



BRIEFING

LEGAL CHALLENGES TO DATA RETENTION IN THE EUROPEAN UNION



EUROPEAN PIRATES
in the European Parliament

INTRODUCTION

On March 15 2006, the European Union passed a **Directive on Data Retention**, amending the ePrivacy Directive and clearing the path for **indiscriminate and generalised surveillance** of citizens' communications. The legislation was widely criticised by journalists, human rights groups, privacy advocates and IT experts, challenged in national courts, and was finally **annulled** by the ECJ in 2014.

At the time of its annulment, it had **already been implemented in national law** of many EU member states, and these laws were **not automatically annulled** following the ECJ ruling. Since then, cases have popped up all over Europe to **end indiscriminate data retention** and protect the privacy and fundamental rights of citizens.

This briefing, which builds on research provided by the European Parliament Research Service, shows the extent to which data retention has been and is being challenged, as well as the legal arguments put forward against it.

Note:

Following its initial publication, a number of additional cases were discovered which have been added to the list, along with relevant ECJ cases, which have been separated from national challenges. As a result, the statistics from the original study have also been updated.



30

LEGAL CHALLENGES TO DATA RETENTION HAVE BEEN LODGED IN EU MEMBER STATES SINCE 2009.

15

OF THESE CASES HAVE SUCCEEDED

09

OF THESE CASES HAVE FAILED

05

ARE CURRENTLY PENDING A HEARING OR SUSPENDED

01

OF THESE CASES WAS PARTIALLY SUCCESSFUL

05

WERE REFERRED TO THE ECJ

04

HAVE RESULTED IN ECJ RULINGS SO FAR.

CASES AGAINST DATA RETENTION IN NATIONAL COURTS

2009

Austria, 01 July 2009 **SUCCESSFUL** Cases [G 31/08](#) and [G 147,148/08](#)

Austrian Constitutional Court rules no basis for extended storage of cell phone and internet data.

Romania, 08 October 2009 **SUCCESSFUL** [Decision 1258](#)

Romanian Constitutional Court rules proposed legislation on data retention unconstitutional.

The Constitutional Court ruled that the legislation proposed by the Romanian Government transposing the Data Retention Directive was unconstitutional, as it **infringes upon the right to private life and secrecy of correspondence** as defined in the Romanian constitution, and could **impede freedom of movement and expression**. The Court further ruled that the legislation did not meet obligations with regards to proportionality. The Romanian Government passed replacement legislation in 2012, [criticised by NGOs](#) as being “worse than the original”.

2011

Czech Republic, 22 March 2011 **SUCCESSFUL** [Case 24/10 \(Data Retention I\)](#)

Czech Constitutional Court annuls provisions on data retention in Electronic Communications Act.

The Constitutional Court ruled on the petition filed by a group of Deputies in the Parliament of the Czech Republic. The Court found that a number of provisions of Czech data retention laws (namely on the duration, extent and means of traffic and location data retention and use) were a **disproportionate interference in the right to privacy**, and hence **unlawful** in their latest wording, and those provisions were immediately annulled.

Czech Republic, 20 December 2011

SUCCESSFUL

[Case 24/11 \(Data Retention II\)](#)

Czech Constitutional Court annuls provisions use of data obtained through data retention.

The Constitutional Court ruled that provisions of the *Criminal Procedure Code* in their latest wording **did not provide sufficient safeguards** on the use of data with regards to the **principle of proportionality**. The court decided that those provisions should be annulled on the 30 September 2012.

2012

Austria, 29 June 2012

UNSUCCESSFUL

[Case B 1031/11](#)

Austrian Constitutional Court rules determination of IP addresses is permissible in the case of open communication.

2014

Austria, 27 July 2014

SUCCESSFUL

[G 47/2012 and others](#)

Austrian Constitutional Court rules data retention laws unconstitutional.

A claim was brought to the Constitutional Court stating that the *Telecommunications Act 2003* is unconstitutional and **violates the rights enshrined in Art. 7, 8, 11 and 12 of the Charter of Fundamental Rights of the European Union**. The act forced providers of public communication services to retain data, and allowed for access to this data by security and law enforcement authorities. The applicant highlighted the **lack of proportionality** of the law considering the extent of data gathered, and the wide spectrum of cases where use of retained data is authorised, which go far beyond serious crime.

2015

Austria, 05 March 2015

UNSUCCESSFUL

[Case 120s93/14i](#)

Supreme Court reintroduces access to cell location data

In this case, the prosecutor sought to obtain data about a call made at a specific time and place, without targeting a specific device, in a move that could infringe on the fundamental right to privacy of other callers. Despite a plethora of judgements against data retention, and going against the rulings of the lower courts, the Austrian Supreme Court decided that mobile operators can be obliged to cross-reference their billing data and provide a list of all calls made in an area at a certain time.

Netherlands, 11 March 2015

SUCCESSFUL

[Case C-09-480009-KG ZA 14-1575](#)

Netherlands District Court renders Data retention law inoperative.

The court rendered the *Telecommunications Data (Retention Obligation) Act* inoperative. This Act obliged telephone and internet service providers to store users' traffic and location data. The court held that the act **infringes upon the right to respect for private life** and to protection of personal data, and that this infringement is **not limited to what is strictly necessary**.

2014

ECJ, 08 April 2014

SUCCESSFUL

[Digital Rights Ireland Case](#)

European Court of Justice invalidates Data Retention Directive

Following a referral over a case concerning Irish data retention legislation, the ECJ ruled the Data Retention Directive to be **invalid**, stating it “*entails a **wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary***”. The ruling sparked challenges to Data Retention legislation throughout the Union.

Romania, 08 July 2014

SUCCESSFUL

[Decision 440/2014](#)

Romanian Constitutional Court rules legislation on data retention unconstitutional (again).

After the annulment of the initial transposition of the Data Retention Directive by the Romanian Constitutional Court, the Romanian Government passed replacement legislation in 2012, [criticised by NGOs](#) as being “worse than the original”. In 2014, following the *Digital Rights Ireland* ruling invalidating the Data Retention Directive, the Romanian Constitutional Court promptly ruled that Romanian Data Retention laws based on it were unconstitutional.

2016

ECJ, 21 December 2016

SUCCESSFUL

[Tele2 and Watson Case](#)

ECJ Declares General and Indiscriminate Data Retention unlawful

The ECJ found in Cases C-203/15 and C-698/15 that General and Indiscriminate Data Retention **incompatible with the EU Charter of Fundamental Rights**. They ruled that **Members States may not impose a general obligation to retain data** on providers of electronic communications services, stating: “*Such national legislation therefore **exceeds the limits of what is strictly necessary and cannot be considered to be justified within a democratic society, as required by the directive, read in the light of the Charter.***”

Sweden, 27 December 2016

SUCCESSFUL

National case number unavailable

Swedish Administrative Court of appeal repeals order to retain data

Following the Tele2 and Watson ECJ ruling, the Court of Appeal ruled that the Swedish legislation regarding data retention was incompatible with EU law and therefore **repealed the order to retain data** in the specific case. After the judgment, **all service providers stopped retaining data** and deleted all remaining data that had been previously retained. As a result of this, a **new data retention law was introduced** in Sweden in 2019.

2017

Portugal, 13 July 2017

UNSUCCESSFUL

[Case 420/2017](#)

Portuguese Constitutional Court rules data retention laws are legal, as appropriate safeguards exist.

In the Judgement of the Constitutional Court no.420/2017, the Court concluded that the ECJ's reasoning in the *Digital Rights Ireland (2014)* judgement does not apply to Law 32/2008 and, in this regard, **does not provide sufficient grounds** to invalidate it, as the **law established adequate safeguards**.

Ireland, 19 July 2017

UNSUCCESSFUL

[Case IEHC 307](#)

Irish Court dismisses request by Digital Rights Ireland to refer legality of data retention laws to the ECJ.

Following the declaration of invalidity of the Data Retention Directive by the ECJ in *Digital Rights Ireland (2014)* and the ruling in *Tele2 and Watson (2016)* that General and Indiscriminate Data Retention is illegal, Digital Rights Ireland sought to invalidate the Irish Data Retention legislation. They argued that the **duration of retention (2 years) is too long**, that **the General and Indiscriminate nature of retention is illegal**, and that it is **not overseen by an independent party**. They sought to argue the case without submission of evidence on the grounds that there is an evident and flagrant violation of the law and that the facts are clearly established. The request was dismissed.

United Kingdom, 29 July 2017

SUSPENDED

[Case CO/1052/2017](#)

Legal challenge to the Investigatory powers act suspended pending ruling by the ECtHR.

The Government is facing ongoing legal challenge to the *Investigatory Powers Act*. The case was suspended pending a judgement by the ECtHR on the legality of the UK's data retention regime. The ECtHR gave [their judgement](#) on the 25 May 2021 and the trial is now [set to resume](#).

Austria, 29 November 2017

UNSUCCESSFUL

[Case G 223/2016](#)

Motion of FPÖ and Greens against the Police State Protection Act rejected.

2018

Germany, 20 April 2018 **PENDING** Cases [9K3859/16](#), [9K7417/17](#), [Az.6C12.18](#), and [Az.6C13.18](#)

German Service Providers challenge customer data retention.

Two German Service Providers mounted a Challenge to data retention rules on the grounds that, **generalised and indiscriminate data retention is illegal**, following the *Tele2 and Watson (2016)* ruling by the ECJ. Following a decision by the Federal Administrative Court, the German Federal Networks Agency (*Bundesnetzagentur*) [announced](#) it would temporarily cease enforcing retention obligations. **The case has now been referred back to the ECJ.**

Ireland, 06 December 2018 **SUCCESSFUL** Case [IEHC 685, 2019/18](#)

Irish High Court rules certain data retention measures incompatible with EU law, EDHR.

The High Court ([IEHC 685](#)) ruled on 6 December 2018 that certain sections of the 2011 Communications Act are **incompatible with EU law and the ECHR**, as they established a general and indiscriminate data retention regime. The ECJ (Case [C-140/20](#)) will hear arguments on the **legality of Irish Data Protection laws**, the obligations of Irish courts in light of that, and the admissibility of illegally obtained data as evidence in September 2021.

2019

Czech Republic, 15 May 2019 **UNSUCCESSFUL** [Case 45/17 \(Data Retention III\)](#)

Czech Constitutional Court dismisses petition of deputies to annul data retention legislation.

The Constitutional Court **UNSUCCESSFUL** the petition of Deputies in the Parliament of the Czech Republic seeking the annulment of the provisions of the Electronic Communications Act, Criminal Procedure Code, Police of the Czech Republic Act, and Decree No. 357/2012 on the retention, transmission and destruction of traffic and location data. The petition was **UNSUCCESSFUL** as the Court found that the **existing legislation has the necessary safeguards** to comply with EU law.

Hungary, 24 July 2019 **PENDING** [Case IV/1365/2016](#)

Hungarian Constitutional Court examines case against data retention for the fourth time with no judgement.

In 2014, the Hungarian Civil Liberties Union launched a civil lawsuit over traffic data retention on the basis of the defunct Data Retention Directive. The constitutional complaint reached the Constitutional Court in the summer of 2016. **No decision has been reached** since then, despite the annulment of the Data Retention Directive by the ECJ, and of numerous laws transposing it by the constitutional courts of EU Member States. The hearing **did not result in a judgement**. The case had **been on the board's agenda three times** prior to this hearing.

Italy, 23 August 2019

UNSUCCESSFUL

[Case Cass.36380/19](#)

Italian Court of Cassation rules Italian data retention framework is in line with EU law.

In Italy, two cases have been brought in front of the Court of Cassation to evaluate the compatibility of the Italian data retention regime with EU law. The applicant argued that the Italian rules are **not compatible with the EU Charter of Fundamental Rights** as interpreted by ECJ case-law, arguing that the Italian law would **not fulfil the proportionality test**, as it allows for use of data retention **regardless of the form of the crime**, and **without proper judicial oversight**. The Court held that the Italian legislation is compatible with EU law, stating that the ECJ case-law concerns only those Member States that do not have legislation in place on data retention and access, whereas Italy has adopted specific rules on data retention, and that the Italian legislation is proportional, claiming the **time limits are adequate** and the **public Prosecutor is a sufficiently independent** organ. The Italian Data protection authority adopted a critical stance towards the long period of data retention in several opinions issued in 2018. It advocates a revision of the national legislation to bring it in line with ECJ case-law.

Portugal, 21 August 2019

PENDING

[Case Q/7746/2017](#)

Portuguese Justice Ombudsman refers data retention regime to Constitutional Court.

In August 2019, The Ombudsman asked the Constitutional Court to review the constitutionality of the law which transposes the now annulled *Data Protection Directive*. The case is currently pending.

Portugal, 21 October 2019

SUCCESSFUL

[Decision 464/2019](#)

Portuguese Constitutional Court declares access to certain communications metadata by intelligence officials unconstitutional

The Court declared the unconstitutionality of legal provisions allowing intelligence officials access to certain communications' metadata (basic and location as well as traffic data) on the grounds that these measures are **not proportional to the detrimental effect they have on fundamental rights**. However, the Court accepted the access to basic and location data in the context of prevention of sabotage acts, espionage, terrorism, the proliferation of weapons of mass destruction, and highly organized crime.

Austria, 11 December 2019

SUCCESSFUL

Cases [G 72-74/2019](#), [G 181-182/2019](#)

Austrian Constitutional Court rules licence plate retention and "Bundestrojaner" unconstitutional

2020

Bulgaria, 17 November 2020 **SUCCESSFUL** [Case 04/2020](#)

Bulgarian Constitutional Court declares location retention legislation unconstitutional.

Owing to the COVID-19 pandemic, the Electronic Communications Act was amended to ensure that location data could be retained for the purpose of compelled compliance with mandatory isolation and hospital treatment of persons who refused or failed to comply with mandatory isolation and treatment. The Bulgarian Constitutional Court, through its judgment of 17 November 2020, declared the abovementioned amendment to the Electronic Communications Act unconstitutional. The court ruled that the adopted legislative measure contradicted the Bulgarian Constitution and **'did not meet the requirements of necessity and proportionality'**.

2021

Spain, 23 March 2021 **UNSUCCESSFUL** [Case 727/2020](#)

Spanish Constitutional Court dismiss challenge to legality of data retention.

The Supreme Court rejected a request by the defendant to refer a preliminary ruling to the ECJ. The Supreme Court maintained the arguments of previous judgments, stating that the Spanish national **legislation meets the requirements set out by the ECJ**, and that it is up to the examining judge to decide in each case, **taking into account the principle of proportionality**.

ECJ, 21 December 2021 **MIXED** [La Quadrature and Others Case](#)

ECJ reaffirms that general and indiscriminate retention is illegal, and sets out national security exceptions and limits.

The ECJ reaffirmed **the illegality of general and indiscriminate data retention**, but ruled that member states could **temporarily introduce general and indiscriminate retention** for means of the **protection of national security**, but that such retention must **be limited in time** and to what is strictly necessary. Furthermore it reaffirmed the need for effective safeguards, as well as **review by a court or an independent administrative authority**.

ECJ, 02 March 2021 **SUCCESSFUL** [H. K. v Prokurator Case](#)

ECJ limit access to retained data to cases of serious crime and threats to public security.

The ECJ ruled that when retained data “allows precise conclusions to be drawn concerning a person’s private life”, then that data **may only be used in order to “combat serious crime or prevent serious threats to public security”**. The court also ruled that a public prosecutor’s office does not meet the required standards to be classified as an independent authority, as **independent authorities may not be involved in the conduct of the criminal investigation** in question and, second, has a neutral stance vis-à-vis the parties to the **criminal proceedings**.

France, 21 April 2021

MIXED

[Case No 393099](#)

French Supreme administrative court annuls some surveillance measures... but finds French data retention to be in line with EU law despite ECJ ruling.

Following the *La Quadrature du Net and Others (2021)* ruling, the French Supreme Administrative Court (Conseil d'Etat) ruled that **some surveillance measures were illegal**, but it broadly found that the French legal framework on access to and retention of connection data for the purposes of combating crime and safeguarding national security is compatible with the EU law requirements. The argumentation used by the court has been **criticised for having twisted and perverted the ECJ ruling** in order to allow for the continued violation of EU law by the French data retention regime. [More](#)

Belgium, 22 April 2021

SUCCESSFUL

[Judgement 57/2021](#)

Belgian Constitutional Court annuls Data Retention act provisions.

Following *La Quadrature du Net and Others (2016)*, the Belgian Constitutional Court found the *Data Retention Act* to be **in breach of EU law**, and subsequently **annulled a number of its provisions**.

Czech Republic, 25 May 2021

PENDING

[Case 31 C 22/2021](#)

Lawsuit filed in the Czech Republic over Data Retention.

The lawsuit was filed against the Ministry of Industry and Trade of the Czech republic as guarantor of electronic communications legislation because the non-removal of widespread data retention from the legislation led to incorrect implementations of the e-privacy directive and thus to interference with the law. The individual action, with the support of the NGO *Iuridicum Remedium*, demands an apology from the state and thus an admission that the current situation is in conflict with European law and case law.

Estonia, 15 June 2021

SUCCESSFUL

[Decision 1-16-6179](#)

Estonian Supreme court rules evidence obtained through data retention in breach of EU law is not admissible.

Following the *H. K. v Prokuratuur (2021)* ECJ judgement, the Estonian Supreme Court found that the Estonian data retention laws are **in breach of EU law**, and that evidence obtained through that legislation is **inadmissible in court**.

Denmark, 29 June 2021

UNSUCCESSFUL

[Case BS-36799/2018-OLR](#)

Danish Court reject request to examine compatibility of data retention legislation with EU law and order plaintiffs to pay legal fees.

The association against illegal surveillance (Foreningen imod Ulovlig Lognin) filed a request to examine the **compatibility of data retention legislation with EU law**. Not only did the district court reject the request, but the court additionally ordered the plaintiffs **to pay the government's legal fees**. The financial weight of this decision risks intimidating future challengers to illegal legislation.

Netherlands, 20 July 2021

SUCCESSFUL

[Case 2200147216](#)

Dutch Appeals rules evidence obtained through data retention without prior judicial review and in breach of EU law is not admissible.

The Dutch Appeals court ruled that, although retained data was requested in accordance with provisions in the Code of Criminal Procedure, those provisions were, in retrospect, **in violation of EU law**, as the data should not have been requisitioned by a **prosecutor without prior independent judicial review** by a judicial body or an independent administrative entity. The court ruled that there had been an irreparable procedural error, without attaching a legal consequence to it.

GLOSSARY

Data Retention: The storage of metadata concerning interaction, location and interests of individuals, usually for use by law enforcement.

General & Indiscriminate Data Retention: A form of data retention that affects the entire population regardless of if they are accused or suspected of a crime or not. Mass Surveillance.

ECJ: The European Court of Justice, the EU's Highest Court, solely responsible for interpreting EU law.

Directive: A type of EU legislation that is passed and then “transposed”: Member States pass a law on a national level that contains the provisions of the Directive.

Charter of Fundamental Rights: Part of the European Union's treaties, the Charter sets out a series of rights that protect citizens in cases where EU law is concerned. The Charter includes the right to privacy.

Annulled / to annul: The decision of a Court to invalidate a piece of legislation.

Proportionality: A principle by which actions must be limited to what is strictly necessary to reach a set goal.



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