

CAIDP Update 2.33 (Sept. 13, 2021) – European Court Data Retention Decisions Will Implicate AI and Fundamental Rights

This week the European Court of Justice will review two cases concerning data retention, the obligation of companies to keep the personal data of their customers for subsequent review by police agencies. In one case, the Court will examine a German law that requires the mass retention of personal data for Internet connections and location. ([Cases C-793/19](#) and [C-794/19](#)). In a second case, the European Court will examine a French law regarding evidence obtained through the unlawful retention of personal data ([Case C-339/20](#)). In a recent decision on data retention in Estonia, the Court established “red lines” for access to traffic and location data for law enforcement purposes but did not establish a general ban on data retention. ([Case C-746/18](#))

Data retention has a long and controversial history in privacy law as many Constitutional courts have found that the collection of personal data without individualized suspicion is contrary to democratic values. Nonetheless, law enforcement and intelligence agencies have successfully argued for data retention mandates, presumably to identify future threats to public safety.

Data retention is also a key issue in AI policy. “Predictive policing” is one of several law enforcement techniques that builds on the extensive collection of personal data gathered from private companies with the aid of data retention mandates. AI policy frameworks typically do not include provisions to minimize the collection of personal data. There are brief mentions of data retention in Articles 17 and 54 of the proposed EU AI Act. However, privacy laws, such as the GDPR and even the American “[Video Privacy Protection Act](#)” include limitations on data retention.

So, data retention is one of the areas where AI policy frameworks require preexisting privacy laws to ensure the protection of fundamental rights.

As the first *CAIDP Update* noted, the decisions of the European Court of Justice concerning data protection have broad influence on digital policy and AI. The Court’s decision in the [Schrems II](#) case occurred when there “growing concern about the fairness of Artificial Intelligence techniques, the unregulated use of face surveillance, and the recognition that mass surveillance curbs democratic freedoms and solidifies authoritarian governments.” ([CAIDP Update 1.1](#))

Decisions by the European Court of Justice will continue to influence the design and impact of AI systems, particularly in the law enforcement realm.