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Press Release

Constitutional Court has reservations against data retention and turns to the CJEU

The Constitutional Court has reservations that the EU Directive on the Retention of Data could be incompatible with the European Charter of Fundamental Rights. For this reason, the 14 constitutional judges have addressed the Court of Justice of the European Union (CJEU), submitting questions on the interpretation of the Charter of Fundamental Rights of the European Union.

This request for a preliminary ruling has been prompted by applications and/or complaints addressed to the Constitutional Court against data retention. To date, the province government of Carinthia, a telecommunications company employee, and a total of some 11,000 private individuals have turned to the Constitutional Court.

Like the European Convention for the Protection of Human Rights and Fundamental Freedoms and the basic right to data protection which is laid down in the Austrian Constitution, the Charter of Fundamental Rights enshrines the right of every person to their personal data being protected.

The Constitutional Court is aware that data retention is aimed at investigating, establishing and prosecuting severe crimes. "This notwithstanding", the 14 constitutional judges stated in their decision that "reservations persist concerning the duty to retain data as such, and the consequences that necessarily result therefrom".

"In the overwhelming number of cases, data retention concerns persons who do not cause any ground for their data being retained. The authorities capture the data of these individuals and are then in possession of information about their private behaviour. "In addition, there is an heightened risk of abuse", explains Gerhart Holzinger, president of the Austrian Constitutional Court, continuing: "The Constitutional Court is under an obligation to turn to the CJEU if it has doubts on the interpretation of Union law. We have doubts that the EU Directive on Data Retention is really compatible with the rights guaranteed by the Charter of Fundamental Rights of the European Union".

As to the further procedure: This decision to seek a preliminary ruling from the CJEU has a suspensive effect on the proceedings pending with the Constitutional Court in Austria. Once the CJEU has ruled on the questions submitted to it, the Constitutional Court will resume its deliberations. It is impossible to estimate for the time being how long it will take the CJEU to decide on the matter. According to the CJEU's own indications, the average length of proceedings for preliminary rulings is 16.4 months for the year 2011.

While the matter has been referred to the CJEU, data retention remains in force in Austria. The Constitutional Court has in fact no means to provisionally suspend the relevant provisions at its own initiative.

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File number of decision: G 47/12, G 59/12, G 62,70,21/ 12

Annex: Wording of the questions submitted by the Austrian Constitutional Court (ACC) to the Court of Justice of the European Union (CJEU)

*1. On the validity of acts of Union bodies:
"Are Articles 3 to 9 of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 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 compatible with Articles 7, 8 and 11 of the European Union Charter of Fundamental Rights?"*

2. On the interpretation of the Treaties:

2.1. In order to assess the permissibility of interferences, are Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Regulation (EC) No. 45/2001 on the protection of individuals with regard to the processing of personal data by the Community Institutions and bodies and on the free movement of such data to be considered on an equal footing with the provisions of Article 8 (2) and Article 52 (1) of the Charter, in the light of the explanations on Article 8 of the Charter - drafted pursuant to Art 52 (7) of the Charter as guidance on the interpretation of the Charter – which must be duly considered by the Constitutional Court?

2.2. What is the relation between “Union law“ referred to in Article 52 (3) last sentence of the Charter and the data protection directives?

2.3. Given that Directive 95/46/EC and Regulation (EC) 45/2001 lay down conditions and limitations on exercising the right to data protection set out in the Charter, should changes arising from later secondary law be considered when interpreting Article 8 of the Charter?

2.4. In consideration of Article 52 (4) of the Charter, does the principle of providing more extensive protection laid down in Article 53 of the Charter in consequence mean that the relevant limits for permissible restrictions by secondary law should be drawn narrower?

2.5. In view of Article 52 (3) of the Charter, para 5 of the Preamble, and of the explanations on Article 7 of the Charter, according to which the rights they guarantee are the same as those laid down in Article 8 ECHR, is it possible that the case law of the European Court of Human Rights on Article 8 ECHR results in positions on the interpretation of Article 8 of the Charter which may influence the interpretation of the said Article?