephone, mobile phone, e-mail and internet usage (known as data retention) disproportionate. The decision reads: 'The court is of the opinion that data retention violates the fundamental right to privacy. It is not necessary in a democratic society. The individual does not provoke the interference but can be intimidated by the risks of abuse and the feeling of being under surveillance ... The directive [on data retention] does not respect the principle of proportionality guaranteed in Article 8 ECHR, which is why it is invalid.'

In early March, the Federal Council of Germany (Bundesrat) also warned that the proposed 'storage of all internet usage data without a specific cause or with blanket coverage [...] violates' the constitution. While the highest court in Germany (the Constitutional Court) has yet to make a final ruling it has already indicated a provisional view that data retention may be 'invalid, disproportionate and unnecessary'.

The directive was first pursued by British home secretary, Charles Clarke, in 2005 to help 'protect public safety and national security'.

The Irish government took a case to the European Court of Justice on a technical issue. The government argued that the legislation should have been agreed under the EU's crime and judicial affairs pillar, which means each country has a veto and the European parliament could only be consulted. However, the directive was agreed under the pillar governing the single EU market, which requires a qualified majority of member states, and the European Parliament has a bigger say in the matter through co-decision.

The directive was agreed through single market rules. The reason was that telecoms and internet providers who sold services across the EU would not have to deal with 27 different legal systems when it came to the rules on retaining telecoms and internet data. In other words, it was an 'Internal Market' and not a 'Police and Judicial Affairs' issue. Jim Killock, executive director of the Open Rights Group, is quoted on the BBC saying 'the EU passed it by saying it was a commercial matter rather than a police matter'.

The European Court of Justice (ECJ) ruled that the directive had been drawn up under the correct legal framework. The court argued that different rules among 27 member states on how companies should retain data would incur significant costs for those companies and hamper the running of the single market. This ruling reaffirms the fact that free market principals are the core driving force of the ECJ and thus the EU.

The voting record of sitting Irish MEPs on the issue was as follows: Proinsias De Rossa voted for data retention. Mary Lou McDonald, Gay Mitchell and Marian Harkin voted against. Eoin Ryan, Liam Aylward, Avril Doyle, Mairead McGuinness, Simon Coveney, Brian Crowley, Kathy Sinnott, Jim Higgins and Seán Ó Neachtain abstained.

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