Belgium Introduces Broad Data Retention Obligations

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The Belgian government recently issued a Royal Decree which lays down broad data retention obligations for telecom, internet access and webmail providers. The Royal Decree (of September 19, 2013 Executing Article 126 of the Electronic Communication Act of June 13, 2005 – hereinafter: "Royal Decree") transposes the EU Data Retention Directive (Directive 2006/24/EC of March 15, 2006 – hereinafter: "Directive") into Belgian law. After establishing the general framework of the data retention obligations in an Act earlier this year (Act of July 30, 2013 amending articles 2, 126 and 145 of the Electronic Communication Act of June 13, 2005 and article 90 decies of the Code of Criminal Procedure – hereinafter: "Act"), the Royal Decree now determines what information needs to be retained by each type of electronic communication provider and for how long.

Scope

The data retention requirements apply to companies providing or reselling any of the following electronic communication services (or the underlying networks for these services) in Belgium: (i) phone services; (ii) mobile phone services; (iii) internet access services, and (iv) email and internet telephony services.

Information to be Retained

Generally, the electronic communication providers need to retain (i) identification data regarding the end users, as well as the communication equipment and the communication service they used; and (ii) traffic and location data. Precisely what information falls within these general data categories is further specified in the Royal Decree.

When assessing the specific information which needs to be retained, it is remarkable that the Royal Decree requires electronic communication providers offering services in Belgium to retain significantly more information than the Directive.

For example, invoicing data such as the end user's invoicing address, as well as the means and time of payment are also subject to retention obligations. The Belgian government justified the choice to go further than the Directive mainly by stating that (i) the minimum legal framework provided by the Directive in 2006 does not cover all the information which police and judicial authorities need for the detection, investigation and prosecution of crimes, and (ii) the Directive is no longer up to date taking into account the technological and economic developments which have taken place since its adoption.

The data retention requirements are limited to information which is actually generated or processed by said providers. This means that they are not required to process additional information if they do not need it to provide the electronic communication services. Furthermore, communication content falls outside the scope of the data retention obligation.

Retention Period

The retention period stipulated in Belgian legislation also deviates from the retention period set forth in the Directive. Whereas the Directive provides that the EU member states should ensure that

the data should be retained for a minimum period of six months and not more than two years from the date of the communication, the Act and Royal Decree provide that (i) end user identification data, as well as the electronic communication service and communication equipment identification data, should be retained from the moment of subscription to the service, until twelve months after the last inbound or outbound communication effected via this service; and (ii) traffic and location data should be retained for twelve months after the date of the communication it concerns. During this period, electronic communication providers need to ensure that the data is accessible from Belgium to the Belgian police, public security and intelligence services, and justice authorities, as well as the Ombudsman for telecommunication. Access must be provided upon simple request, without any restrictions, and without undue delay.

Accompanying Obligations

In addition to stipulating data retention requirements, the Act and the Royal Decree also determine how providers, as data controllers, should handle the retained data. Specific stress is put on adequate technical and organizational measures to ensure the quality and security of the retained data. Further, such data should be promptly deleted upon expiration of the retention period. Internal access to the retained data should be limited to the members of the "Justice Coordination Cell" (a body which each electronic communication provider needs to establish in Belgium and which is responsible for physically handling the Belgian judicial authorities' information requests). One of the members of the "Justice Coordination Cell" should be appointed as data protection officer, to ensure that the retained data is processed in compliance with the law.

Furthermore, the Royal Decree requires electronic communication providers to annually provide certain aggregated data (e.g. data concerning the number of information requests) to the Belgian Telecom Authority (the Institute for Postal Services and Telecommunications).

Conclusion

Electronic communication providers should prepare for the data retention obligations and related information security requirements, to ensure compliance by October 9, 2014.

The obligation for electronic communication providers to retain significantly more information than required under the Directive, not long after the PRISM affair and in the wake of a major hacking case at one of the biggest telecom providers in Belgium, has led to serious criticism of the new law in Belgium, including from human rights organizations. It is possible that one of these critical organizations will challenge the legality of the new retention obligation in the Belgian Constitutional Court on the basis that it constitutes a disproportionate violation of the right to privacy as provided in article 8 of the European Convention on Human Rights and the article 22 of the Belgian Constitution.

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