

Analysis



Alberto Miglio

“Advocate General suggests the Court of Justice
uphold its stance on bulk data retention”

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Yesterday, Advocate General Campos Sánchez-Bordona delivered [three Opinions](#) on the legality of bulk data retention for security purposes, suggesting that the Court uphold the strict approach followed in [Tele2 Sverige](#) and in [Ministerio Fiscal](#).

The Opinions relate to four references for a preliminary ruling submitted by the French Council of State, the Belgian Constitutional Court and the UK Investigatory Powers Tribunal, questioning the compatibility of the respective national legislations on data retention with EU law.

In line with the Court’s finding in *Tele2 Sverige*, the AG argues that Directive 2002/58/EC applies to legislation requiring electronic service providers to retain subscribers’ data and to allow public authorities access to it. Although ‘activities concerning public security’ are excluded from the scope of the Directive, he pleads for a strict interpretation of the exception, which should not extend to activity performed by private operators acting under certain obligations imposed by public authorities.

The AG then recalls the criteria elaborated by the Court to assess the lawfulness of data retention and proposes some adjustments and clarifications.

First, he argues that generalised retention of all users’ traffic and location data is *per se* disproportionate, regardless of whether access to that data by public authorities is restricted.

Second, the collection of data of targeted individuals would also be disproportionate if it were broad enough to provide a detailed account of the life of the individuals in question.

Third, while noting that it is for the national legislature to define the exact scope of data retention, the AG cautions against the potential discriminatory effects of targeting specific geographic areas or social groups and suggests several alternative criteria.

Fourth, he argues that a differentiation of time limits for retention is necessary in relation to different categories of data.

Finally, he suggests confirming that access to the data must be subject to prior authorisation by a court or independent authority, and that affected

parties must always be informed, unless this is liable to compromise investigations.

Against this background, it is not surprising that according to the AG none of the three national legislations under scrutiny, all of which provide for generalised and indiscriminate data retention, meets the proportionality test. However, in response to a question raised by the Belgian Constitutional Court, he suggests that the effects of the national legislation could be partially maintained for the time strictly necessary for the legislature to bring it in line with EU law.

The Court of Justice has been under considerable pressure to ease its stance on the lawfulness of bulk data retention, which several Member States perceive to be an important tool in the fight against terrorism and serious crime. Should it follow the AG's Opinions, as is expected, the Court would confirm it takes concerns about mass surveillance seriously and would acknowledge that legislation permitting the retention of electronic communications data needs to be carefully drafted in order to balance fundamental rights and the protection of public security.

The three Opinions are available [here](#) (Joined Cases C-511/18 and C-512/18, *La Quadrature du Net and Others*, in French), [here](#) (Case C-520/18, *Ordre des barreaux francophones et germanophone and Others*, in French) and [here](#) (Case C-623/17, *Privacy International*).

Alberto Miglio is a post-doctoral researcher at the Law Department of the University of Turin and currently visiting researcher at the Brussels Privacy Hub. His research focuses on the extraterritorial application of EU data protection law. His recent publications include 'Enforcing the Right to Be Forgotten beyond EU Borders', in E. Carpanelli, N. Lazzarini (Eds), Use and Misuse of New Technologies. Contemporary Challenges in International and European Law, Springer, 2019, p. 305-326. He is also co-editing a book with Stefano Montaldo and Francesco Costamagna on European Union Law Enforcement: The Evolution of Sanctioning Powers (Routledge, 2020, forthcoming).



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