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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Retention of electronic communication data - General debate

1. The invalidation of the Data Retention Directive [1] by the Court of Justice of the EU [2]on the grounds that it disproportionately restricted the rights to privacy and to the protection of personal data, has given rise to questions in the Member States, in particular as regards national transposition legislation and the availability of electronic communication data collected for access by law enforcement authorities and their use as evidence in criminal proceedings.

[1] Directive 2006/24/EC 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

[2] Judgement of the Court of justice of the European Union (CJEU) (Grand Chamber) *"Digital Rights Ireland and Seitlinger and others"* of 8 April 2015 in joined Cases C-293/12 and C-594/12

2. Member States had been given a wide margin of discretion in the implementation of the Data Retention Directive. This lead to considerable differences in the national legal frameworks[3], which are compounded by the varying consequences of the assessment of the national data retention schemes by national parliaments and courts, especially in view of the Data Retention Judgement and the pending "Tele2" case [4].

3. The Data Retention Judgement has not directly affected national implementing legislations of the Data Retention Directive and these remain valid until amended, or repealed by national parliaments, or invalidated by national courts, provided that they comply with Articles 7 and 8 of the Charter of Fundamental Rights of the EU. Member States thus find themselves in a situation where they no longer have an obligation deriving from a specific Union legal instrument to introduce or maintain a national data retention regime providing for the mandatory storage of electronic communication data by providers for the purposes of detecting, investigating, and prosecuting serious crime. However, Member States retain the possibility to do so under Article 15(1) of the "E-privacy Directive" [5].

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[3] It is recalled that the transposition did not go easily in certain Member States, as a number of national constitutional courts annulled the national transposition laws for being contrary to the Constitution or the European Convention on Human Rights and certain national parliaments raised serious concerns.

[4] The CJEU currently examines a preliminary ruling (pending Case C-203/15, lodged on 4 May 2015, *Tele2 Sverige AB v. Post-och telestyrelsen*) on the compatibility of a national legislation (Swedish law in this case) to retain traffic data covering all persons, all means of electronic communication and all traffic data for the purpose of combating crime, with Article 15(1) of Directive 2002/58/EC (the e-privacy Directive), taking account of Articles 7, 8 and 15(1) of the Charter.

[5] Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector

4. Opinions diverge on the interpretation of the Court's judgement and thus on the legality of schemes for retaining bulk electronic communication data without specific reason. This has inter alia resulted in a large variety of situations at national level[6]. Some Member States have already adopted or are in a process of preparing new legislation on data retention, that, according to the information received by delegations, aims at ensuring strengthened procedural guarantees and safeguards in compliance with the Charter and in line with the ruling of the Court (EE, ES, IE, LT, LU, LV, MT, PL), including some Member States where the national law has been invalidated by the constitutional Court (DE, BG, NL).

5. Eurojust's analysis of the current situation[7] and expert debates held during the Luxembourg Presidency[8] highlight that this fragmentation of the legal framework on data retention across the Union has an impact on the effectiveness of criminal investigations and prosecutions at national level, in particular in terms of reliability and admissibility of evidence to the courts based on the collection of electronic communication data, as well as on cross-border judicial cooperation between Member States and internationally.

6. In view of these challenges and the legal, procedural and practical problems they pose for investigations and prosecutions of all kinds of crime, not in the least in relation to counter-terrorism, the Presidency invites Ministers to address the following questions:

   - **Is the Data Retention Judgement to be interpreted in the sense that retaining bulk electronic communication data without specific reason is still allowed ?**
   - **Considering the current fragmented situation throughout the Union, and the consequences it entails, should an EU-wide response be considered or should it be up to individual Member States to address the issue ?**
   - **Should the Commission be invited to present a new legislative initiative and if yes in what timeframe ?**

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6 The current state of play is as follows: the transposition law of the Data Retention Directive has been invalidated in at least 11 Member States (AT, BE, BG, DE, LT, NL, PL, RO, SI, SK, UK). Amongst these, 9 countries have had the law invalidated by the Constitutional Court (AT, BE, BG, DE, SI, NL, PL, RO, SK). In 15 Member States (CY, CZ, DK, EE, ES, FI, FR, HR, HU, IE, LU, LV, MT, PT, SE) the domestic law on data retention remains in force, while they are still processing communication data.

7 Doc. 13085/15 and 13689/15

8 Doc. 11747/1/15 REV 1