

ISOC European Regional Bureau Newsletter

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Data Protection

EU: Annulment of data retention Directive results in diverging national responses

- **The decision** of the European Court of Justice **annulling the EU's data retention Directive** has left governments and national courts across the EU tackling the legality of national rules based on the Directive.
- In April, the court ruled that the 2006 **EU Directive** that required telecom operators and Internet-service providers to retain certain categories of traffic and location data for law enforcement purposes, **breached human rights** and therefore has been invalid since the adaptation of the decision.
- Many **Member States** have been calling on the European Commission to put forward a new pan-European data retention law. However, the Commission has so far declined to draft legislation or publish guidance on the matter. Commenting on the situation, **EU Home Affairs Commissioner** Cecilia Malmström has said that the decision on whether new legislation is needed will be taken by the new College of Commissioners.
- **The Article 29 Working Party** is soon to publish an **opinion** on the matter, in which it is expected to urge the Commission to provide Member States with guidance on how to respond to the ruling.
- Meanwhile, Member States have been struggling to find the best approach to the situation. The **UK** parliament has adopted emergency legislation to ensure that law-enforcement agencies could continue to access subscriber data. The national courts in **Austria, Romania** and **Slovenia** ruled that national laws on data retention are either unconstitutional or lack legal safeguards. In **Bulgaria** the national constitutional court is also considering the matter.
- The situation has caused legal uncertainty for some **telecom operators**. For example, in Sweden **Tele2** announced that it would no longer store data and would delete what it had already collected. But the Swedish telecom regulator issued a warning to the company saying that it suspects the operator of breaching national rules that require it to supply data to police on request.
- It is said that the Commission might **delay any new proposal** on the matter until after the ongoing negotiations on EU data protection Regulation are finalised.

Right to be forgotten: new concerns expressed by German constitutional judge

- « Well meant, but possibly dangerous » – that is the assessment of a highly regarded judge of Germany's Constitutional Court, Johannes Masing, about the recent judgement of the European Court of Justice (ECJ). (<http://policyreview.info/node/315>)
- Masing applauded that the EU judges have clearly confirmed that Google was subject to EU data protection law. Nevertheless he has considerable concerns that the **judgement would in fact bestow more power to large search engine providers**.
- Beside making search engine providers a **quasi-private censor**, he is wary of allowing search engine providers to decide on the value of a deletion request. Based on their assessment, search providers can decide whether there is a need to turn to data protection authorities.

- Not only would there be strong incentives for the search engine providers to decide cases on their own, possibly overriding citizens' own interests. But, additionally, once data protection authorities are brought into the equation they would become de facto communication regulation authorities, Masing reasons.
- In the end the German judge concludes, that there are gaps in EU data protection legislation, especially when it comes to acknowledge and put into law the differences between public law and private law actors. The proposed EU data protection regulation which is still on the agenda of the EU bodies might be the right place to find better and more targeted provisions for the different spheres, Masing hopes. But so far the proposals did not go far enough in that direction.

EU/US: CDT claims a number of US companies do not respect Safe Harbour provisions

- The **Center for Digital Democracy (CDD)** has submitted a **filing** to the **US Federal Trade Commission** claiming that at least thirty **US companies** are compiling, using and sharing personal information of EU consumers without their awareness and meaningful consent, thus **violating the Safe Harbour framework**.
- CDD has called on the trade commission, which is in charge of managing and ensuring the validity of the Safe Harbour rules, to investigate on the alleged **data profiling and online targeted practices** of the companies listed. CDD has claimed that **FTC's oversight and enforcement is limited**.
- In the wake of Snowden's revelations, the self-certification system has been criticised as being inadequate. The former European Parliament called for the immediate suspension of the agreement

Internet governance

EU: Italian 'bill of rights' initiative could be adopted across Europe

- The Italian government is working on an **Internet 'bill of rights'** that is said to **define web users' rights and obligations**. The government has set up an ad hoc committee that is composed of **politicians** from all parliamentary parties and of **independent experts**, including representatives of telecoms industry and consumers' associations.
- Among the topics included in the committee's **work programme**, there is Internet access as a universal right; net neutrality; freedom of information; protection of users against the misuse of their data by online companies; and digital literacy. The committee also underlined the need to strike a balance between transparency, the rule of law and privacy.
- At its first meeting that took place last month, the committee decided to form a **smaller group of experts** that will be led by jurist and politician **Stefano Rodotà**, a well-known and respected figure who served for many years as member of the European Parliament. The group will produce a first draft of the bill that should be discussed by the **end of September**. The final proposal will be presented at an inter-parliamentary meeting on fundamental rights, organised by the Italian presidency of the Council of the EU in Rome in **October**. In addition, the government will organise a public consultation on the proposals in Italy.
- The **challenge** for the initiative would be to live up to the expectations of the current Italian government, considering that Prime Minister Matteo Renzi has a particular interest in digital issues.
- It was argued that the Italian initiative could serve as a foundation for a model of similar legislative projects that could be adopted **across Europe**.

Cloud computing/Data protection

EU: Cloud providers are not ready to comply with the proposed data Regulation

- According to a **research** by a cloud security company Skyhigh Networks, **only one cloud provider in 100 would meet all aspects** of the proposed **General Data Protection Regulation**. The research compiled data on 7,000 cloud services.
- One of the issues the providers would need to face is **request for data deletion** that the proposal has put forward. Currently, 63% of providers maintain data indefinitely or make no data retention provisions in their contracts. Over 23% of cloud providers maintain the right to share data with a third party.
- **Data residency requirement** from the proposal would also prove an issue for cloud providers as only 11 non-EU countries satisfy EU privacy requirements. While the US is not one of them, it is the location for 75% of cloud services. According to Skyhigh Networks, only 8.9% of US-based providers have **Safe Harbour certification**.
- With regards to the obligation to **notify EU regulatory authorities** within 24 hours of a **data breach**, it was noted that this might prove difficult for the providers, as they would have troubles spotting a data breach or have clauses putting responsibility to detect breaches directly on customers.

Open Internet/General

Russia: A new decree demands Internet users show ID to access public Wi-Fi

- On 31 July, Russia's **Prime Minister Dmitry Medvedev** signed a **decree** that requires people using public Wi-Fi hotspots provide their **identification**. The decree, published online on 8 August, also requires companies to reveal who is using their web networks.
- The move is perceived as another attempt of Russia to tighten its control of the Internet. According to President Putin, similar laws are necessary to combat extremism and terrorism. Commenting the new law, **Communication Minister** Nikolai Nikiforov said that requiring ID from Internet users to access public Wi-Fi is a worldwide practice.
- Head of the **Russian Electronic Communications Association** Sergei Plugotarenko stated that Internet companies know little about this unexpected new law which was signed in a short time and without consultation.
- However, it is still unclear how the legislation would be enforced, due to what the industry experts consider as **vague wording**, especially with regards to determining who would have to comply with the decree and what methods would be needed to authenticate users' identity.

General

EU: National parliaments oppose a Commission's power grab

- Last week, the European Commission published the 2013 **report on subsidiarity and proportionality**¹ and the 2013 **report on relations between the Commission and national parliaments**. The reports revealed that **proposals related to the electronic telecommunications** sector were subject to an **unusual high number of protests** from Member States Parliaments.
- The issue at stake was the perceived **power grab operated by the European Commission**, as the parliaments claimed the Commission is overstepping its **remit to legislate** matters that should be decided on by national governments. While the opinions of national parliaments do not play a role in the

¹ The **principle of subsidiarity** is designed to ensure that decisions are taken as closely as possible to the citizens and that constant checks are made to verify that action at Union level is justified in view of the possibilities available at local levels. Specifically, it is the principle whereby the Union does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. Subsidiarity is bound up with the principle of proportionality, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties.

EU legislative process, they often reflect the position of national governments that have a formal negotiating role.

- Among the activities that received the most national opinions were the proposals on the **reduction of cost of broadband rollout, connected continent** and **cybersecurity directive**.
- Nine parliaments expressed reservations with regards to the broadband rollout legislation, with **Denmark and the UK** providing detailed reasoning on why the Commission was overstepping its legislative mandate. The bill on broadband cost reduction took effect in May. In the course of amending the law, governments trimmed positions perceived as interfering with national administrative structures.
- Eight national parliaments expressed concerns with regards to the **connected continent proposal**, with **Austria, Ireland, Malta** and **Sweden** providing detailed reasoning.
- The proposed **cybersecurity measures** were pointed out in six opinions, with **Sweden** providing detailed reasons for the concerns.
- Considering that the connected continent and cybersecurity proposals are being scrutinised by the national governments, it is expected for the **national parliaments' concerns to be addressed through watering down of clauses** that are perceived as impeding on the Member States competences.

EU: ETNO recalled for deregulation to attract telecom investors

- In an **opinion piece** published in the *Wall Street Journal*, Luigi Gambardella, **the executive chairman of ETNO** (the European Telecommunications Network Operators) has urged the EU policymakers to focus on **a new regulatory framework**, setting **lighter and better targeted digital policies** that would boost demand and attract investors in Europe.
- He wrote that in view of **new projects** requiring huge capital investments (e.g. 4G and fibre deployment); Europe needs to lighten **the regulatory framework** in order to reassure telecom investors about their business opportunities. Gambardella also stressed that instead of focusing only on consolidation and consumers, policymakers should allow **stronger market players** to deliver **top-level quality** for all.