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From:	General Secretariat of the Council
To:	Delegations
N° prev. doc.:	5206/2017 REV 3
Subject:	Data retention - Situation in Member States

Delegations will find in the Annex a table outlining the status of legislation on data retention and relevant court cases on data retention in the Member States as noted to date. The table in Annex provides an update of the table annexed to document 5206/2017 REV 3 on the basis of contributions of: BE, CZ, DK, DE, FR, HR, CY, HU, MT, NL, AT, PL, PT, RO, SE, UK.

This revised version includes additional updates from NL and RO.

Data Retention

State of play in the Member States

Member State	DR legislation in force	Status of the legislation	Relevant Court cases
Austria Up-dated on 5 March 2019	No	Currently, AT neither has any DR legislation in force, nor is AT preparing any new DR law. Unlike the Data retention table, distributed on 27 Nov. 2017 (WK 5206/2017 ADD 3), indicates, AT never intended to install a data retention regime since this regime was repealed by the Austrian Constitutional Court in 2014 following the decision of the ECJ in Digital Rights Ireland. Since then there is no data retention regime in force in AT. However, law enforcement authorities can access data that has been stored by the providers for billing purpose, where the retention period is, in general, three months. Under EE presidency, AT presented a different model ("Quick Freeze") which was not a legislative proposal concerning DR, but rather gives an opportunity to refrain from deletion of data stored for billing purposes for a maximum time period of 12 months, which was subsequently wrongly inserted in the data retention table in document WK 5206/2017 ADD 3 as a "DR legislative proposal".	Most parts of the Austrian law on data retention were declared invalid by the Constitutional Court on 27 June 2014 following the Ireland Digital Rights judgement of 8 March 2014.

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Belgium Up-dated on 5 March 2019	Yes	• Law of 29 May 2016 on the collection and retention of data in the telecommunications sector (<i>Loi relative à la collecte et à la conservation des données dans le secteur des communications électroniques</i>) The Law entered into force on 28 July 2016. • Code of criminal procedure (<i>Code d'instruction criminelle</i>): articles 46bis, 88bis, 464/13 and 464/25 • Law of 30 November 1998 on the intelligence and security services (<i>Loi organique des services de renseignement et de sécurité</i>): articles 13, 18 §3, 18 §8, 18/3 §2 and 18/8 • Law of 13 June 2005 on electronic communications (<i>Loi relative aux communications électroniques</i>): articles 126 and following, as well as 145	• In the aftermath of the decision of the Court of Justice of the EU in the case C-203/15 <i>Tele2 Sverige</i> on the 21st of December 2016, four claims for annulment of the new Belgian legislation have been introduced before the Constitutional Court. On the 19th of July 2018, the Constitutional Court referred three questions to the Court of Justice of the EU for further interpretation (case C-520/18). It concerns (1) whether a broader objective would justify a general data retention scheme; (2) whether positive obligations imposed on the government on the basis of the Charter would justify a general data retention scheme; and (3) whether the effects of the national legislation could be temporarily uphold in case of a complete/partial annulment. Fourteen Member States and the European Commission have submitted written contributions. A hearing is expected in the course of 2019.

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Bulgaria Up-dated on 29 November 2017	Yes	- Electronic Communications Act Prom. SG 41 of 22 May 2007, last amended and supplemented by SG 103 of 27 December 2016 - Criminal Procedure Code Prom. SG 83 of 18 October 2005, last amended and supplemented by SG. 13 of 7 February 2017	The previous Bulgarian data retention law was declared incompatible with the national constitution by the constitutional Court on 12 March 2015.
Croatia Up-dated on 5 March 2019	Yes	- Electronic Communications Act. - Criminal Procedure Code. - Police Duties and Powers Act. - Law on the Security system and Intelligence of Republic of Croatia. - National Defence Act. - Regulation on the obligations in the field of national security of the Republic of Croatia for legal and natural persons in telecommunications - Regulation on Military Police Affairs and Enforcement of Certified Officials of Military Police. <i>In our national legislative no changes were done so far, but we are in the process of analysing implications of ECJ judgments on the national legislation.</i>	

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Cyprus Up-dated on 5 March 2019	Yes	Following the judgement in the case of Digital Rights Ireland the national legislation has been upheld by a Supreme Court's Judgement in October 2015. Although the national law has not been challenged before the Supreme Court after the issuing of the judgement in Tele2 Sverige Case, an interim judgment of the Assize Court issued in January 2019 referred to the issue in the following context: The defense lawyer objected to the filing of digital evidence containing telecommunication data of the defendant by the prosecution, alleging that the data was kept illegally by the internet service provider (isp) thus violating the right to private communication. To support his position the defense lawyer referred to the judgement in Tele2 Sverige. The objection was dismissed by the Assize Court on the ground that the national law provides for all necessary safeguards to the right to private communication explaining the following in its judgment: - Both the retention and the access to telecommunication data in Cyprus under the relevant legislation, Law 183(I)/2007, are subject to strict and thorough checks by national competent authorities. The retention of data is under the supervision of the Commissioner for the Protection of Personal Data and access to data is permitted only,	

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		following a request by a police investigator and not by any other public body. - The access to data is restricted to serious criminal offences punishable with a term of imprisonment of at least five years. Before any application is filed to the Court, the Attorney General's consent must be obtained and the application must be heard by a Senior District judge who might reject or grant the application. - The European Court's suggestion to retain telecommunication data in certain geographical areas cannot be implemented in Cyprus having in mind the way crime is committed in Cyprus and in particular the nature and the place where offences are committed, since the serious criminal activity can be noted in all areas under the control of the legal government in the Republic of Cyprus. - Furthermore, the retention of data on the basis of geographical areas with increased criminality might be rendered as discriminatory to the citizens of that area taking into consideration that the isp would not know in advance who will commit crime and therefore would be obliged to retain also the data of law abiding citizens in that area. Despite the above mentioned, it is stressed that the issues arising from the judgment in Tele2	

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		Sverige have not been examined conclusively by the Supreme Court in Cyprus. Lastly, it is stressed that Cyprus is in favour of the development of an EU regime on data retention, in line with the requirements of the case law of the Court of Justice of the EU, while taking into account the needs of the competent authorities in the fight against serious crime in the digital age.	
Czech Republic Up-dated on 5 March 2019	Yes	• Electronic Communications Act • Code of Criminal Procedure, Section 88a	The current legislation is being challenged before the Constitutional Court.
Denmark Up-dated on 5 March 2019	Yes	• Administration of Justice Act, Act no 1255 of 16 November 2015, Chapter 71 • Executive Order No. 988 of 28 September 2006 on the retention and storage of traffic data by providers of electronic communications networks and electronic communications services, amended by Executive Order no. 660 of 19 June 2014 (following the 2014 Digital Rights Ireland judgment) • Guidelines for the Executive Order on the retention and storage of traffic data by providers of electronic communications networks and electronic communications services	The Danish rules on data retention (executive order no. 988 of 28 September 2006) are currently being challenged before the Eastern High Court. The case has been postponed – initially until 1 September 2019 – due to the pending case C-520/18 at the ECJ.

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Estonia Up-dated on 29 November 2017	Yes	- Electronic Communications Act based on Directive 2006/24/EC concerning data retention obligation and retention criteria by telecommunication service providers - Several other national legal acts set the access criteria, prior authorization and other criteria for access. For example, access and use of retained telecom data is regulated in the Criminal Procedure Code. For misdemeanors procedure, it's the Code of Misdemeanor Procedure etc. Access to the retained data is allowed in different procedures and slightly different rules and criteria apply.	
Finland Up-dated on 29 November 2017	Yes	- Information Society Code 917/2014, sections 157- 159 and 322 - The Act refers to the Police Act, the Border Guard Act (578/2005), the Act on the Processing of Personal Data by Border Guards (579/2005), the Customs Act (1466/1994) and the Coercive measures Act (806/2001). - Assessment of the data retention legislation was assigned by the National Parliament in early 2017. The report of the Working Group established by the Ministry of Transport and Communications was published on 22 June 2017.	

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France Up-dated on 5 March 2019	Yes	• Code des postes et des communications électroniques, articles L34-1 et L39-3 et les dispositions réglementaires correspondantes R10-12 à R10-22 et D 98-7 du même code. • Loi n 215-912 du 24 juillet 2015 relative au renseignement. • Code de procédure pénale, articles 60-1, 60-2, 77-1-1, 99-3, 706-95-4 et 706-95-5 et les dispositions réglementaires R 15-33-67, R 15-33-68 et R 213-1. • Article L83 du livre des procédures fiscales. • Article 65 du code des douanes remplacé par l'article 65 quinquies du code des douanes (article 14 de la loi n° 2018-898 du 23 octobre 2018 relative à la lutte contre la fraude). • Loi n 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement • Loi n 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (LCEN) et son décret d'application n 2011-2019 du 25 février 2011 relatif à la conservation et à la communication des données et notamment son article 6.	• Following the Tele2 judgement, 2 French requests for preliminary ruling are pending before the ECJ (C-511/18 and C-512/18). Those cases have been brought by the French administrative Supreme Court on July 26th. • On February 15th, the French constitutional court has ruled that former legislation on the access to metadata by customs officers during criminal procedures was unconstitutional. The legislation which has been overruled by the constitutional court had already been repealed by a new one before this decision (see "status of legislation").

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Germany Up-dated on 5 March 2019	Yes	• Law on the introduction of an obligation to store and a maximum period to retain traffic data (Gesetz für Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten) • The law entered into force on 18 December 2015. The storage obligation became effective on 1 July 2017.	<u>Constitutional Court</u> The current legislation is being challenged before the German Constitutional Court (several constitutional complaints). Requests for interim decisions in relation to these complaints have been denied in July 2016 and in April 2017, respectively. <u>Administrative Courts</u> A complaint brought forward by an Internet Access Provider – directed against the obligation to store internet traffic data only – is pending at the Federal Administrative Court. After the corresponding request for interim relief has been denied in February 2017 by the Administrative Court Cologne, the Higher Administrative Court for North Rhine-Westphalia granted the appeal against that decision and ruled that the provider is not obliged to store data until the main proceedings are concluded. It based its decision on the notion that in light of the Tele2 judgment the German legislation on data retention would clearly be incompatible with EU law. The court acknowledged that the current storage

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			obligation is more restrictive in comparison to the previous system. It concluded, however, that these restrictions do not warrant a different assessment than that provided by the Tele2 judgment regarding the SE and GB legislation. Following the decision of the Higher Administrative Court, the Federal Network Agency announced that it will abstain from enforcement measures regarding the storage obligations and that it won't impose fines for non-compliance with the storage obligations until main proceedings are concluded. The Administrative Court Cologne followed the decision of the Higher Administrative Court on 20. April 2018. The appeal against this decision is pending at the Federal Administrative Court. Another corresponding complaint has been filed by another Internet Access Provider (Telekom Deutschland GmbH). It was parallel ruled by the Administrative Court Cologne. The appeal against this

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			decision is pending at the Federal Administrative Court as well.
Greece Up-dated on 29 November 2017	Yes	Act 3917/2011 (implementing Directive 2006/24)	
Hungary Up-dated on 5 March 2019	Yes	- Act C of 2003 on Electronic Communications (Data shall be retained for 12 months as a general rule, and for 6 months in case of unsuccessful calls.) - Act XC of 2017 on Criminal Proceedings (The act has entered into force on 1 July 2018 and introduced the requirement of prior review by the prosecutor when investigating authorities request data from service providers within the criminal procedure.) - Act XXXIV of 1995 on the Police - Act CXXII of 2010 on the National Tax and Customs Office - Act CXXV of 1995 on the National Security Services - Government decree 180/2004 (V.26) on electronic communications networks and bodies and agencies authorised to conduct covert investigations on cooperation between organisations - Under the coordination of Ministry of Interior an expert group on data retention has been established at a national level in the beginning of May 2017 in cooperation with the ministries, organisations and authorities concerned. The main task of the group is to	

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		analyse and assess the impacts of the Tele2 judgement on the existing Hungarian legislation and based on the practical experiences to draft possible solutions regarding the way forward with amending current legislation. The current legislation, in relation with the Tele2 judgement, has not been amended until this time. No court decision has been delivered so far in relation with the current national regulation. A complaint has been submitted to the Constitutional Court on 26 July 2016, which found it eligible for further examination. No decision has been made yet.	
Ireland Up-dated on 29 November 2017	Yes	• Communications (Retention of Data) Act 2011 • On 3 October 2017, the Minister for Justice and Equality published the general scheme of the Communications (Retention of Data) Bill 2017. The proposals take account of evolving ECJ jurisprudence.	
Italy Up-dated on 29 November 2017	Yes	• Legislative Decree n. 109/2008 • Legislative Decree n. 7 of 18 February 2015 (confirmed by law n. 43 of April 17, 2015)	
Latvia Up-dated on 29 November 2017	Yes	• Electronic Communications Act (Article 71) • Criminal Procedure Act (Article 192) • Cabinet Regulation No 820 of 2007	

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Lithuania Up-dated on 29 November 2017	Yes	- Electronic Communications Law No IX-2134 of 15 April 2004 (Articles 65, 66, 67 and 77) - Code of criminal Procedure (Article 154) - Law on Criminal Intelligence No XI-2234 of 2 October 2012 (Article 6) - Law of the Republic of Lithuania on Cyber Security No XII-1428 of 11 December 2014 should also be pointed out (Articles 12-16)	
Luxembourg Up-dated on 29 November 2017	Yes	Loi modifiée du 30 mai 2005, relative aux dispositions spécifiques de protection de la personne à l'égard du traitement des données à caractère personnel dans le secteur des communications électroniques et portant modification des articles 88-2 et 88-4 du Code d'instruction criminelle	
Malta Up-dated on 5 March 2019	Yes	Subsidiary Legislation 440.01 Processing of Personal Data (Electronic Communications Sector) Regulations of 15 July 2003 (last amended by Legal Notice 429 of 2013)	In 2018, three constitutional cases were filed wherein the applicants challenged Legal Notice 198 of 2008 (the subsidiary legislation transposing Directive 2006/24/EC into Maltese legislation). All three cases are still at first instance level.

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Netherlands Up-dated on 10 April 2019	No	- The Data Retention Act of 1 September 2009 is no longer applicable following a ruling of the the Hague Civil Court of 15 March 2015 - Proposal of 13 September 2016 amending the Telecommunications Act and the Criminal Procedures Act in view of the retention of data processed in the context of providing public telecommunication services and public telecommunication networks (<i>Voorstel van wet van 13 september 2016 tot Wijziging van de Telecommunicatiewet en het Wetboek van Strafvordering in verband met de bewaring van gegevens die zijn verwerkt in verband met het aanbieden van openbare telecommunicatiediensten en openbare telecommunicatienetwerken</i>) - In March 2018 it was announced that the law proposal made in 2016 was to be amended to be in conformity with the Tele2 judgment. The new proposal will contain an obligation to retain subscriber data. Next to this the Dutch government started a scientific research into the ways to overcome the attribution problem that arises from the use of CGNAT.	
Poland Up-dated on 5 March 2019	Yes	Telecommunications law of 16 July 2004 (Section VIII – Obligations as regards defence, national security, internal security and public order) (Articles 180a-180e)	Judgement of the Constitutional Tribunal of 30 July 2014 (K 23/11) on catalogue of data on the individual, collected via electronic means in the course of operational surveillance; data destruction requirements.

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		- Regulation of the Minister of Infrastructure of 28 December 2009 with regard to the detailed list of data, the categories of the providers of publicly available telecommunications services or public networks that are obliged to retain and store the data - Law of 15 January 2016 amending the Law on the Police and other certain Laws - Law of 16 November 2016 on the National Revenue Administration - Code of Criminal Procedure (Articles 218, 218a, 218b) - Regulation of the Minister of Justice of 28 April 2004 on the means of technical preparation of information systems and networks for the collection of lists of phone calls and other communications and the means of securing IT data	
Portugal Up-dated on 5 March 2019	Yes	Law No 32/2008 of 17 July transposing Directive 2006/24/EC	<u>Judgement of the Constitutional Court no. 420/2017, of 13 July 2017</u>: The Portuguese Constitutional Court was called upon to decide whether specific provisions of Law 32/2008, of 17 June, were in conformity with the Portuguese Constitution. The question posed to the Constitutional Court was specifically whether the duty imposed on the providers of publicly available electronic communications services or of a public communications

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			network to retain, for the period of one year from the date of the conclusion of the communication, data regarding the name and address of the subscriber or registered user to whom the user ID was attributed at the time of the communication violated the right to secrecy of correspondence and other means of private communication and the right to privacy of personal and family life enshrined in the Constitution. The Constitutional Court declared that the relevant provisions do not contradict the Constitution. Further to this, the Constitutional Court concluded that the ECJ's reasoning in the Ireland Digital Rights judgement of 8 March does not apply to Law 32/2008 and, in this regard, does not provide sufficient grounds to invalidate it. In fact, this law densified the Directive by regulating the procedure of retention and access to the data by the authorities and establishing adequate safeguards.
Romania Up-dated on 14 March 2019	Yes	• Law No 235/2015, amending Law No 506/2004, introducing rules regarding access of competent national authorities to retained data (notably Articles 5 and 12¹) • Law No 75/2016, amending Law No 235/2015 and Government Emergency Order No 82/2014 (amending and supplementing Law	By Decision no 589/2017, the Constitutional Court dismissed the constitutional challenge of art. 12¹ of Law 506/2004, amended, regarding the retention regime of data. According to paragraphs 30 – 32 of the aforementioned judgement, the Court found that “the legislative action provided by art. 12¹ of

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		No 135/2010 on the Criminal Procedure Code (notably Articles 138 and 152). • Law no. 363/2018 transposing Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data	Law 506/2004 does not impose an excessive burden on the objective to be attained since the access of the criminal investigation bodies is conditional, in all cases, by the prior control carried out by a court, which may refuse such access or may impose its use to what is strictly necessary to achieve the objective pursued.” Regarding the proportionality of the measure, respectively, the existence of a fair balance between general and individual interests, the Court found that art. 12¹ para. (1) of Law No. 506/2004, introduced by Law No. 235/2015, provides, in all cases where traffic data, equipment identification data and location data are requested, prior authorisation of the judge. Also, regarding the possibility of storing this data, the rule consists in deleting or anonymisation of traffic data, location and identification of equipment. The exceptions to this rule are clearly stated in art. 5 para. (1) of Law No 506/2004, amended by Law No. 235/2015, providing that traffic data must be erased or transformed into anonymous data when communication is no longer required "but

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			not later than 3 years after the date of the communication, except in the cases provided for in para. (2), (3) and (5).
Slovakia Up-dated on 29 November 2017	Yes	Act no. 351/2011 of 14 September 2014 on Electronic Communications	Ruling of the Constitutional Court of the Slovak Republic of 29 April 2015 No. PL ÚS 10/2014-78 (On 29 April 2015, The Grand Chamber of the Constitutional Court (PL. ÚS 10/2014) proclaimed provisions Article 58(5) to (7) and § 63(6) of the Act on Electronic Communications (Act No. 351/2011 Coll.), which until now required mobile network providers to track the communication of their users, as well as provisions of Article 116 of the Criminal Code (Act No. 301/2005 Coll.) and § 76(3) of the Police Force Act (Act No. 171/1993 Coll.), which allowed access to this data, to be in contradiction to the constitutionally guaranteed rights of citizens to privacy and personal data.
Slovenia Up-dated on 29 November 2017	No	The Slovenian Constitutional Court annulled Chapter 13 on data retention of the Electronic Communications Act on 3 July 2014. No proposal has been made by the government to replace this law.	The Slovenian Constitutional Court annulled Chapter 13 on data retention of the Electronic Communications Act on 3 July 2014.
Spain Up-dated on 29 November 2017	Yes	Law 25/2007 of 18 October on the retention of data concerning electronic communications and public communication networks, last amended on 10 May 2014 (<i>Ley 25/2007, de 18 de octubre, de conservación de datos relativos a las comunicaciones</i>)	

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		<i>electrónicas y a las redes públicas de comunicaciones, consolidado de 10 de mayo de 2014).</i>	
Sweden Up-dated on 5 March 2019	Yes	• Law (2003:389) on electronic communications (<i>Lagen (2003:389) om elektronisk kommunikation</i>) • Regulation (2003:396) on electronic communications (<i>Förordningen (2003:396) om elektronisk kommunikation</i>) • Law (2012:278) on gathering of data relating to electronic communications as part of intelligence gathering by law enforcement authorities (<i>Lagen (2012:278) om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet</i>) • Code of Judicial Procedure (<i>Rättegångsbalken</i>) • Public Inquiry has been commissioned by the Government on 16 February 2017 to provide proposals in order to make Swedish law compatible with the Tele2-judgment. The results of the enquiry were presented on 11 October 2017. A new bill is under preparation. • <u>On 28 February 2019, the Government decided to refer a proposal for new legislation regarding data retention to the Council on Legislation.</u>	

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		• <u>The consultation with the Council on Legislation is a step in the Swedish legislative process and the aim is to present a final bill to the Parliament later this spring.</u> • <u>The draft bill builds on the proposals put forward by a Public Inquiry in October 2017 and is designed along the lines of the concept of restricted retention as discussed at EU-level, i.e. a series of data types and categories previously subject to retention will no longer be retained according to the proposal. A detailed list can be found in Annex 1 on page 38 in WK 3005/2018/INIT, Preparatory work for the Data Retention Matrix.</u> • <u>According to the draft bill, location data is to be retained for two months and traffic data for six months.</u> • <u>In addition, it can be noted that it is proposed in the draft bill that it must be possible to identify a subscriber to the internet regardless of the technical solution used by the operator (such as the Carrier-Grade NAT).</u> • <u>Furthermore, it is proposed that data must be retained within the EU and that the Prosecution Authority will examine and decide upon requests for access to retained data for certain intelligence purposes.</u> • <u>Finally, it is proposed that the legislation will enter into force on 1 October 2019.</u>	
United Kingdom	Yes	• Investigatory Powers Act 2016, notably Part 3 on the authorisations for obtaining	• In April 2018, the UK High Court ruled on the UK's data retention regime and

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Up-dated on 5 March 2019		communications data and Part 4 on the retention of communications data. Legislation was amended in October 2018 to reflect the additional requirements of independent authorisation and the serious crime threshold for the retention and acquisition of communications data as required by <i>Tele2 & Watson</i>.	found in the Government's favour on all parts except where we had conceded (and have subsequently amended), including ruling that our regime is not general and indiscriminate. The Government is facing ongoing legal challenge to the Investigatory Powers Act, and a hearing is scheduled for June 2019.