Facts on Data Retention
And the case before the Bundesverfassungsgericht

The Data Retention Directive

* The Data Retention Directive (2006/24/EC; "the DRD") obliges Communications Service Providers (CSPs) to retain certain non-content data (subscriber data, traffic and location data) relating to internet, email and telephony communications for **a period of minimum 6 and maximum 24 months** (to be decided by MS in transposing national laws). **Data regarding the content of communications are not retained.**

* The retained data can be used by Law Enforcement Authorities (LEAs), such as the police, for the "investigation, detection and prosecution" of "serious crime" (Art. 1 DRD). The retained data **cannot**, on the basis of the DRD, **be invoked for the purpose of prevention**.
The definition of "serious crime" is left to the MS. Most MS use the criterion of crimes which carry a punishment of at least a maximum sentence of X years imprisonment, to qualify the type of crimes for the investigation of which retained data can be requested.
LEAs must as a rule obtain prior authorisation of a public prosecutor or (pre-trial) judge to request the data. Since the DRD only covers the conditions for retaining (recording) data, issues relating to access and use of data are covered by the national legislation of MS.

* As of 24 February 2010, **six MS still have not implemented the DRD**: LU, BE, IE, SE, GR, AT. The European Commission started or intends to start infringement procedures against these countries. The ECJ condemned IE and GR for not implementing the DRD on 26 November 2009 (judgments: case C-202/09 for IE and case C-211/09 for GR), and SE on 4 February 2010 (case C-185/09).
Most of these MS are committed to adopt the DRD as they are currently finalising the legislative process.

* On 8 October 2009, the **Romanian Constitutional Court ruled that the Romanian legislation transposing the DRD is unconstitutional**, since it is incompatible with Article 8 of the European Convention on Human Rights (right to privacy). The Commission has asked Romania for clarification of this issue.
Also in Hungary an action has been brought to the Constitutional Court against the law transposing the DRD.

Data retention in Germany

* Germany transposed the DRD by an amendment of the telecommunications law, which came into effect on 1 January 2008. The law obliges all CSPs to retain communications data for the period of **six (6) months. Thus, Germany has implemented the minimum retention period** allowed for by the DRD. (The average period for data retention among EU27 is ca. 12 months.)

* As regards the **definition of serious crime**, retained data can be requested by German LEAs for the purpose of investigation, detection and prosecution of **crimes that are punishable with at least a maximum 5 years imprisonment**. (This means crimes for which the maximum possible punishment is five years, plus all heavier crimes.) With this definition,

Germany already finds itself on the cautious side of the road, given that most MS deem crimes which carry a lesser penalty sufficiently "serious" for the possibility of requesting retained data in the course of criminal investigations.

Evaluation of the DRD

* Since the 14 May 2009 conference on the DRD, **the Commission** (DG JLS, Unit F3, in cooperation with DG INFSO) **has been evaluating the DRD**. The evaluation takes stock of the national experiences with regard to data retention, and is done by various ways:
  - bilateral meetings with all MS have been undertaken, as well as with many other stakeholders;
  - an extensive questionnaire has been issued to all stakeholders: MS, EP, civil society, Data Protection Authorities (DPAs), Industries;
  - several meetings with MS have taken place.

* The Commission is due to present the evaluation report to the Council and the Parliament **before 15 September 2010**.

* Among the findings of the Commission are the following:
  - **LEAs are very positive about data retention**. This instrument is a meaningful and necessary tool to fight serious crime;
  - no data protection complaint has been filed; no ex officio investigation launched by any DPA; no DP infringement was found.

* The planning is now as follows: **the draft evaluation report** will be subject to inter service consultation in the next few months. The factual information (not the conclusions or the recommendations) in the draft report will be informally circulated to MS, in order to make sure that all (sometimes rather technical) information is correct. A meeting on the evaluation and the preliminary findings is foreseen to take place in Brussels on Friday 12 March 2010 with all MS.

Case before the German Constitutional Court

* An initial action was issued in 31 December 2007, on behalf of ca. 30.000-35.000 citizens (the number has increased ever since). The substance of the complaint is that **the data retention law should be abrogated**, due to its "manifest unconstitutionality". (Another constitutionality complaint against the data retention law has been issued by DE MPs (Bündnis 90/Die Grünen).)
The complainants also demanded the BVerfG to ask the ECJ about the validity of the DRD, and to declare the German data retention unconstitutional (see below).

* **This action was partly successful**. On 11 March 2008, the Bundesverfassungsgericht (BVerfG) ruled in a interim, preliminary injunction fast track procedure "einstweiliger Anordnung" that the conditions for the data retention law to be invoked by LEAs should be stricter:
  - the suspect whose data are concerned should be known;
  - the crime of which he is suspected should be serious;
  - the suspicion has to motivated;
  - other means for the investigation of the case must be looked at first.

* The claim of the litigating parties, that the data retention law should be declared unconstitutional and / or that the BVerfG should issue a preliminary question to the ECJ, will be subject to the **final judgment** of the Court (2 March 2010).

* The complainants claim that the data retention law is **in breach of Article 10 of the German Constitution** that states that "the privacy of correspondence, posts and telecommunications shall be inviolable."
Some (more) arguments of the complainants:

- data retention violates personal privacy;
- data retention harms professional activities, such as those of doctors, laywers, pastors, journalists, politicians, because traces of communications are retained. This can be considered as a violation of the free society as a whole;
- data retention cannot prevent terrorism or crime. It is easy for criminals to bypass the investigative instrument of data retention;
- data retention breaches the human right to privacy and self-determination of personal information;
- data retention is expensive, it produces extra costs for the economy and for consumers;
- data retention discriminates users of telephone and internet in comparison to users of other forms of communication.

* On 15 December 2009, the BVerfG undertook a hearing on this case of all stakeholder groups. The final ruling is expected for **2 March 2010, 10:00h.**

* Among the complainants is **Sabine Leutheusser-Schnarrenberger**, the current Bundesministerin of Justice. This liberal politician (FDP) voted against the German law in 2007, when she was still a MP – however, in her current position as Justice Minister she is the formal defendant of the criticized law.