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WORKING DOCUMENT

From: Europol
To: DAPIX (Friends of the Presidency - Data Retention)

Subject: Proportionate data retention for law enforcement purposes



Proportionate data retention for law enforcement purposes

DELETED

Data Protection Function

18 September 2017

DAPIX FoP meeting on data retention

The forgotten part of 'Digital Rights'

“(...) the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest. (...) Article 6 of the Charter lays down the right of any person not only to liberty, but also to security. (...) It must therefore be held that the retention of data for the purpose of allowing the competent national authorities to have possible access to those data (...) genuinely satisfies an objective of general interest.”

Very similar most recently in PNR Canada!

Data retention for LE is not blocked by ECJ

There is an essential need to incorporate data retention rules for law enforcement purposes into the upcoming ePrivacy Regulation or other European legislative act.

Data retention for LE must be defined as specific purpose.

Need and possibility for proportionate LE data retention regime

Need to overcome fragmented national legislation

Lack of EU data retention legislation for LE prevents Member States from adopting effective data retention law

Not all *Tele2*-criteria bind the EU legislator

Data retention must not be the exception,
it must only be proportionate!

Structure

Relationship between ePrivacy Regulation and the EU Charter of Fundamental Rights

Legal capacity of the legislator to adopt proportionate data retention measures

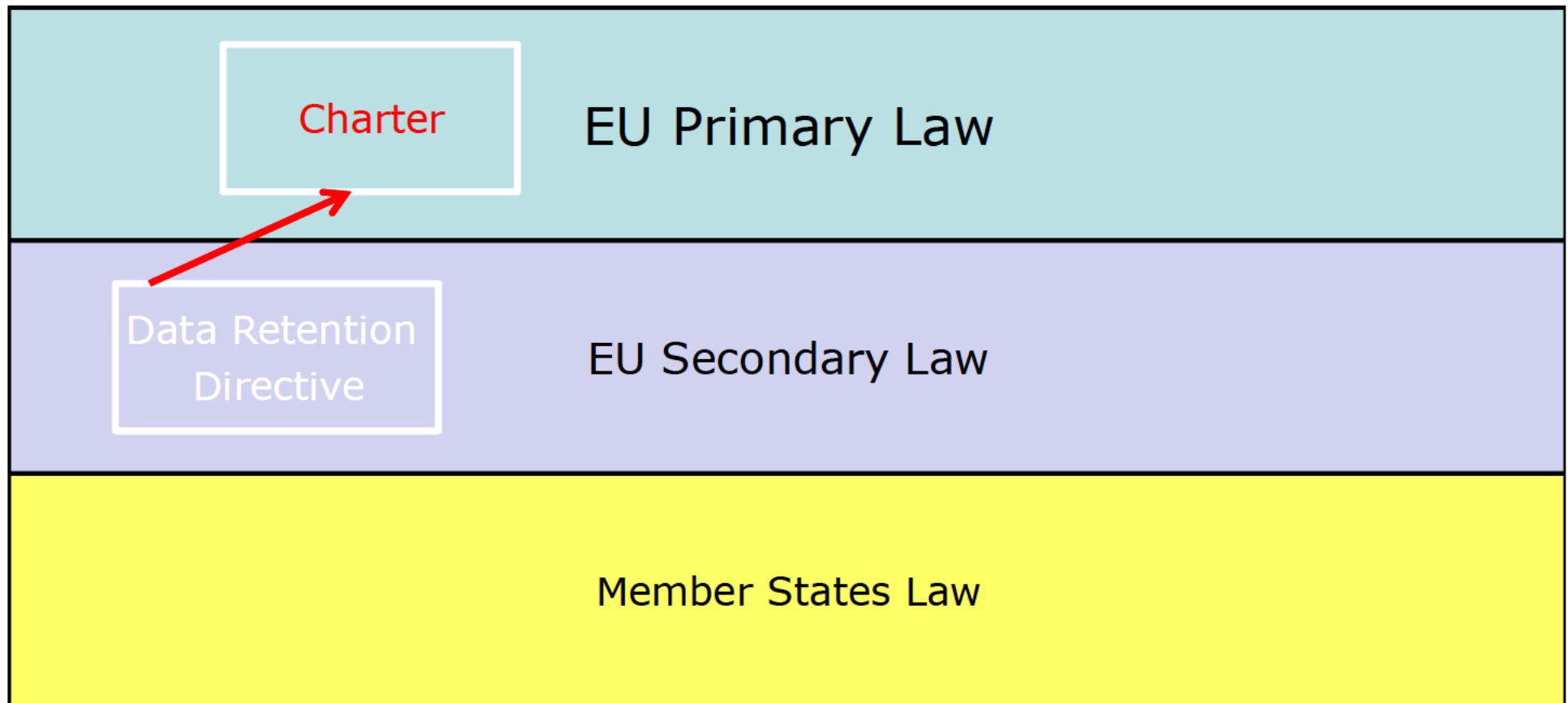
Interference levels (retention vs. access)

“Restricted data retention” and “targeted data access”

Different background of ECJ's judgements

Digital Rights

Tele2



Different background of ECJ's judgements

Digital Rights:

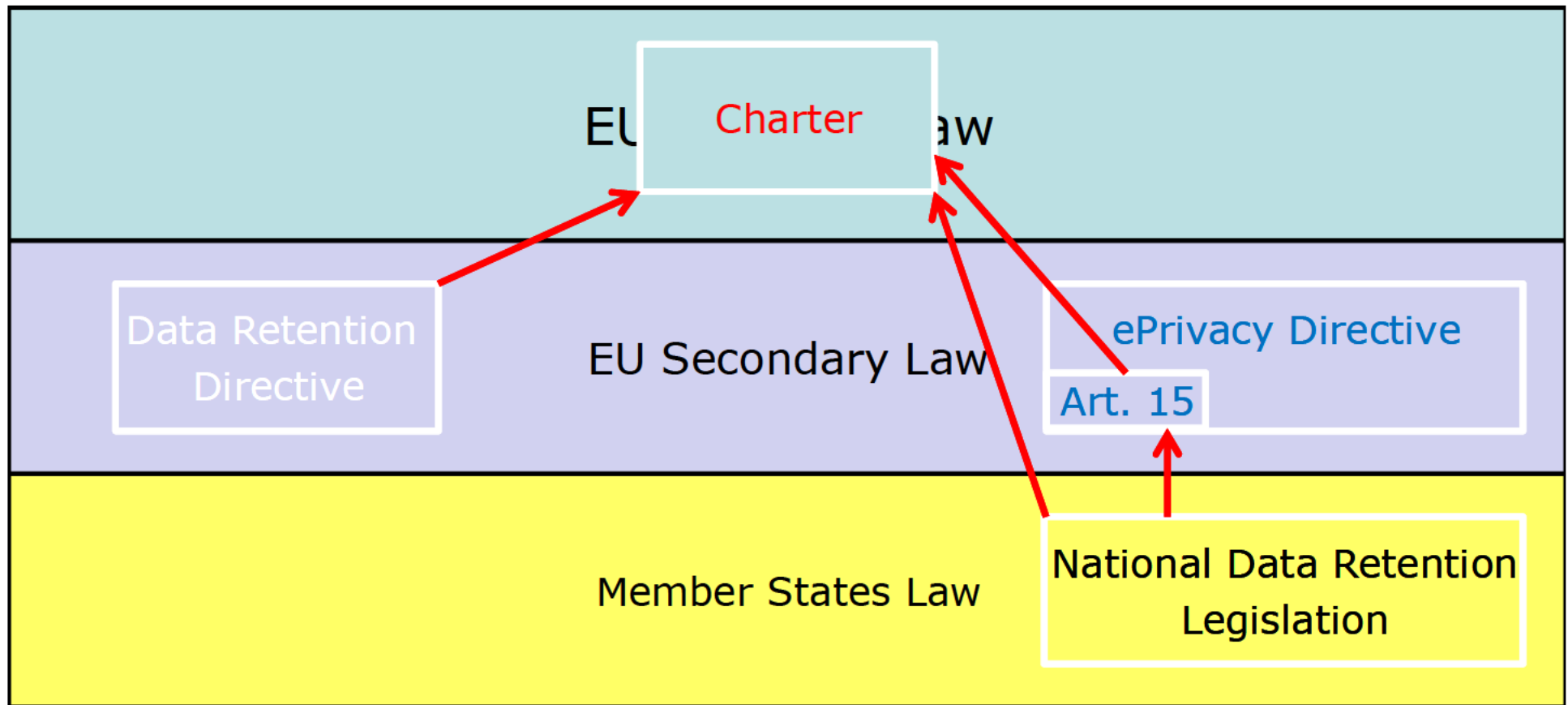
- “link between retained data and the pursued purpose” and/or
- additional safeguards as regards storage and access

-> DRD was not proportionate

Different background of ECJ's judgements

Digital Rights

Tele2



Different background of ECJ's judgements

Digital Rights:

- “link between retention and the pursued purpose” and/or
- additional safeguards regards storage and access



Stricter criteria of Tele2:

- general data retention on level 1 is *per se* unlawful, irrespective of safeguards on level 2
- data retention must not “become the rule”

Different background of ECJ's judgements

Digital Rights:

- "link between retention and the pursued purpose" and/or
- additional safeguards regarding storage and access

Charter

Charter?

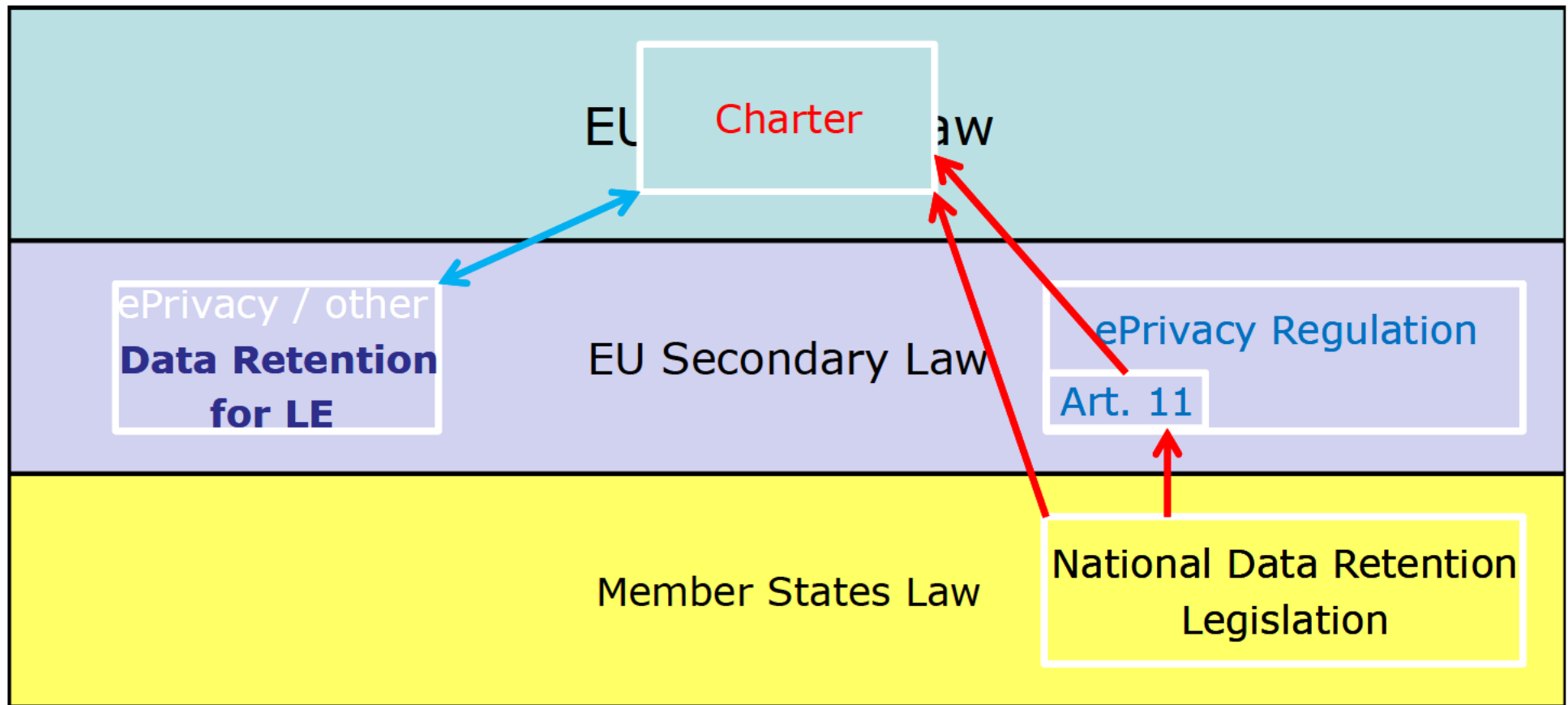
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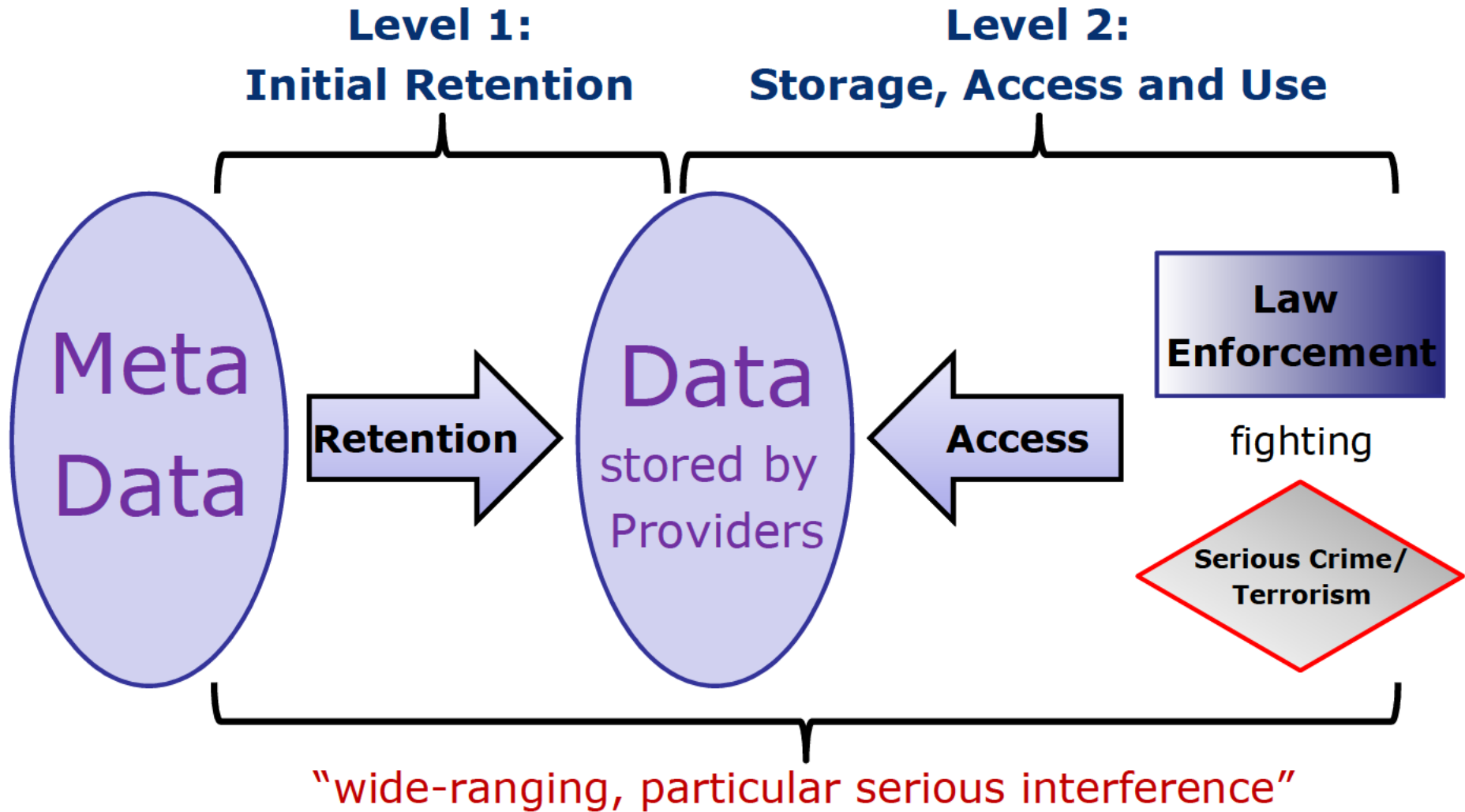
Secondary Law!
- ePrivacy -

status proposed

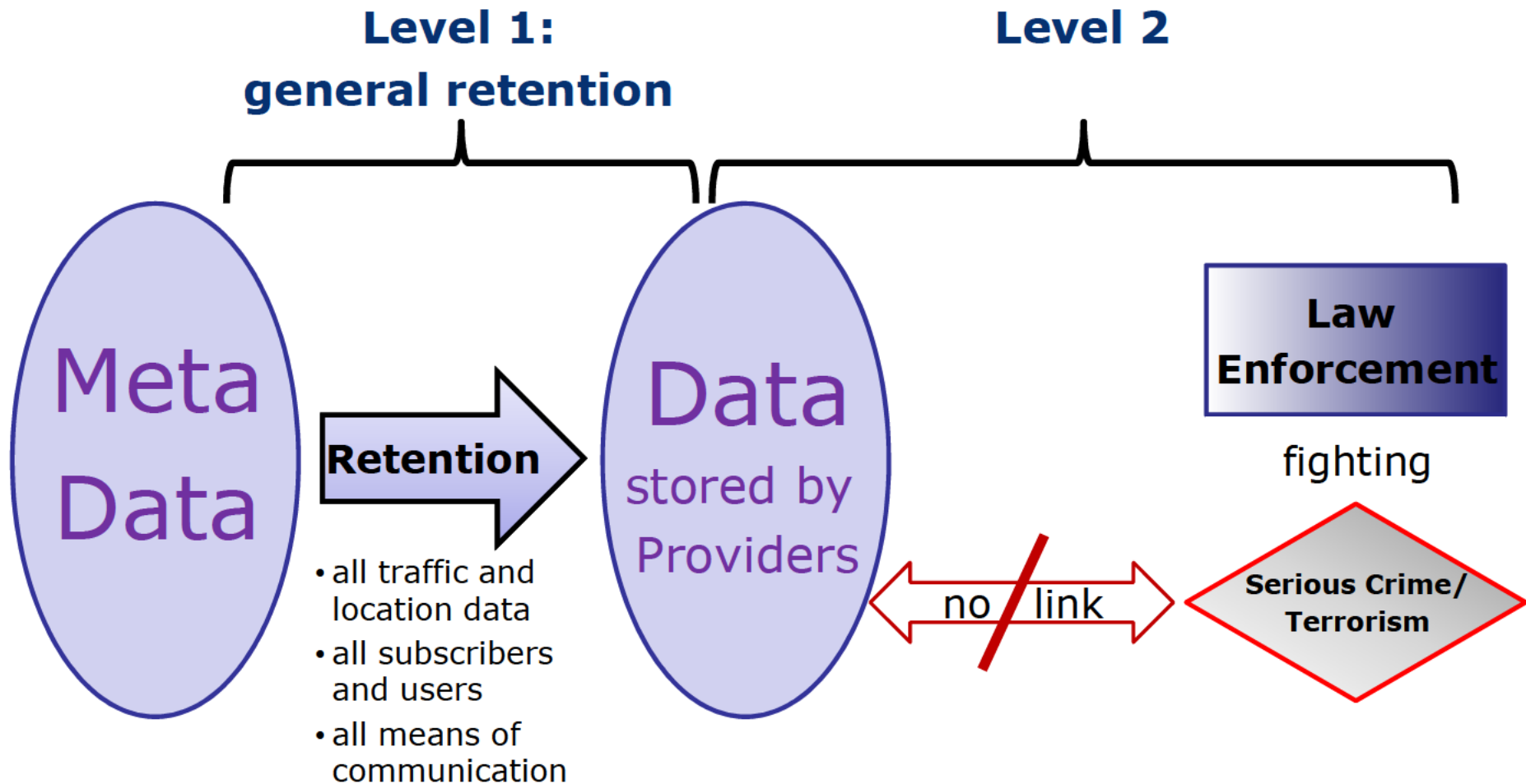
status envisaged



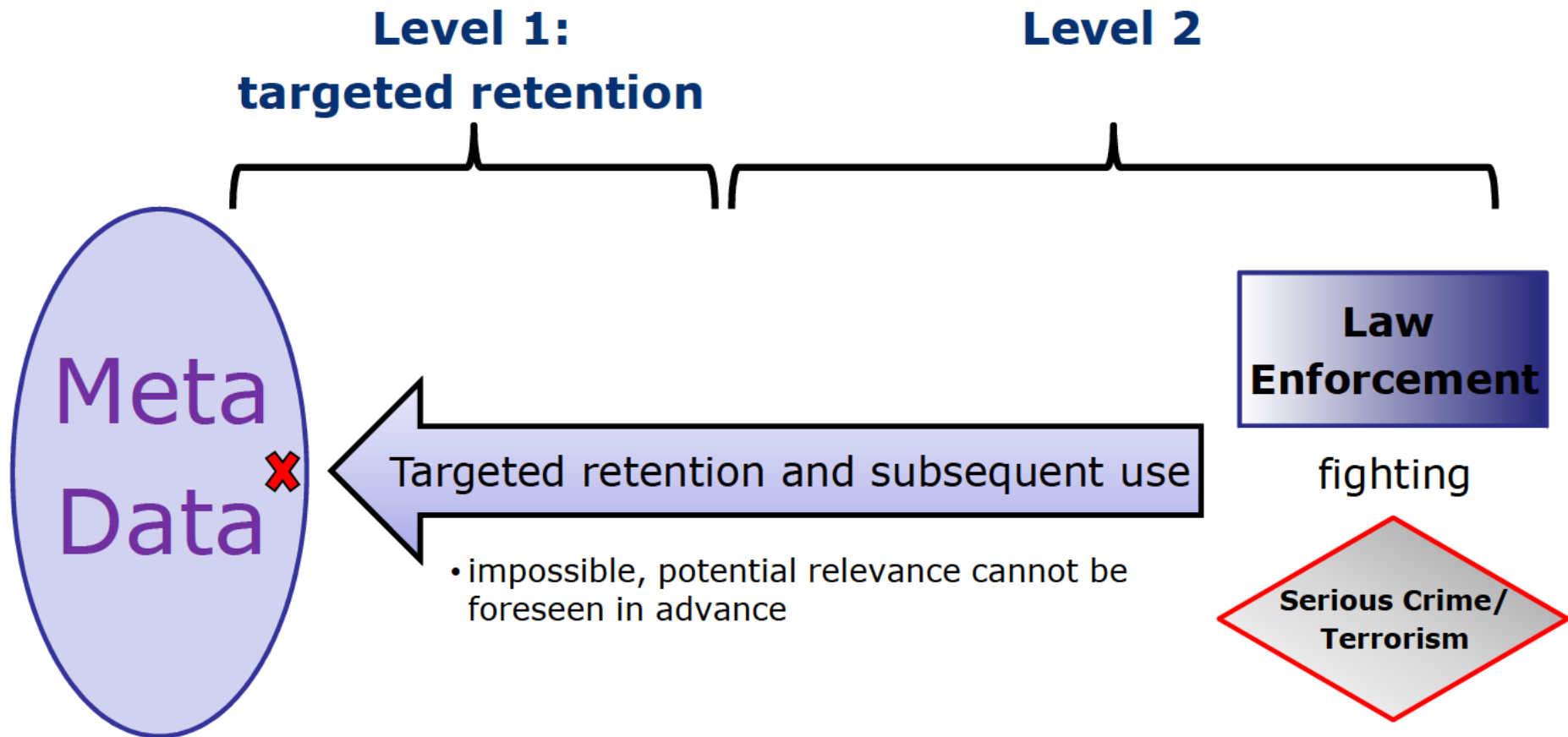
Interference Levels



Clearly non-compliant with Charter



Clearly compliant with Charter – but not fit for LE reality



Restricted retention and targeted access

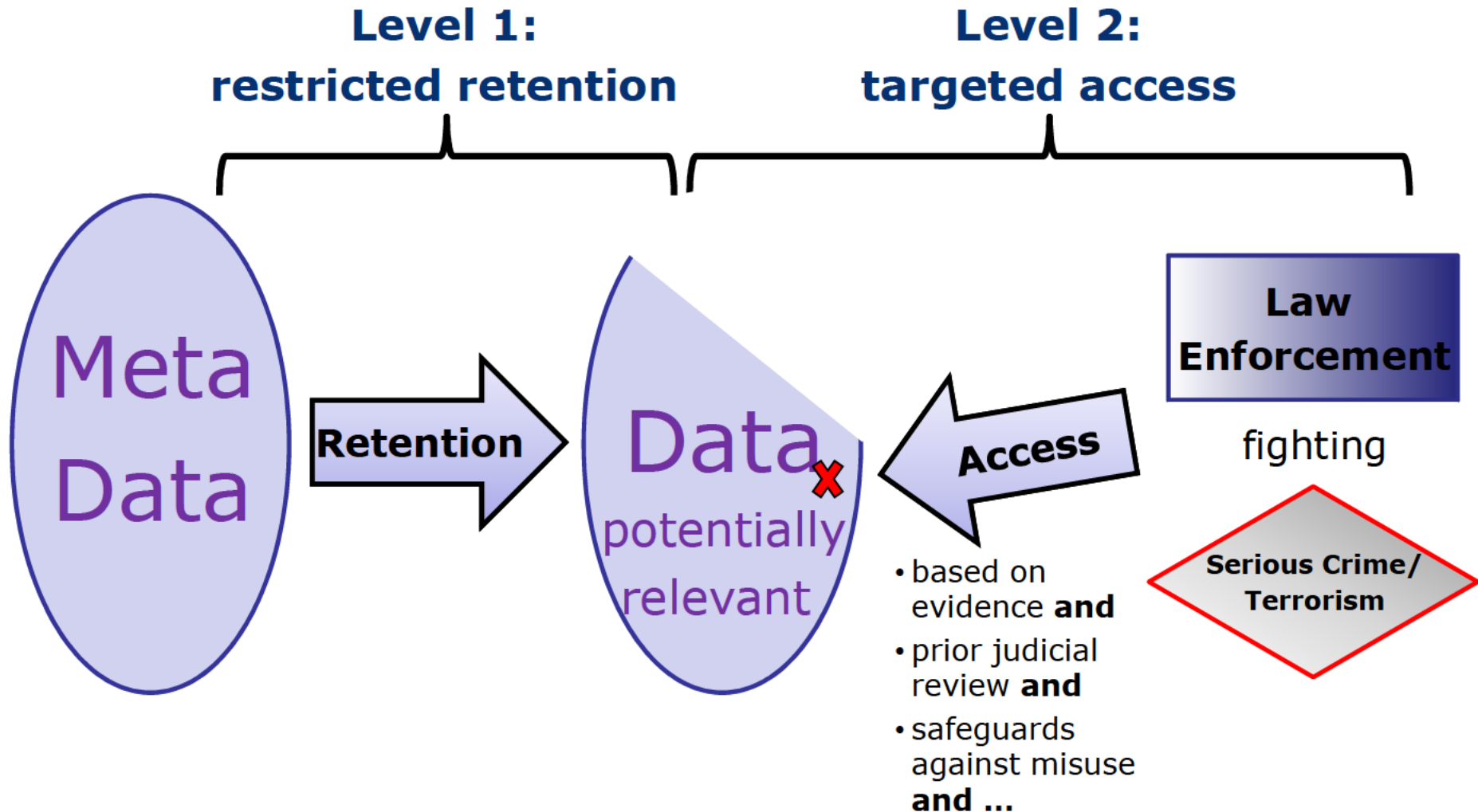
Level 1:

- Not only targeted data retention, but also restricted data retention is compliant with the Charter according to *Digital Rights and Tele2*.

Level 2:

- Access to metadata must be targeted according to *Digital Rights and Tele2*.

Compliant with Charter – and fit for LE reality!



Restricted data retention

Limitation of retention only as far as possible

Only exclusion of irrelevant data categories is necessary

-> required link between retained data and the purpose of fighting crime is provided

Targeted access

Compensation of wide-ranging level 1 interference

Reduces “feeling of constant surveillance”

Feasible without losing additional value (“examining the past” still possible)

Conclusion

- Some “stricter” Tele2 criteria only derive from EU secondary law, not from the Charter.
- Currently, Member State’s legislative capacities are curtailed more than necessary.
- EU legislation can remedy this by adopting data retention law.

Conclusion

- The initial retention of data has to be restricted in order to be compliant with the Charter.
- Such restriction can be achieved through exclusion of data not even potentially relevant.
- To compensate the strong interference as regards retention, the data access must be strictly targeted.



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