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The indiscriminate collection of data by telecom operators remains incompatible with the EU law

At the end of last year, the European Court of Justice (ECJ) in its decision of 21 December in the case *Tele2 Sverige AB* (C-203/15) has explained that the general obligation of telecom operators to preserve the traffic data of the electronic communication service users, including all the data on the persons, electronic communication devices and other related data, is inconsistent with the EU law.

The dispute started on 9 April 2014, when Tele2 Sverige, a Swedish provider of telecom services, informed the Swedish Post and Telecom Authority that, it was going to stop retaining the electronic communications data, as required by the Swedish law on electric communications, and that it was also going to erase data that had been retained so far. Tele2 Sverige explained its decision with the fact that the obligation to retain data in the amount provided by the national legislation is inconsistent with the Charter of Fundamental Rights of the European Union.

What is important here is that already in 2014 the ECJ in its decision on the case *Digital Rights Ireland and Others* (C-293/12) has declared invalid the EU Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The respective directive generally covered, all the persons and all means of electronic communication, as well as all the traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.

In its judgment, the ECJ has concluded that the directive did not contain clear and precise enough rules governing the allowed extent of interference with the fundamental rights stipulated in Article 7 (respect for private and family life) of the Charter of Fundamental Rights of the EU. Therefore, the directive discussed entailed an extensive and serious interference with those fundamental rights without limitations to ensure that such interference is limited only to what is strictly necessary.

In line with its previous practice, the ECJ decided in *Tele2 Sverige AB* case that the following national legal provisions are inconsistent with the EU law:

- provisions regulating the traffic data and location data protection and security, and especially the access of competent authorities to the data stored, without limiting such access in the context of the fight against crime only to cases related to combating serious crime;
- which do not provide that a prerequisite for obtaining access to information is a prior review by the court or an independent administrative authority;
- and which do not require that the data has to be stored on the territory of the EU.

Thus, as of today there are two judgments of the ECJ, which send a clear signal to all the EU member states to amend their national laws, if those still contain an obligation for the telecom operators to preserve all the traffic data of the electronic communications service users.

Also in Estonia, the valid Estonian Electronic Communications Act unrestrictedly obligates the telecom operators to retain the communications data of all the persons. We are dealing with the provisions, which is still inconsistent with the EU law. Although the ECJ did not explicitly say that the retention of the communications data for the purpose of fighting crime as a whole would be fully inconsistent with EU law, but such obligation must nevertheless be limited to what is strictly necessary.

In addition to the interference with the fundamental rights, such data retention requirements are also economically costly for the telecom operators. In addition, a greater

responsibility towards the customers, in connection with the strict data protection requirements is assumed.

Therefore, also in Estonia it is necessary to find a balance between combating crime and obligation to retain data. To this end, regulators should be able to limit the circle of persons whose data telecom operators have to collect.