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NOTE

From: Presidency
To: CATS

Subject: Retention of electronic communication data
- next steps

I. Background

1. By its Judgment of 8 April 2014 ¹*Digital Rights*, the European Court of Justice invalidated Directive 2006/24/EC (the Data Retention Directive) ² ab initio, i.e. from the date it took effect in 2006. The Court held that the Directive disproportionately restricted the right to privacy and to the protection of personal data as guaranteed by Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter of Fundamental Rights.

¹ Judgement of the Court of Justice of the EU (Grand Chamber) "*Digital Rights Ireland and Seitlinger and others*" of 8 April 2014 in joined Cases C-293/12 and C-594/12.

² Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC(OJ L 105, 13.4.2006, p. 54).

2. In its Judgment of 21 December 2016³ *Tele2*, the Court ruled that Article 15(1) of Directive 2002/58/EC (the ePrivacy Directive)⁴, read in the light of the Charter of Fundamental Rights, must be interpreted as precluding national legislation "*which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication*", as well as national legislation that "*governs the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union*".

3. At the GENVAL meeting of 3 February 2017 and further to the presentation by the Council Legal Service of its preliminary analysis of the judgment⁵, delegations indicated that they are currently examining the judgement and assessing its impact at national level. Many delegations expressed their concerns on the implications of the judgement, which might hinder the effectiveness of the investigations and prosecutions of crimes. The majority of delegations reiterated the support expressed at the informal ministerial meeting in Valletta on 26-27 January 2017 for a coordinated approach at EU level and for discussions to continue at expert level.

³ Judgement of the Court of Justice of the EU (Grand Chamber) "*Tele 2 and Watson*" of 21 December 2016 in joined Cases C-203/15 and C-698/15.

⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 201, 31.7.2002, p. 37). This Directive is being thoroughly reviewed following the proposal submitted by the Commission in January 2017 to replace it by a Regulation (see Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), doc. 5358/17).

⁵ doc. 5884/17.

4. The Commission indicated that it is currently assessing the impact of the judgment and that further reflection is needed on its legislative and operational implications. The Commission confirmed its intentions to elaborate guidance as to how national data retention laws can be construed in conformity with the judgement. Active input from Member States ,Eurojust and Europol will be sought in this respect.
5. Eurojust is also assessing the potential impact on judicial cooperation in criminal matters, in particular on the admissibility of evidence within the context of cross-border investigations and prosecutions. The Eurojust College has approved in this respect an extensive research and work programme, including a consultation on the basis of uniform questionnaire with various stakeholders.

II. Common reflection process

6. In view of the above and in order to put the various working strands together, the Presidency would like to facilitate a further expert debate on this matter.
7. To that end, the Presidency suggests convening the Working Party on Information Exchange and Data Protection (DAPIX) in Friends of the Presidency format to discuss issues on data retention- *DAPIX (Friends of the Presidency) - Data Retention*.
8. This format should facilitate a common reflection process at EU level on the impact of the recent case law of the Court of Justice concerning rules on data retention and in particular:
 - discuss the specific requirements that emerge from relevant case-law, and in particular from the Tele 2 judgement; the group would also explore possible options to address the requirements set out by the Court and liase, as appropriate, with other Council working parties, e.g. in the context of the examination of the draft ePrivacy Regulation;

- analyse the specific needs related to availability of data for the purposes of prevention, investigation, detection and prosecution of criminal offences;
 - serve as an interface for exchanging national experiences and best practice to that end;
 - allow for synergies with the work on the guidance under preparation by the Commission on the basis of active exchange and feedback to this process by the Member States.
9. Expert participation should allow for a comprehensive overview on the matter, combining considerations from various areas of expertise, such as law enforcement, operational and judicial, fundamental rights (data protection and other fundamental rights), internal market (communications providers and technical). Experts from relevant competent national authorities, taking into account the specific arrangements at national level, can participate in the meetings of the group.
 10. Eurojust and Europol will be closely associated in the common reflection process.
 11. The ensuing findings and conclusions will be presented to CATS, COSI and to the Council, as appropriate.

CATS is invited to agree on the above approach.
