LETTER FROM EUROPE

# Data Retention in the EU

The following is a transcript of the 29 April 2014 podcast

I don't often write about data protection, as it's at the periphery of what I do. But two things prompted me to do so: First, there's a new Banksy mural in Cheltenham that depicts spying. Second, the Grand Chamber of the CJEU has deemed invalid the EU Directive on the retention of data arising from the provision of publicly available electronic communication services or public communications networks. These two acts have more in common than you might imagine.

Banksy, for those of you unfamiliar with the famously secretive street artist, enjoys poking fun at the Establishment.

His latest work can be found on the side of a house not far from the Government Communications Headquarters (GCHQ), which is the UK Government's 'listening post', our equivalent of Langley for the CIA in the U.S. The mural depicts three men in 'spook' attire: trench coats and homburgs in two cases, with the third man kneeling, wearing headphones and with old-fashion tape-reel recording equipment by his side. All three are grouped around a public telephone box, and in a final clever turn, Banksy has incorporated the house's television satellite dish into the image, suggesting how the spooks are sending back the information.

The mural has achieved widespread publicity, as it draws attention to the allegation of Government agencies eavesdropping on our personal conversations. It's something that remains topical, what with last year's revelation of the NSA's collection of the calling records of U.S. citizens, and more recently with the accusation that the CIA has spied on the U.S. Senate Intelligence Committee's investigation of the CIA's activities (a truly classic case of irony if ever there was one).

Yet only the *Irish Times* and a bunch of lawyers' webpages have reported on the Grand Chamber's decision that the data retention practices of the past few years, effectively, have been illegal.

The Directive in question (2006/24/EC – and its predecessors) sought to harmonize Member States' national laws relating to data transmitted electronically, but specifically in the area of the type of data to be retained (for example, caller ID, telephone number called, Internet log-in/log-off, IP addresses, and so on).

It also sought to provide (in Article 6) the periods for which the data must be retained: not less than six months, and not more than two years from the date of communication.

Essentially, the Directive and its predecessors were seeking to balance out the protection to be given to an individual, whilst recognising that national security agencies must be given the opportunity to have access to information, so as to prevent crime and, as importantly, terrorist attacks.

**Paul Harris** | Partner
Tower 42, Level 23
25 Old Broad Street
London, EC2N 1HQ
+44.20.7847.9517
**paul.harris@pillsburylaw.com**

In two test cases, one brought in Ireland and the other in Austria, the challengers essentially asked whether the Directive breached the Charter of Fundamental Rights of the EU (called simply 'the Charter'), particularly Articles 7 (right of privacy), 8 (right of protection of personal data) and 11 (freedom of expression).

The Grand Chamber considered that, when taken as a whole, the type of data that could be reviewed would enable someone to identify an individual and to draw precise conclusions about his or her everyday life, including place of residence, daily movements, social relationships and places frequented, amongst other things. What the legislation does not do, however, is allow the content of the communications to be accessed and retained.

The importance of combatting crime and terrorism was highlighted by the Grand Chamber, but the retention of

data was a serious interference with an individual's fundamental right in Articles 7, 8 and 11. That interference, therefore, had to be tested as to whether it genuinely satisfied the objective of being of general interest. In other words, is the balance right?

In a nutshell, the Grand Chamber considered that the Directive did not:

(i) Sufficiently tie the type of data to a threat, or categories of individuals;
(ii) Objectively limit an authorities' access and use of the data; or
(iii) Distinguish between categories of data, and objectively attach criteria for how long each category could be held.

Taking all of this into consideration, the Grand Chamber concluded that the Directive did not lay down sufficient safeguards against the risk of abuse of the data or unlawful access to it. There wasn't even any requirement that the data be permanently destroyed at the end of the relevant periods nor for it to be held in the EU. Put simply, the Grand Chamber found that economic considerations determined the security measures, not what was actually required technically or organisationally.

While I found all of this fascinating, and as always, I am grateful to those groups who tested the law for legitimate reasons, the decision cannot help but raise the question, 'What next?'

Data is held by every business to varying degrees. Credit card companies now identify my shopping habits for me (like I didn't know!), travel organisations target me with adverts based on the places I have recently visited via plane, and online cosmetic companies thrust a variety of products at me with monotonous regularity (particularly hair care products!).

The sale/transfer of data about the various habits I have are picked over and analysed by companies in order to tempt me to buy their goods or services. How different is that from what the Grand Chamber has just considered to be unlawful? I can be identified, conclusions drawn about my relationships, social habits identified and so on.

I just wonder, therefore, whether one day the gaze of Human Rights Organisations will shift from Government to big business, and the true extent of the use of data will be played out in a court, somewhere in Europe. Perhaps not. But the safeguards that are in place, the sharing (or not, as the case should be) and the uses made of that data, are probably something that all companies ought to have in mind now and in the not-too-distant future.

Whether Banksy knew or had been tipped off as to the Grand Chamber's decision I'll never know. His timing and choice of subject-matter are, however, quite brilliant.

And while graffiti (or maybe it is called 'wall art' these days), may well constitute some civil (or even criminal) transgression, I don't suppose for one moment, Banksy's at risk of being identified and the safeguard of his human rights breached. At least I hope not. After all, the myths of who he is and what he does in real life are far more romantic than the risk of finding out that he's a long-distance lorry driver from Hull. But whatever Banksy is, he, like the rest of us, deserves sufficient safeguards from unwarranted intrusions in to our lives.