The Consequences of the Data Retention Judgment for Mass Surveillance

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Law Building Room 210, Queen Mary University of London

Speaker: Mr Hielke Hijmans, VUB Brussels and Amsterdam University

Discussant: Mr Christopher Graham, UK Information Commissioner

Speaking points by Hielke Hijmans

- **Introduction: the Court judgement in a nutshell**
  - Case brought to Court on request Irish + Austrian judge.
  - Instrument required retention of traffic data/metadata ALL citizens
  - Articles 7 + 8 Charter as framework for assessment
  - First time Charter used to annul entire instrument for not compatibility with Charter
  - Blanket retention of data all citizens not acceptable
  - Schoolbook-example of balancing privacy and security
  - A strong statement from perspective human rights
  - Consequences on 3 levels: Data retention directive itself, consequences for data retention under national law (e.g. DRIPA), comparable EU-instruments (PNR),

- **The history of the directive**
  - Madrid bombings, London bombings, famous quote Home Secretary Charles Clarke, that the only fundamental right that counts is right to get to work without getting bombed
  - Legislative procedure in record speed (3 months)
  - Political compromise (but no room for data protection relate amendments)
  - Legal basis in internal market, with result that access by the police was not regulated
  - It was adopted before Lisbon Treaty, when EU Charter was not yet binding

- **2005-2015, privacy v security against a moving background.**
  - Balance between these two rights/interests like the tides of the sea
  - 2004-2009: Multi-annual programme EU on police and justice (The Hague) with strong security agenda, range of legal instruments on data use: data retention, Prüm, PNR
  - 2009: entry into force of Lisbon Treaty, ending pillars (not fully for UK), binding Charter (not fully for UK) and data protection recognised as constitutional right
  - 2009-2014, new Multi-annual programme EU on police and justice (Stockholm), with strong fundamental rights agenda
  - 2012: European Commission proposes new data protection package. Little instruments on data use by EU. Pending proposals get blocked (like EU-PNR)
  - 2013: Snowden revelations
2014: The data retention judgement,
2015: Charlie Hebdo
First reaction: unblock EU-PNR.
Most recent reaction: report UK Parliament Committee for Intelligence and Security, comparing the individual right to privacy with collective right to security

- **Main elements of data retention directive**
  - Dual ambition: harmonisation in the internal market + security
  - Retention traffic data, exception to ePrivacy, exception purpose limitation
  - Retention period between 6 and 24 months
  - Government access mainly left to Member States
  - “Legal loophole”: Member States could use retained data for additional goals under national law.
  - Court of Justice (2009) accepted legal basis.

- **The Courts judgement**
  - Scholarly fundamental rights assessment: 1. Interference of the rights, 2. Justification of Interference, 3. Proportionality test
  - Interference particularly serious: feeling private life under constant surveillance.
  - But, justification given (fight of serious crime)
  - Essence of rights not affected

- **And then: proportionality test fails**
  - Retention on all persons, all means of communication, all data
  - No restriction to people linked to a crime, and even professional secrecy not respected.
  - No link to specific threat to public security
  - No restrictions to use by the police
  - Further elements relate to retention period, security of the data and oversight by DPA.
  - Last point remarkable, Court seems to require that data should be stored in EU.

- **Analysis**
  - It leaves fundamental question: Is blanket retention of data in any form impossible? I plead this is not the case. But others think differently.
  - Where EU directive requires interference with fundamental right, it must also ensure safeguards
  - Data protection as particularly strong fundamental right. Would same apply to other fundamental rights?
  - Room for national legislator limited? How does British law knows as DRIPA fit?
  - What can EU legislator still do? Is PNR also similar form of ‘blanket retention?’

- **The judgement and mass surveillance**
  - Snowden, NSA, HCHQ and metadata
  - Exception for national security? EU law does not apply to national security; there is tendency to interpret this notion widely, whereas the EU Court uses strict interpretation.
  - Developments in the U.S.: stronger oversight.
- Is data retention still needed in future? What about the use of publicly available data, in the era of big data?

- Does this judgement set the trend?
  - Does the threat after Charlie Hebdo lead to different outcomes?
  - Is EU PNR – as modified alongst lines MEP Kirkhope – allowed?
  - Schrems-case on safe harbour has public hearing 24 March at CJEU
  - We now see varied picture in reactions in Member States. Will the Commission try to solve this and propose new instrument?