



Challenging mass surveillance in Ireland and Europe

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POLITICAL



SOCIAL

SUMMARY

A European law providing for mass surveillance of the entire population was struck down in 2014 following seven years of litigation by Digital Rights Ireland.

UCD law lecturer Dr TJ McIntyre is the chair of Digital Rights Ireland and the legal arguments in the case were based on his research into privacy and data protection rights.

The judgment in the case, by the European Court of Justice, was a landmark decision for privacy and has led to similar surveillance laws being struck down across the EU — as well as reform of the law in Ireland.

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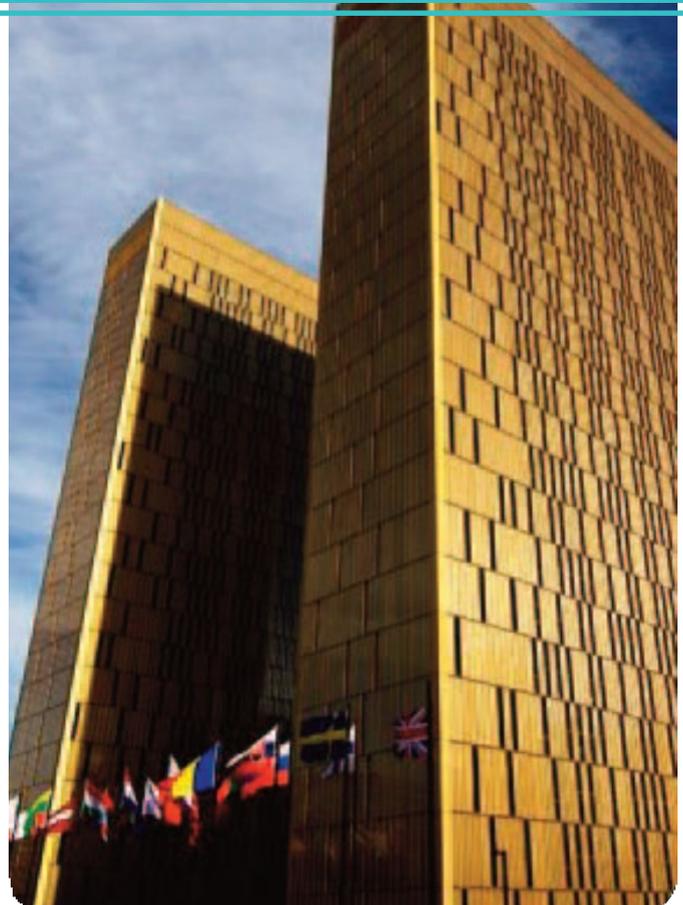
SUMMARY

This research looked at data retention – state schemes requiring telecommunications companies to record details of everyone’s calls, text messages and movements for several years, and to make that information available to police without any warrant. It concluded that these schemes amounted to a form of mass surveillance which breached European legal standards for privacy and data protection.

Beginning in 2005, Dr McIntyre put together the first comprehensive analysis of how data retention schemes had developed in Ireland and how they affected the fundamental rights of citizens. In 2006 he extended this research to the EU level in response to a new EU law – the Data Retention Directive – which required all EU states to adopt similar data retention schemes.

He found both Irish law and the Directive – by providing for indiscriminate surveillance of the entire population, with no judicial controls on access to this information – were in breach of the rights to privacy and data protection under the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Based on this research, in August 2006 Digital Rights Ireland filed an action in the Irish High Court challenging data retention under both Irish law and the Data Retention Directive. This ultimately led to a judgment of the European Court of Justice in April 2014 striking down the Directive as a “wide-ranging and particularly serious interference” with the rights to privacy and data protection.





RESEARCH IMPACT

The judgment of the European Court of Justice in the Digital Rights Ireland case had an immediate impact for all European citizens by invalidating the Data Retention Directive's requirement of mass surveillance. In addition to this outcome at the EU level, it also had a direct effect at the national level by invalidating most national laws which had implemented the Data Retention Directive into domestic law.

For example, the laws in Austria, Belgium, Bulgaria, Germany, the Netherlands, Romania, Slovakia, and Slovenia were all struck down by national courts shortly afterwards on the basis of this judgment. The judgment was significant as the first time an EU Directive was struck down on fundamental rights grounds and as the precursor of a more expansive approach to privacy by the European Court of Justice. It has since been relied upon in several further landmark cases.

In Schrems, the European Court of Justice relied on the judgment in finding that the transfer of data to the United States was illegal where US law did not provide adequate protections against state surveillance, and in Tele2/Watson the European Court of Justice again relied on the judgment to find national data retention schemes illegal under EU law.

It has also influenced the European Court of Human Rights, which cited it in the leading judgment of *Zakharov v. Russia* finding Russian surveillance laws violated fundamental rights. In Ireland, this research and the judgment in Digital Rights Ireland has led to significant policy developments.

In 2016 the Department of Justice and Equality commissioned a report on data retention law by the former Chief Justice, John Murray. His April 2017 report relies on the judgment to reach the conclusion that Irish law illegally "establishes a form of mass surveillance of virtually the entire population of the State".

In October 2017 the Department of Justice and Equality accepted that reform was necessary and published draft legislation. In November 2017 the Oireachtas Joint Committee on Justice and Equality held a hearing on that legislation in which Dr McIntyre appeared as an invited expert. His testimony is cited extensively throughout that committee's report, which accepts his arguments regarding faults in the proposed legislation and the need for amendments.

Dr McIntyre has presented extensively on this research, including as an invited speaker before bodies such as the Law Society of Ireland, the European University Institute, KU Leuven, the Irish Centre for European Law, and the European Union Agency for Network and Information Security. He has written numerous opinion pieces on the topic for publications including the Irish Times, Irish Independent, and Irish Examiner.

RESEARCH REFERENCES

Articles

T.J. McIntyre, "Coherence in Data Protection: The Case of Data Retention after Digital Rights Ireland," in *EU and Member State Competences in Human Rights*, by Tamara Lewis et al. (Dublin, University College Dublin, 2015): fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-8.2.pdf. (This was part of the FP7 FRAME (Fostering Human Rights Among European Policies) project.)

T.J. McIntyre, "Implementing Information Privacy Rights in Ireland," in *Implementing Human Rights in Ireland*, Ed. Suzanne Egan (Dublin: Bloomsbury Academic, 2015): ssrn.com/abstract=2701206

T.J. McIntyre, "Judicial Oversight of Surveillance: The Case of Ireland in Comparative Perspective," in *Judges as Guardians of Constitutionalism and Human Rights*, Ed. Martin Scheinin, Helle Krunke, and Marina Aksenova, (Cheltenham: Edward Elgar, 2016): hdl.handle.net/10197/7363

T.J. McIntyre, "Data Retention in Ireland: Privacy, Policy and Proportionality," *Computer Law & Security Report* 24, No. 4 (2008): 326, DOI: 10.1016/j.clsr.2008.03.001. Also: ssrn.com/abstract=2426208.

ECJ Judgment

European Court of Justice judgment invalidating the Data Retention Directive: Judgment of 8 April 2014, Digital Rights Ireland, C-293/12, ECLI:EU:C:2014:238. At: curia.europa.eu/juris/documents.jsf?num=c-293/12

Media Coverage

The litigation attracted extensive international media coverage:

New York Times: James Kanter, "European Court Rejects Data Retention Rules, Citing Privacy," *The New York Times*, 8 April 2014; nytimes.com/2014/04/09/business/international/european-court-rejects-data-retention-rules-citing-privacy.html

Financial Times: James Fontanella-Khan, "European Court of Justice Rules EU Data Collection Laws Illegal," *Financial Times*, 8 April 2014; ft.com/content/752ec05c-bf0e-11e3-8683-00144feabdc0.

The Guardian: Charles Arthur, "EU Court of Justice Overturns Law That Would Enable 'Snoopers' Charter'," *The Guardian*, 8 April, 2014; theguardian.com/technology/2014/apr/08/eu-court-overturns-law-snoopers-charter-data-phones-isp



T.J. McIntyre, "State's Approach to Data Privacy Is a National Scandal," Irish Times, 6 October 2017; [irishtimes.com/opinion/state-s-approach-to-data-privacy-is-a-national-scandal-1.3246055](https://www.irishtimes.com/opinion/state-s-approach-to-data-privacy-is-a-national-scandal-1.3246055)

T.J. McIntyre, "Trawling a Journalist's Phone Records Can Only Ever Be OK When a Judge Approves It," Irish Independent, 15 January 2016; [independent.ie/opinion/comment/tj-mcintyre-trawling-a-journalists-phone-records-can-only-ever-be-ok-when-a-judge-approves-it-34366403.html](https://www.independent.ie/opinion/comment/tj-mcintyre-trawling-a-journalists-phone-records-can-only-ever-be-ok-when-a-judge-approves-it-34366403.html)

T.J. McIntyre, "Why Ireland Must Protect Privacy of Irish Emails and Internet Usage from Surveillance," Irish Times, 20 December 2014; [irishtimes.com/opinion/why-ireland-must-protect-privacy-of-irish-emails-and-internet-usage-from-surveillance-1.2044384](https://www.irishtimes.com/opinion/why-ireland-must-protect-privacy-of-irish-emails-and-internet-usage-from-surveillance-1.2044384)

T.J. McIntyre, "Surveillance Judgment Is a Victory for Democracy," Irish Independent, 10 April 2014; [independent.ie/opinion/analysis/surveillance-judgment-is-a-victory-for-democracy-30172786.html](https://www.independent.ie/opinion/analysis/surveillance-judgment-is-a-victory-for-democracy-30172786.html)

Impact of Judgment

The academic literature has consistently described the judgment as of profound significance:

"[A] landmark decision marking a constitutional moment in striking a balance between fundamental rights and security in the digital age" – Professor Tuomas Ojanen, Professor of Constitutional Law at the University of Helsinki. Tuomas Ojanen, "Privacy Is More Than Just a Seven-Letter Word: The Court of Justice of the European Union Sets Constitutional Limits on Mass Surveillance," in *European Constitutional Law Review* 10, no. 3 (December 2014): 528–541. DOI:10.1017/S1574019614001345.

"Digital Rights Ireland is a landmark decision in the CJEU fundamental rights jurisprudence. Peers has equated the judgment in importance with the US classics *Brown* (on the desegregation of schools) and *Miranda* (on criminal suspects' rights). The case also seems to be a turning point where the Luxembourg court takes the lead in protecting European human rights, leaving behind Strasbourg and the margin of appreciation." Niklas Vainio and Samuli Miettinen, "Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States," in *International Journal of Law and Information Technology* 23, no. 3 (September 2015): 290–309. DOI:10.1093/ijlit/eav010. (Citing Professor Steve Peers, Professor of Law at the University of Essex.

Prominent privacy advocates have taken the same view:

"The European Court of Justice's verdict on the incompatibility of the Data Retention Directive with the EU Charter of Fundamental Rights is a major victory for civil rights in Europe." Jan Philipp Albrecht, Green MEP and privacy advocate, quoted in James Fontanella-Khan, "European Court of Justice Rules EU Data Collection Laws Illegal," *Financial Times*, 8 April 2014: [ft.com/content/752ec05c-bf0e-11e3-8683-00144feabdc0](https://www.ft.com/content/752ec05c-bf0e-11e3-8683-00144feabdc0)

The judgment has influenced numerous significant judgments at the national and international level. In particular it has been cited in the most significant recent European cases on state surveillance:

By the Grand Chamber of the European Court of Justice in its judgment of 6 October 2015, *Schrems*, C362/14. ECLI:EU:C:2015:650

By the Grand Chamber of the European Court of Human Rights in its judgment of 4 December 2015, *Zakharov v. Russia*, application no. 47143/06; and

By the Grand Chamber of the European Court of Justice in its judgment of 21 December 2016, *Tele2/Watson*, Joined Cases C–203/15 and C–698/15, ECLI:EU:C:2016:970.

The judgment has led directly to reform of Irish law in this area of surveillance:

The 2017 report by the former Chief Justice, John Murray, relies on the judgment in reaching the conclusion that Irish law illegally "Establishes a form of mass surveillance of virtually the entire population of the State". John Murray, "Review of the Law on the Retention of and Access to Communications Data" (Dublin: Department of Justice and Equality, April 2017); [justice.ie/en/JELR/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf/Files/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf](https://www.justice.ie/en/JELR/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf/Files/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf)

The Joint Committee on Justice and Equality relied on the invited testimony of Dr McIntyre in concluding that proposed legislation to reform Irish data retention law was insufficient to meet Ireland's obligations under international human rights law. "Report on Pre-Legislative Scrutiny of the Communications (Retention of Data) Bill 2017," (Houses of the Oireachtas, January 2018), 32/JAE/22; [oireachtas.ie/parliament/media/committees/justice/2018/Data-Retention-Report-Final.pdf](https://www.oireachtas.ie/parliament/media/committees/justice/2018/Data-Retention-Report-Final.pdf).