Data Retention in the the EU and the Netherlands

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The Data Retention Directive: will it make a difference?

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- Academic background
  - in Law (LL.M., 2006)
  - and Mathematics (M.Sc, 2002)

- Professional background
  - Co-director and current member of the board of Bits of Freedom

Outline: Law and politics of data retention

EU: History & Current Issues

- Early History
- A European 'pillar game' (Ireland)
- Directive vs. national safeguards (Germany)

The Netherlands: History & Current Issues

- Early history
- Campaign Bits of Freedom
- Issues in current implementation process

Conclusions

EU: History & Current issues

Let's go back in time…

2006, March: Directive 2006/24/EC **(DRD)**

2005, December: Compromise in the EP

2005, September: Proposal by the Commission

2004, April: Proposal for Framework Decision

2002: Amendment to the ePrivacy Directive article 15, which makes DR in MSs possible.

2001: Council Resolution on law enforcement operational needs with respect to public telecommunication networks and services.

1995: Council Resolution on the lawful interception of telecommunications.

1991: Meeting Trevi group.

Council Resolution of 17 January 1995 on the lawful interception of telecommunications Official Journal of the European Communities November 4, 1996 (almost 2 years later).

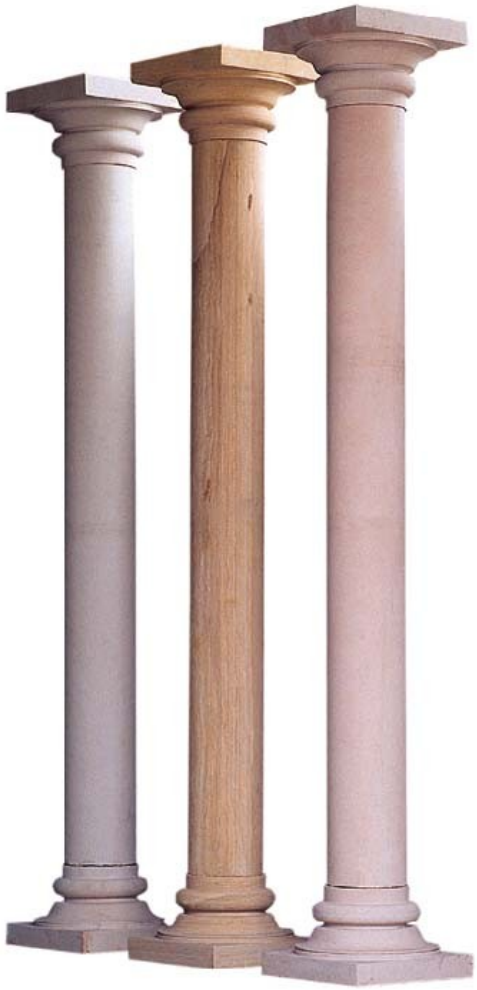
Source of discussion: Trevi Meeting in 1991 and U.S./FBI.

REQUIREMENTS	
1. […] Law enforcement agencies […] require access to the call associated data that are generated to process the call.	✓
1.4. Law enforcement agencies require access to call associated data such as:	
1.4.1. signalling of access ready status;	✓
1.4.2. called party number for outgoing connections even if there is no successful connection established;	✓
1.4.3. calling party number for incoming connections even if there is no successful connection established;	✓
1.4.4. all signals emitted by the target, including post-connection dialled signals emitted to activate features such as conference calling and call transfer;	✓
1.4.5. beginning, end and duration of the connection;	✓
1.4.6. actual destination and intermediate directory numbers if call has been diverted.	✓

Continued

1.5. Law enforcement agencies require information on the most accurate geographical location known to the network for mobile subscribers.	✓
2. […] Call associated data should […] be provided in real-time. If call associated data cannot be made available in real time, law enforcement agencies require the data to be available as soon as possible upon call termination.	✓
3.1. Law enforcement agencies require network operators/service providers to provide call associated data and call content from the target service in a way that allows for the accurate correlation of call associated data with call content.	✓

European Pillar Politics



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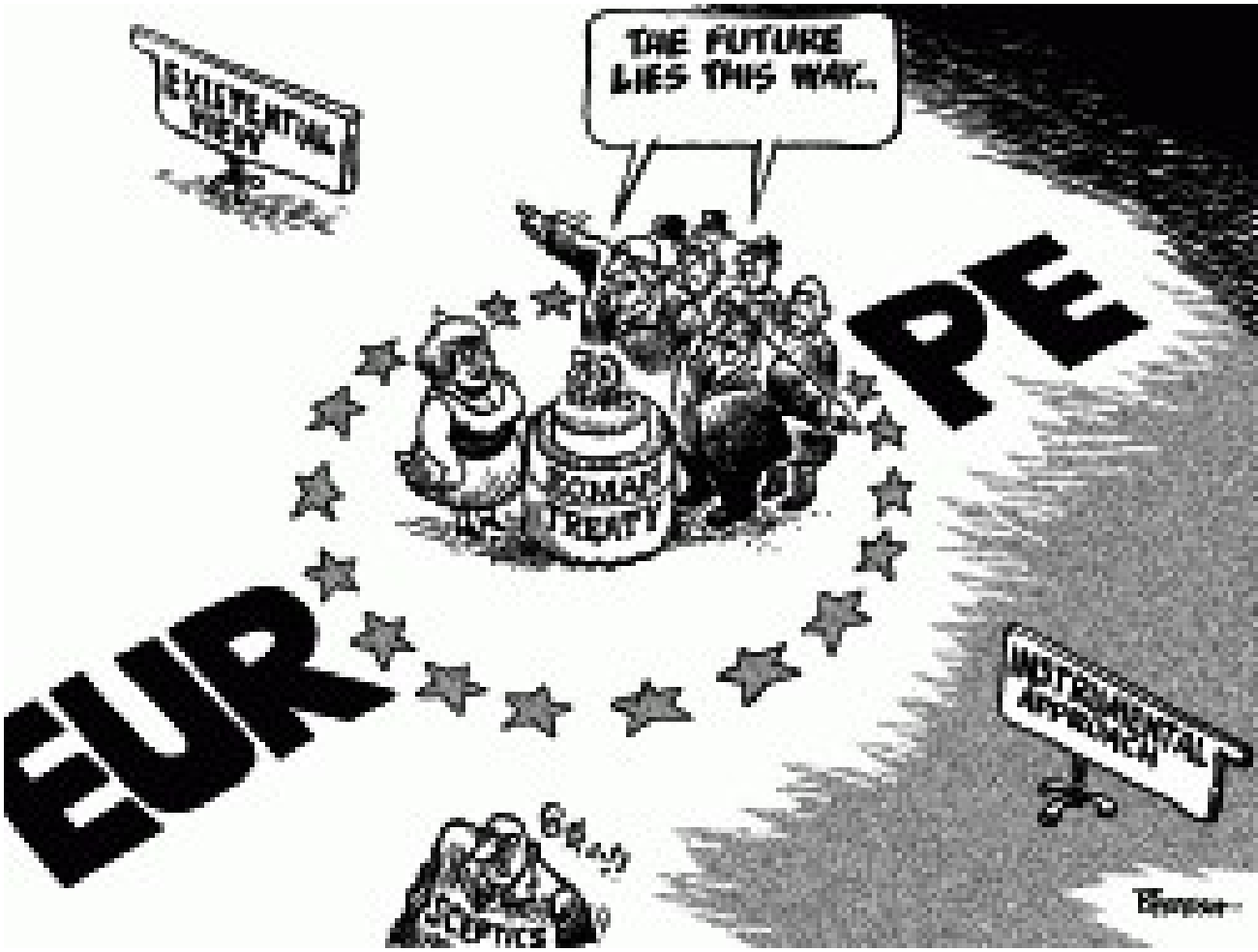
EXISTENTIAL DREAD
THE FUTURE LIES THIS WAY..
ROMAN TREATY
EUR
PE
INSTRUMENTAL APPROACH
EU SCEPTICS

= ?

European pillar politics

- Third Pillar (EU) vs First Pillar (EC)
- Commission vs. Council proposal
- Role of EP (Consultation vs. Co-legislator)
- Circumvention of veto of the Member States?
- DRD is Amendment to 2002 ePrivacy
- Legal basis is Article 95 (Internal Market)
- Goal of the Directive? Harmonisation?
- Ireland's position

Ireland's position:

Ireland submits that the choice of Article 95 of the EC Treaty as the legal basis for the Directive is fundamentally flawed. Ireland further submits that **neither Article 95 TEC nor any other provision of the TEC can provide a proper legal basis for the Directive**. It is primarily Ireland's case that the sole or, alternatively, **the main or predominant purpose of the Directive is to facilitate the investigation, detection and prosecution of serious crime, including terrorism.** In those circumstances, it is Ireland's contention that the only permissible legal base for the measures contained in the Directive is **Title VI of the Treaty on European Union ('TEU'),** in particular Articles 30, 31(1)(c) and 34(2)(b).

Why is this procedural stuff important?

BVerfG, 2008: Zudem kann derzeit nicht ausgeschlossen werden, dass der Europäische Gerichtshof die Richtlinie 2006/24/EG aufgrund der anhängigen Nichtigkeitsklage der Republik Irland (Rs. C-301/06) [...] nichtig erklären wird. **Diese Klage erscheint** angesichts der Erwägungen, mit denen die Klägerin die Kompetenzwidrigkeit der Richtlinie begründet, **zumindest nicht von vornherein aussichtslos** (vgl. dazu ferner Alvaro, DANA 2006, S. 52 <53 f.>; Gitter/Schnabel, MMR 2007, S. 411 <412 f.>; Leutheusser-Schnarrenberger, ZRP 2007, S. 9 <11 ff.>; Westphal, EuZW 2006, S. 555 <557 ff.>; Zöller, GA 2007, S. 393 <407 ff.>). **Sollte der Antrag der Republik Irland Erfolg haben, wäre Raum für eine umfassende Prüfung der angegriffenen Normen durch das Bundesverfassungsgericht am Maßstab der deutschen Grundrechte (vgl.BVerfGE 118, 79 <97 f.>).**

Decision German Constitutional Court

- Federal German Constitutional Court;
- Preliminary decision, 19 March 2008;
- Case supported by 34 000 people;
- Against the German implementation of the DRD;
- Parts of the act are unconstitutional pending review;
- Court has limited access to instances of serious crimes and with a judicial warrant, in case other evidence are not enough.

Outcome?

1. DRD valid. Current situation.

2. DRD invalid (Compare PNR agreements)

- Moved to third pillar but no agreement between member states.
- Involvement of national parliaments
- Unclear what compromise could look like.
- Limited data retention in Germany

Data Retention in the Netherlands: History & Current issues

History

Implementation:

14.05.2008: Plenary session on implementation law

19.09.2007: Proposal implementation law

21.12.2006: Draft proposal

Directive:

Mar. 2006: Motion Parliament: No-Vote in Council

Sept. 2005: Parliament blocks cooperation by Dutch Minister, Council's proposed Framework Decision

Campaign EDRi & Bits of Freedom

Start 2002, End 2005

International and national level

Cooperation between more than 90 organizations

Coordinated by European Digital Rights

Petition: more than 50.000 signatures of which 22.000 Dutch nationals.

There is still a lot of debate about

Data retention term

Which data

Costs and competition in the EC

Proportionality of infringement of Article 8 ECHR

- general character
- effectiveness
- circumvention
- alternatives

Data retention term

- Proposal: 1.5 years for all data to be retained;
- Almost maximum (24 months) and much higher than neighbouring countries (For instance in Germany it is 6 months);
- Arbitrary and no empirical evidence;
- Max Planck Study shows there is no proof of need for older data. (older than a few months)

Which data?

Unclear. Like the list in the Directive it needs much more detail for providers to know what they have to do.

Additional data: location data ***during*** a mobile call

Internet access: **destination of communications**

- Directive: in final version no
- Dutch Law: unclear

Costs and Competition in EC

Like in most EU countries, in the Netherlands there would be no imbursement of costs. The UK and Finland are exceptions.

Costs unclear because obligations unclear.

What does it mean for competition, small ISPs, cross border services?

What is the difference before and after implementation in Mss for Internal Market?

Proportionality of infringement of Article 8 ECHR

General character: society serves law enforcement or law enforcement serves society?

Datamining: risks are high for the innocent

Open letter academia: Control/Police Society

Effectiveness: "at least 99.98 % useless"

No empirical evidence: MP report. Data older than few months never used.

Circumvention: extremely easy.

Alternatives: freezing order.

Conclusions

- DRD has a history of pillar politics and might be illegal.
- DRD implementation in Germany ran into trouble because of fundamental rights.

- In the Netherlands the debate is focused on a variety of issues. Outcome of debate today?

Hopefully: There is still no proof of the value of DR. DR leads to mass serveillance and a waste of time, money and energy at the same time. The best choice for MSs is:

NO OR MINIMUM IMPLEMENTATION