

## **The Consequences of the Data Retention Judgment for Mass Surveillance**

**Thursday, 12 March 2015 from 18:00 to 20:00**

**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 related 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
  - 2005: adoption directive. Post 9/11, post London bombings
  - 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 known 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?