



What the European Commission owes 500 million Europeans¹

At the start of this day of discussion and deliberation, it is important to realise the task that faces us. This is not your everyday discussion about the minutiae of European regulation. Today we are discussing the future of the most controversial surveillance measure in Europe: the indiscriminate retention of telecommunications data on every communication made by every European citizen every day of every year.

While the original Directive was hastily thrown together as a single market initiative, after years of failed attempts to adopt it under the former “third pillar”, we now have more time, more experience and a different legal environment.

A core aspect of this new legal environment is the legally binding oath, taken by all Commissioners, to be completely independent in carrying out their responsibilities in the general interest of the Union. For the first time in history, the oath included “a solemn undertaking to uphold and respect the Charter of Fundamental Rights of the European Union”.²

The current evaluation of the Data Retention Directive and the new oath of this Commission raise the fundamental question: **what does the European Commission owe 500 million Europeans?**

In the next ten minutes, I will address this question, taking into account:

- decisive legal developments since 2005;
- the scale of the damage done to fundamental rights by the Directive.

Decisive legal developments since 2005

The objections to the Directive are overwhelming – indeed, every national constitutional court that has so far been asked to speak on the legislation has either rejected the Directive out of hand³ or firmly rejected the national implementation.⁴

How will the Commission or Council be able to defend the concept that data retention is “necessary in a democratic society” when lack of implementation in six Member States, including the Commissioner's own home country, clearly shows that it is not?

It is untenable for the European Commission to be negotiating ratification of the European Convention on Human Rights and simultaneously taking Member States to court for failing to implement a Directive which they patently do not consider to be “necessary”. When Constitutional Courts of Member States have ruled a particular piece of legislation to be ‘not necessary in a democratic society’, it is profoundly dangerous for the European Commission to take legal action to force the adoption of that legislation. Dangerous for fundamental rights, but also dangerous for the credibility of the European Union itself.

Core principles are being attacked by the Directive, core principles that must be defended. We see this in the

1 Plenary presentation at the 'Taking on the Data Retention Directive' conference, Brussels, 3 December 2010, <http://www.dataretention2010.net/>, delivered by A.M. Arnbak LL.M., Privacy expert at EDRI-member Bits of Freedom.

2 European Commission swears oath to respect the EU Treaties, IP/10/487, 3 May 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/487>

3 Romanian Constitutional Court, DECISION no.1258, 8 October 2009, <http://www.legi-internet.ro/english/jurisprudenta-it-romania/decizii-it/romanian-constitutional-court-decision-regarding-data-retention.html>

4 BVerfG, 1 BvR 256/08 vom 2.3.2010, Absatz-Nr. (1 – 345), http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html

Marper case,⁵ which shed light on the constitutionality of indiscriminate surveillance actions. The European Court of Human Rights explained that mere retention of personal data has a “direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data”⁶ and that the disproportionality of the biometric data retention was founded in the indiscriminate nature of the measure, not in retention periods.⁷ In the case of this Directive: the indiscriminate retention of telecommunications data on every communication made by every European citizen every day of every year.

Recent case law from the European Court of Justice is equally unequivocal. Only three weeks ago, for example, the Court reaffirmed a strong proportionality test in the *Schecke* case.⁸ It stated that derogations and limitations in relation to the protection of personal data must apply only in so far as is **strictly** necessary.

It must be stressed the criterion is not usefulness.⁹ It is neither the provision of random anecdotes about usefulness. Having said that, we even see that Member States can't come up with relevant anecdotes: nine out of ten court rulings the Dutch Ministry of Justice submitted to the Commission contain crimes that are committed long before the date the Directive was implemented in the Dutch Telecommunications Act.¹⁰

Strict necessity is the threshold for judging whether data retention can be justified under the Charter. In this context, it was disturbing to see the Commission ask Member States, in a letter sent on 27 July, for data that could “adequately demonstrate that the Directive is useful”.¹¹ It was equally disturbing to note that the Commission made no effort to obtain data from the six Member States that had not implemented the Directive. Any serious attempt to independently review the Directive would have included collection of this data in order to assess necessity, and viability of “less restrictive alternatives”.

This is the benchmark used by the European Court of Justice in the *Schecke* case and by the European Court of Human Rights in numerous cases: if some Member States have viable and less restrictive measures in place, while reaching similar results in their Law Enforcement efforts, then the Directive is not necessary, and therefore illegal.¹² Hence, we can expect the European Court of Justice to reason accordingly, when ruling on the constitutionality of data retention. It will do so, after the Irish High Court referral in a case brought by our colleagues of Digital Rights Ireland.¹³

The scale of the damage done to fundamental rights by the Directive

In the last five years the impact of data retention has created real harms for the fundamental freedoms of individuals and the very nature of society at large.

Information technology is spreading into every part of our daily lives, as a positive force for fundamental freedoms, for business and as an increasingly indispensable tool for democracy. But with data retention measures in place, information technology actually facilitates unprecedented surveillance of each and every ordinary citizen - invasive surveillance that was underestimated by legislators back in 2005.

In 2010, the average European has his traffic and location data logged in a telecommunications database

5 ECtHR 4 december 2008, appl. 30562/04, (S. and Marper v. The United Kingdom).

6 ECtHR 4 December 2008, appl. 30562/04, (S. and Marper v. The United Kingdom), §121.

7 ECtHR 4 December 2008, appl. 30562/04, (S. and Marper v. The United Kingdom), §119 & §125.

8 ECJ 9 November 2010, C-92/09 and C-93/09, Volker und Markus Schecke, §86.

9 ECtHR 25 March 1983, appl. 5947/72, (Silver a.o. v. The United Kingdom), §97 and ECtHR 4 December 2008, appl. 30562/04, (S. and Marper v. The United Kingdom), §101.

10 The Dutch submission can be found on the conference website: <http://www.dataretention2010.net/docs.jsp>

11 COM HOME A3/JV/cn D (2010) 11574, 27 July 2010, <https://www.bof.nl/live/wp-content/uploads/Letter-to-MS-supp-info-on-DRD.pdf>

12 ECJ 9 November 2010, C-92/09 and C-93/09, Volker und Markus Schecke, §86.

13 Digital Rights Ireland, High Court decision on our data retention challenge, 5 May 2010, <http://www.digitalrights.ie/2010/05/05/high-court-decision-on-our-data-retention-challenge/>

once every six minutes. According to official Danish statistics, every citizen is logged 225 times a day.¹⁴

This brings us back to the Marper and Schecke cases: such indiscriminate collection of personal data without concrete suspicion or conviction is a violation of our fundamental freedoms.¹⁵ Basically, the Courts are saying: “dynamite fishing is illegal, because you can use a fishing rod and achieve the same results, without destroying the entire ecosystem”.

Let me briefly illustrate how data retention is destroying our digital ecosystem with a few practical examples.

- In Germany, a study showed that, as a result of data retention, half of Germans will not contact marriage counsellors and psychotherapists through telephone or e-mail.¹⁶ As such, data retention affects the daily life of 40 million citizens.

- In Sweden, a case has been referred to the European Court of Justice after Bonnier Audio, a copyright holder, requested access to telecommunications data directly with the ISP.¹⁷ The copyright industry also took part in the famous German Constitutional Court ruling.¹⁸ Function creep, the use of personal data for other goals than defined in the Directive, is thus increasingly becoming reality.

- On a European level, the European Federation of Journalists strongly opposes data retention due to the damage to secrecy of communications and the freedom of the press.¹⁹ The damage to the press is not just theoretical. Nick Kivits, a Dutch research journalist, exposed security weaknesses in the e-mail account of the State Secretary of Defense.²⁰ Rather than relief that this had been discovered by a well-meaning journalist, the authorities reacted with prosecution.

His case deserves some extra attention. In trial, Mr. Kivits found his entire telecommunications history in his file, including his anonymous sources in unrelated articles. And guess what? He even discovered the entire telecommunications history of his friends - bearing the same first name as the security expert that had helped him – in his dossier. He was, of course, not convicted but tells us he feels intimidated to write such articles in the future.

Civil society united across Europe

For all of these reasons, and many more, 106 organisations from across Europe, not only civil liberties organisations, but journalists, lawyers, healthcare professionals, trades unions, consumer organisations, health hotlines and telecoms associations have joined forces requesting an end to data retention.²¹

14 CEPOS, Logningsbekendtgørelsen bør suspenderes med henblik på retsikkerhedsmæssig revidering, p. 4, 20 July 2010, based on official figures for 2008 from the Danish Ministry of Justice,

<http://www.cepos.dk/publikationer/analyser-notater/analysesingle/artikel/afvikling-af-efterloen-og-forhoejelse-af-folkepensionsalder-til-67-aar-vil-oege-beskaeftigelsen-med-1370/>

15 ECtHR 4 December 2008, appl. 30562/04, (S. and Marper v. The United Kingdom), §121. ECJ 9 November 2010, C-92/09 and C-93/09, Volker und Markus Schecke, §86.

16 FORSA, Opinions of citizens on data retention, 2 June 2008, p. 3,

http://www.eco.de/dokumente/20080602_Forsa_VDS_Umfrage.pdf

17 ECJ 20 November 2010, C-461/10, Bonnier Audio and Others. OJ C 317, p.24, [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:317:0024:0024:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:317:0024:0024:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:317:0024:0024:EN:PDF)

18 BVerfG, 1 BvR 256/08 vom 2.3.2010, Absatz-Nr. (1 – 345), §173 – §174,

http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html

19 European Journalists Warn EU Home Affairs Chief that European Data Law Threatens Freedom, 01 October 2010,

<http://europe.ifj.org/fr/articles/european-journalists-warn-eu-home-affairs-chief-that-european-data-law-threatens-freedom>

20 N. Kivits, 'Yes, we're in', Nieuw Revu, 17 December 2008, p. 28, http://www.nick-kivits.nl/blog/?page_id=256. The journalist refrained from publishing any personal information, as his sole intention was to illustrate the security leak.

21 Civil society calls for an end to blanket data retention, 106 organisations from all over Europe, 22 June 2010,

Conclusion: what does the European Commission owe 500 million Europeans?

Ladies and gentlemen, the world has changed since 2005. We have experienced the serious flaws of this Directive while the legal environment has moved the tide in favour of civil society and fundamental freedoms. The time is now to show that the new protections for fundamental rights are practical safeguards and not just hollow words.

We are convinced that the principle of data retention erodes the essence of the Charter, the essence of our fundamental freedoms and the essence of our free societies. And we are confident that the ECJ will rule accordingly after the Irish referral. Furthermore, we are convinced that this Commission will not betray its solemn oath before the ECJ by maintaining the principle of data retention. We are convinced of this by the principled position taken by an important European legislator in 2005.

This person said: "I have so far not been convinced by the arguments for developing extensive systems for storing data, telephone conversations, e-mails and text messages. Developing these would be a very major encroachment on privacy, with a high risk of the systems being abused in many ways. The fact is that most of us, after all, are not criminals."²²

Subsequently, this person emphasized this principled approach a few months later, stating that: "reflection is required, together with a solid factual basis in relation to the privacy aspect, the technical consequences and the actual costs for telecommunications operators and thus consumers. This is an approach we owe Europeans."²³

This person, then a Member of the European Parliament, is Commissioner Malmström. She saw the dangers of an unnecessary and disproportionate proposal, rushed through the Parliament after being rejected repeatedly by the Parliamentary Committee of which she was a member. The evidence of this Directive's failures over the past five years can only have reinforced her conviction that the Directive is fruitless, flawed and failed.

After the Commission sworn solemnly before the ECJ, to respect the Charter, to be completely independent, to refrain from taking instructions from governments, the only question is the amount of political courage needed to take the only rational and legal approach possible.

If this Commission believes in evidence-based decision-making, it cannot maintain the principle of blanket data retention. If this Commission respects fundamental rights and believes in free and open societies, it cannot maintain the principle of blanket data retention. If this Commission respects its legally binding oath sworn to the European Court of Justice, it cannot maintain the principle blanket of data retention.

The Commission needs to reject the indiscriminate retention of telecommunications data on every communication made by every European citizen every day of every year.

To paraphrase the Commissioner, this is precisely what the European Commission owes 500 million Europeans.

<http://www.vorratsdatenspeicherung.de/content/view/363/158/lang.en/>

22 European Parliament, Debates, Liberty and Security, 7 September 2005, Cecilia Malmström (ALDE), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20050907+ITEM-002+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-044>

23 European Parliament, Debates, Explanations of vote, Alvaro report (A6-0365/2005), 14 December 2005, Cecilia Malmström (ALDE), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20051214+ITEM-011+DOC+XML+V0//EN>