The European Court of Justice and Security Services - an emerging conflict?

The UK played a leading role in the development of the range of EU programmes for cooperation in the areas of security, counter-terrorism and fighting crime. The Government has recently confirmed its wish to achieve an UK-EU treaty for the continued participation in these areas including the work of Europol and the European Arrest Warrant, albeit outside the direct jurisdiction of the Court of Justice of the European Union[1].

Exchange of data has become central to such cooperation. Amongst relevant data is the "Who? When? Where?" information on communications by persons of interest to intelligence and law enforcement authorities.

A requirement for retention of such data by telecommunications companies for 12 months was introduced by the EU's Data Retention Directive of 2006. This regime prevailed for 8 years, but in *Digital Rights Ireland*[2] the Directive was held by the CJEU to be incompatible with the EU Charter of Fundamental Rights and so invalid.

The UK Parliament then hastily enacted the Data Retention and Investigatory Powers Act 2014 in order to retain a basis in law for the obligation of retention in the UK.

Two Members of Parliament brought proceedings for a declaration that the retention obligation in the 2014 Act should be held of no legal effect, on the grounds that it was precluded by EU law. The Court of Appeal was unpersuaded by this argument but referred the question to the CJEU[3].

By *Tele2 and Watson* in December 2016 the CJEU held that EU law does preclude a member state from domestic legislation imposing a general obligation to retain data[4]. The Court further held that any data so acquired must be retained within the EU. The Court rejected the advice of its Advocate-General, who had inter alia cited the view of the French Government that access to communications data had been useful in its investigations into the terrorist attacks in France in 2015.

The 2014 Act has since January 2017 been replaced by new legislation, and currently bulk data is collected by security authorities under an older power in the Telecommunications Act 1984. The implication of *Tele2 and Watson* is that these provisions should also be held to be of no effect as contrary to EU law.

In July 2017 the CJEU gave an Opinion[5] that the Agreement between Canada and the EU on the transfer of Passenger Name Records was incompatible with the Charter.

However, these CJEU decisions received a frontal challenge from the UK's Investigatory Powers Tribunal in September 2017 expressing the opinion that the EU has no competence in

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1 "Security, Law Enforcement and Criminal Justice: A Future Partnership Paper", published by DEXEU and HJOme Office, September 2017

2 *Digital Rights Ireland v Minister for Communications* (2014) C-293/12

3 *Secretary of State for the Home Department v Davis & Watson* [2015] EWCA Civ 1185

4 *Tele2 Sverige v Post-och, Secretary of State v Watson* (2016) C-203/15 and C-698/15

5 Opinion 1/15 of the Grand Chamber

respect of national security[6]; the Tribunal made a reference to the CJEU.

The European Court of Human Rights has taken a different approach from the CJEU: it has held that bulk retention of data involves no necessary incompatibility with the Convention provided there is effective independent oversight[7].

The problems caused by these Luxembourg Court decisions will take a slightly different form upon the UK's exit from the EU, but will not disappear. The UK will not be able to ignore EU law: indeed, the Government is already in the process of implementing the EU's new data protection framework, and plans to retain this after Brexit[8]. But data exchange between British and French security authorities could face a prohibition.

This meeting will address the questions:-

- Is communications data of real value to intelligence authorities?
- How important is exchange of data between Western allies?
- How can intelligence activities be reconciled with the emerging CJEU jurisprudence?

[6] *Privacy International v Secretary of State for Foreign Affairs* UKIPTrib IPT/15/110/CH, 8 Sept 2017

[7] *Weber & Saravia v Germany* (2008) 46 EHRR SE5; *Kennedy v UK* (2011) 52 EHRR 4

[8] "The Exchange and Protection of Personal Data: A Future Partnership Paper", published by DEXEU, August 2017