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Data Retention by OTT Service Providers and the Decision of the Court of Justice of the European Union in the matter Tele2 Sverige AB

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IT Law Newsletter Switzerland

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1 Revision of the Lawful Interception Ordinance

The Lawful Interception Act has been revised recently and it is expected that it will enter into force on 1 January 2018. The final wording of the implementing Ordinance is still pending.

With the revision of the Lawful Interception Act, the personal scope of application will be extended to OTT service providers¹. According to the first draft of the Ordinance, major OTT service providers will have to provide the Surveillance Authority with

- identification data,
- content data in real time, and
- traffic data in real time, retroactively for a period up to 6 months.

This could turn out to be too broad in the light of the Decision of the Court of Justice of the European Union (CJEU) in the matter Tele2 Sverige AB (et al.) of 21 December 2016.

2 The Decision of the CJEU in the matter Tele2 Sverige AB

Swedish Lawful Interception Act ("Swedish LIA") has been revised in order to implement the EU-Directives and had foreseen that telecommunications service providers, such as Tele2 Sverige AB ("Tele2") had to retain all traffic and location data on all devices in relation to its subscribers and registered users for a

duration of 6 months. Tele2 challenged the order received, obliging it to retain data. The Swedish court raised questions with the CJEU and the CJEU had to decide whether the data retention foreseen by the Swedish LIA was compliant with the EU directives and with the Charter of Fundamental Rights of the European Union ("EU-Charter"), in particular the rights to privacy (art. 7), protection of personal data (art. 8) and the freedom of expression (art. 11).

In essence, the CJEU found that the retention of all traffic and location data on all devices and in relation to all of the provider's subscribers and registered users was a serious interference in the fundamental rights and could only be justified for the purpose of fighting serious crime. The CJEU even found that, while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, how fundamental it may be, it cannot by itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight. A national legislation has to provide for differentiation, limitation or exception according to the objective pursued and needs to require a relationship between the data which must be retained and a threat to public security.

The decision of the CJEU provides the following principles:

- the purpose for retention must be limited to fighting serious crime
- the retention must be limited to what is strictly necessary, i.e. the retention of data must be lim-

¹ For more details, please refer to the newsletter "Upcoming Revisions in the Telecommunication Sector" of 1 September 2017, available under www.thouvenin.com.



ited with respect to the categories of data to be retained, the means of communications affected, the persons concerned and the retention period adapted.

- access to retained data must be subject to prior review by a court or an independent authority
- data subject must be informed as soon as possible.

3 Conclusion

Since Switzerland is not part of the EU, compliance of Swiss legislation with EU law is not subject to review by the CJEU and the EU-Charter is not applicable either. However, the Decision of the CJEU in the Tele2 matter provides guidance when it comes to limit fundamental rights such as the right to privacy and the freedom of expression granted by the European Convention on Human Rights (ECHR, art. 8 and 10).

Because Swiss legislation will be interpreted as to be compliant with the ECHR and taking into account that the principles set out by the Decision of the CJEU in the matter of Tele2, the OTT service providers should use any opportunity to open the dialogue with the regulator and, eventually, challenge a request for data retention to come, as this could limit their obligation to retain a tremendous amount of data.

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