

Data retention review: Visit to Berlin 23 June 2011

Ministry of Justice

Unit A3, DG Home.

Ministry of the Interior

Impact of BvG

UW said that the absence of data retention in DE had created an unprecedentedly serious problem for the police – never before had the BKA collated in such a systematic way statistics and examples of the impact losing access to communications data. Of all the cases submitted by the BKA, none of them could have been solved through 'quick freeze' as proposed by the justice minister.

CDU support the COM's efforts to enforce DRD and encourage greater pressure through infringement process.

UW said he would ask the BKA to provide evidence of the need for communications data especially where there is a cross-border dimension.

Likely compromise with MoJ on retention periods

Justice minister's proposal for quick freeze was unacceptable. UW expected that a compromise between CDU/FDP could be 'limited' data retention and quick freeze. MoJ would prefer for the COM *not* to seek to amend the DRD – this would maintain pressure on MoJ to concede. But, if the COM is determined to propose changes, then MoJ would this could be helpful for harmonising access conditions.

MoJ would prefer a 6 month maximum with the possibility of a lower minimum period [i.e. in line with the *Bundesverfassungsgericht* judgment]. But also accepted that DE could re-transpose DRD correctly and comply with BvG judgment. Given that BvG said that 6 months was the absolute maximum, UW expected the compromise to be a 3 month retention period.

At *Länder* level, SPD *Länder* tended to be less anti-DR than at national level.

On reform of the DRD

MoJ opposed the limitation to 'serious crime' as it was not compatible with DE criminal procedure code, but understood why COM might prefer a narrower purpose limitation.

Cost recovery was 'not an issue' for DE. Impact on private sector of police activities generally is compensated, which in practice helps to improve the service provided. It was a problem for smaller providers, even more so once DE applies the data security measures required by the BvG. **Deutsch Telekom** claimed in 2009 that they had incurred €10m in investment costs for complying with data retention. Overall, DE estimated the cost overall for DE at €500m. Parallel and separate data retention and quick freeze requirements could be problematic for industry.

Ministry of Justice

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Non-transposition of DRD

MoJ accepted that January proposal from the Justice Minister would not 'completely transpose' the DRD – but this proposal was itself a compromise for her, having resigned from the federal government in 1994 on surveillance of residential premises.

On reform of DRD

MoJ in principle supported COM's 'efforts' to reform.

MoJ would prefer to keep EU data retention regulation on an **internal market** legal basis.

But if COM wishes to regulate **access and use**, then there would need to be many changes e.g.

- access would have to be on the basis of a justifiable suspicion and a judicial authorisation
- it would have to protect privileged communications e.g. journalistic sources, medical and religious counselling, lawyer-client discussions (as provided for in art 99 of the Telecommunications Act)
- generic definition of serious crime on basis of length of sentence but not definition of the crimes themselves - this was a weakness with the catalogue in the European Arrest Warrant instrument.¹
- data categories: the obligation should only concern IP addresses, which in 80-90% of cases are not stored by internet service providers. There was no need to oblige retention of telecoms data as only 10-20% of operators were unlikely to keep data for about 100 days – which was long enough for law enforcement.

But it was too early to guess DE formal position on reform; discussions would have to take place with MoI and the ministry of economics and technology (FDP minister). DE industry was 'open minded' about the issue.

Conclusions

1. No sign yet of DE administration agreeing terms for transposition of the DRD in 2011.

¹ DE Basic Law permitted home surveillance only in cases of suspicion of committing a crime carrying a maximum sentence of 10 years prison; a 'serious crime' was defined as carrying a maximum 5 year prison sentence.

2. The DE administration, although divided on coalition lines, does not want reform of the DRD; it prefers to have flexibility for national approaches which do not affect criminal procedure. The only benefit that they might see in DRD reform would be to reduce the retention period minimum below 6 months. Given the positions of other MS, the effect of lowering the minimum period would be to create even less harmonisation for the internal market compared with the current DRD.

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