Federal Constitutional Court Declares Data Retention in its Current Form Unconstitutional

The Federal Constitutional Court of Germany decided on March 2, 2010 that the collection and retention of traffic data, as provided in Sections 113a and 113b of the German Telecommunications Act as well as in Section 100g Para. 1 (1) of the German Code of Criminal Procedure, is unconstitutional and declared that these provisions are void. The Court held that these regulations are not compatible with Article 10 Para. 1 of the German Constitution, which guarantees privacy of telecommunication. Hence, the data retention which is currently practiced in Germany is illegal and all data collected based on these regulations have to be deleted by the concerned telecom companies and must not be transferred to requesting authorities. However, data retention can be legal provided that certain requirements are met.

The provisions now declared void on the basis of constitutional appeals by 35,000 appellants were the implementation of the 2006 Directive 2006/24/EC of the European Parliament and of the Council on the retention of data. Under this directive, providers of telecommunications services were to be obliged to retain the data covered by Section 113a TKG for at least six months and no longer than two years and to make the data available for the prosecution of serious crimes upon appropriate request.

In its judgment the Federal Constitutional Court holds that data retention constitutes particularly serious interference with basic rights in a scope previously unknown to the German legal system. Even without retention of content data, the data stored make it possible to draw conclusions about content which reach into intimate private areas. Depending on the use of telecommunications, such retention of data without cause enables meaningful profiles of practically every citizen's personality and movements to be created. Because retention and use of the data go unnoticed, retention of telecommunications traffic data without cause is apt to create a diffuse threatening feeling of being observed, which could interfere with the relaxed enjoyment of basic rights in many areas.

"In light of the special significance of precautionary data retention, this practice is only compatible with Art. 10 (1) GG where it is structured in accordance with special constitutional requirements. In this respect, sufficiently sophisticated and clear regulation of data security, limitations on the use of data, transparency and legal protection is needed", the court held. The provisions under attack however did not provide sufficient data security, nor sufficient limitations on the purposes the data could be used for. In addition, overall they failed to meet constitutional requirements for transparency and legal protection.

However, in the reasons for its decision the court emphasised that only the current form failed to comply with the proportionality principle, and a duty to retain data in the scope intended was not unconstitutional per se. It therefore refused the appeal to the European Court of Justice and outlined very precisely what the implementation of data retention in conformity with the Basic Law should look like. Particular points concerning access to data by the State, requirements for data security, procedural rules for evaluation and further points were listed explicitly by the court here.

The court did not set such high barriers for requests for information about IP addresses, in so far as State authorities only asked for identification of the owner of a particular IP address. The legislature should continue in future to permit supply of such information independently of "restrictive catalogues of legal rights and interests or criminal offences for the prosecution of crime, for averting danger and for intelligence agencies to be able to perform their tasks on the basis of general legal powers to intervene in that area of law". However, in future those affected must be informed of requests for their data.

With this decision, for the first time since its Census Decision in 1983 the court moved away from its previous creed, under which the Basic Law protected the citizen "against unlimited collection, retention, use and transmission of his data" and permitted the retention of data in general, as long as individual strict requirements were met. Due to the provisions of the European directive, reformed regulation is to be expected. The decision gives the German legislature the opportunity to reregulate the duty to retain data as previously intended, in a similar scope, in accordance with the decision. Accordingly, it is not advisable to dispose of infrastructure already acquired, because a new duty to acquire could exist in the near future.

The decision is available online at
http://www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html

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