Academic Symposium: In the quest of clarity for data retention and national security in Europe- the way forward

Monday 30 May 2022

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Rome, Italy

In the context of the European Union, Article 4(2) of the Treaty on European Union (TEU) explicitly provides that national security remains the sole responsibility of each Member State.

Specifically, as regards the protection of personal data, Article 23 General Data Protection Regulation (Regulation 2016/679) foresees restrictions to the rights of data and the application of all (except for the accountability) basic principles of the processing of personal data to safeguard, among others national security. Similarly, the Law Enforcement Directive (Directive 2016/680) allows restrictions to the information notice rights, the right of access and the right to rectification or erasure in order to protect national security, among others. The ePrivacy Directive (Directive 2002/58) allows Member States to adopt legislative measures to restrict the scope of concrete the rights and obligations, when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, among other grounds.

However, despite the repeated reference to national security in EU legislation, there is no definition of the term to be found. In its recent case law, the Court of Justice of the European Union (CJEU) has offered some clarifications on the limitations and restrictions established for national security. In *Privacy International*, the CJEU examined national legislation enabling a state authority to require providers of electronic communications services to forward traffic data and location data to the security and intelligence agencies for the purpose of safeguarding national security. A number of European governments argued in *Privacy International* (Case C-623/17) that "the activities of the [national] security and intelligence agencies are essential State functions relating to the maintenance of law and order and the safeguarding of national security and territorial integrity, and, accordingly, are the sole responsibility of the Member States" and therefore national measures concerning the safeguarding of national security cannot be considered falling within the scope of the e-Privacy Directive.

However, the CJEU argued that the processing of personal data carried out by individuals for *inter alia* national security purposes falls within the scope of the GDPR. The CJEU concluded that "although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law". In simple words, the CJEU clearly found that national measures taken for the purpose of protecting national security cannot render EU law inapplicable as such and exempt the Member States from their obligation to comply with that law. Similar conclusion was reached in the *LQDN* judgment (Joined cases C-511/18, C-512/18 and C-520/18).

The judgements complement a series of judgments on data retention and the secondary use of personal data by intelligence and law enforcement agencies, in particular traffic and location data initially collected by service providers for commercial purposes: *Digital Rights Ireland* (Joined cases C-293/12 and C-594/12, *Tele 2/Watson* (Joined cases C-203/15 and C-698/15), *Ministerio Fiscal* (Case C-207/16) and *Prokuratuur* (Case C-746/18).

Similarly, in the case law of the European Court of Human Rights (ECtHR) the topic of national security comes often across in relation to the margin of appreciation. In *Esbester v UK (1993)* the European Commission for Human Rights (ECmHR) stated that "the term 'national security' is not amenable to exhaustive definition and [considers it satisfactory when] sufficient indication is given of the scope and manner of exercise of the functions of the Security Service. (…)." In *Liberty v UK (2008)* the Court relied on the definition of national security given by the British Commissioner designated under the British Interception of Communications Act of 1985. In his report of 1986, the Commissioner defined threats to national security as activities: "which threaten the safety or well-being of the State, and which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means."[1] Later on, the Court again mentioned this definition in *Kennedy v UK* when indicating how to apply the term regarding secret surveillance activities in the UK. Under the current UK legislation, RIPA does not contain a definition of national security. However, the notion of national security is found to have an expansive definition spanning from "the classic concept of direct threats (whether internal or external) to the safety of the realm but also indirect ones."[2]. In *Big Brother Watch vs UK* the ECtHR confirmed that bulk interception of foreign communications contributes to the identification of unknown threats to national security and therefore it falls within a wide margin of appreciation of states.

The event will discuss the rich case law of the CJEU and the ECtHR on data retention and national security; it will focus on the demystification of the (sometimes conflicting) requirements established by the CJEU and will attempt to propose comprehensive safeguards for the respect of the rights to privacy and data protection in this context.

Organisers:

Prof. Dr. Antonio Gullo (LUISS, Italy)

Prof. Dr. Eleni Kosta (TILT/Tilburg University, The Netherlands)

Prof. Dr. Sofia Ranchordas (LUISS & University of Groningen, The Netherlands)

Dr. Irene Kamara (TILT/Tilburg University, The Netherlands)

Dr. Pietro Maria Sabella (LUISS, Italy)

Dr. Filiberto Brozzetti (LUISS, Italy)

[1] The British Commissioner designated under the British Interception of Communications Act of 1985, Report of the UK Commissioner of 1986 under reference of *Liberty and Others v United Kingdom* App no 58243/00 (ECtHR, 1 October 2008), para 20.

[2] Eric Metcalfe, 'Terror, reason and rights' in Esther D. Reed et al. (eds) *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge University Press 2012) 155.

PROGRAMME

9.00. Welcome Speech

Prof. Dr. Antonio Punzi, Dean of the Department of Law, LUISS Guido Carli

9.15. Welcome [organisers]

Prof. Dr. Antonio Gullo, LUISS Guido Carli

9.30-10.30 Keynote on European Data Protection by Dr. Alessandra Pierucci, Chair of the Consultative Committee of the Council of Europe Convention 108

Moderator: Prof. Dr. Antonio Gullo, LUISS Guido Carli

10.30-11.00 Coffee Break

11.30-13.00: Roundtable Session 1 "The status quo of data retention"

Chair/Discussant: Prof. Dr. Eleni Kosta, Tilburg University

Participants:

Prof. Dr. Vanessa Franssen, University of Liège

Dr Nóra Ní Loideain, Institute of Advanced Legal Studies, University of London

Dr. Luigi Montuori, Autorità Garante per la protezione dei dati personali

Veronica Tondi, LUISS Guido Carli

13.00-14.00 Lunch

14.00-15.30: Roundtable Session 2 "Balancing security and privacy in national security"

Chair/Discussant: Prof. Dr. Sofia Ranchordas, LUISS & University of Groningen

Participants:

Prof. Dr. Franziska Boehm, Leibniz-Institute for Information Infrastructure in Karlsruhe (FIZ) and the Karlsruhe Institute for Technologies (KIT)

Silvia Signorato, University of Padua

Dr. Filiberto Brozzetti, LUISS Guido Carli & Autorità Garante per la protezione dei dati personali

Dr. Lorenzo Dalla Corte, Tilburg University

15.30-16.00: Coffee break

16.00-17.30: Roundtable Session 3 “The Politics of Data”

Chair/Discussant: Dr. Irene Kamara, Tilburg University

Participants:

Prof. Dr. Sofia Ranchordas, LUISS & University of Groningen

Dr. Jockum Hildén, University of Helsinki

Dr. Ivan Manokha, Institut d'Etudes Politiques de Paris
Dr. Oskar Gstrein, University of Groningen

17.30-17.45: Closing speech

Prof. Dr. Ginevra Cerrina Feroni, Vice President, Autorità Garante per la protezione dei dati personali

17.45-18.00: Closing note [Sofia Ranchordas, Eleni Kosta]