# Response to the Commission's call for evidence for an impact assessment on retention of data by service providers for criminal proceedings

## Introduction

We want to thank the Commission for the opportunity to provide feedback in the call for evidence on the impact assessment on the retention of metadata by service providers for criminal proceedings[1].

Our organization Epicenter.works started its work 15 years ago as the working group on data retention Austria with the sole purpose of eradicating the indiscriminate mass surveillance of the EU data retention directive[2] and its national implementation in Austria. In 2014 we succeeded with our high court challenge at the ECJ[3] and national Constitutional Court. For over a decade Austria strived and succeeded in its endeavor to uphold public order, fight crime and keep people save – all without data retention.

## Data Retention is illegal and dangerous

Any form of indiscriminate retention of personal information for the purpose to use this data in the investigation of later offenses goes against the fundamental rights of large parts of the population and undermines the presumption of innocence. High court jurisprudence has repeatedly found such measures to be in violation with fundamental rights. While the Commission chooses to ignore these legal facts, the courts will certainly remember and court challenges are inevitable. Any attempt to re-introduce data retention obligations in EU law is destined to fail and will further erode the trust of citizens in the European Unions obligation to uphold and protect the fundamental rights of people.

Since the court rulings annulling data retention measures the digitization of our lives has only intensified. The intrusiveness of surveillance obligations for private companies will lead to more areas of life coming under scrutiny and fewer private means of expression remaining available to people. The liberal democratic foundation of our society risks being undermined by the increased surveillance pressure that data retention obligations introduce.

## Data Retention is not necessary to fight crime

The experience of Austria provides a valuable data point in the debate about data retention. The country was late in the implementation of the data retention directive with national legislation being enacted in 11. April 2011 that came into force in 1. April 2012. While the Austrian police made use of

1 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14680-Impact-assessment-on-retention-of-data-by-service-providers-for-criminal-proceedings-_en

2 Directive 2006/24/EC

3 C-293/12 und C-594/12

the retained data on an almost daily basis, the majority of offenses it was used for were petty crimes and in the few cases of serious crime the retained data did not help investigators[4].

In the ECJ court case the Austrian government could neither substantiate the usefulness of data retention nor point towards serious offenses that the surveillance measure helped solve or prevent. This lead to critical questions from the judges that were further exemplified with a lack of statistics about the usefulness of the measure by the Ministry of Justice.

In June 2014 the Austrian Constitutional Court followed the ECJ judgement and annulled the national data retention legislation. Hence, for over a decade Austria has no data retention measure in place, while in 2018 a quick freeze provision (see below) came into force. The criminal statistic of the country speak a very clear picture: Austria is not only one of the safest countries of the world,the percentage of solved crimes has even peaked in recent years[5].

## Constitutional Alternatives

Since 2015 no political party in Austria has even called for the re-introduction of data retention. Even in light of terrorist threats the debate has steered away from any form of indiscriminate mass surveillance obligation with the correct justification that such measures would not hold up in court.

What Austria did do was the establishment of a targeted surveillance measure that links the retention of meta-data by service providers causally to the geographical and time scope of a reasonable suspicion of an offense. This quick freeze provides a constitutional and targeted alternative to data retention and should be the focus of the work of the Commission.

## Rule of Law Crisis

Instead of the proposed measures the Commission should immediately initiate infringement proceedings against all EU member states that still have data retention measures active in their country. We witness an unprecedented ignorance of the Commission towards a clear violation of citizens fundamental rights by data retention provisions still being allowed to exist and peoples rights being violated. The ECJ has repeatedly clarified that there are very strict limits for these types of surveillance measures and found many of them illegal, but only when a challenge was brought for the court. Yet, the Commission was complicit in the systematic refusal of Member States to uphold the Charter of Fundamental rights by not acting after the multiple ECJ rulings on this question.

We are at a critical moment for the European project in which upholding our values will decide about the future of the Union. If the Commission really aims to reintroduce the most disputed and heavily criticized surveillance measure in its history, it will do so against the explicit opinion of the courts, academics and civil society. We therefore urge the Commission to abort any plans of reintroducing data retention, explore alternatives like quick freeze and initiate infringement proceedings against any member state that has failed to revoke their data retention legislation..

4 https://www.derstandard.at/story/1385170781207/oesterreich-vorratsdatenspeicherung-gegen-dealer-diebe-und--zigarettenfaelscher

5 https://www.bundeskriminalamt.at/501/start.aspx