PRESS RELEASE

The Hamburg Commissioner for Data protection and freedom of

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ECJ ruling: Data retention *reloaded*

The European Court of Justice (ECJ) has yesterday updated, specified and partly partly aligned its view on data retention in four judgements. First of all, the ECJ maintains that EU law, specifically the Data Protection Directive for Electronic Communications (Directive 2002/58/EC), takes precedence over national law. National regulations that require providers of electronic communications services to store traffic or location data and to pass it on for the purposes of national security authorities and intelligence services must therefore be measured against EU law.

With regard to the question of whether EU countries can force communications service providers to store and transmit communications data, the ECJ has now relaxed its 2016 case law. Up to now, the ECJ had always rejected a comprehensive regulation on the retention of telecommunications data as disproportionate, unless restrictions on specific occasions are imposed by concrete objectives, for example with regard to special groups of persons or local limitations. Furthermore, the retention of data without reason and indiscriminately continues to constitute a particularly serious encroachment on the fundamental rights of the persons concerned, because there is no relation between the behaviour of the persons whose data are affected and the purpose pursued by the regulation in question. However, the protection of privacy guaranteed by fundamental rights in the electronic communications sector does not, in the view of the Court, preclude unlimited data retention if the Member State concerned is facing a serious threat to its national security which proves to be genuine and present or foreseeable. This may be the case, for example, when serious criminal offences or attacks on national security have already been established, or where existing attacks can at least be suspected. An order against providers of electronic communications services generally and indiscriminately to retain traffic and location data is therefore not precluded in such cases.

In its decision, the highest European court has dealt with concrete proceedings from France, Belgium and Great Britain. At present, two proceedings concerning the German regulations on data retention are still pending before the ECJ for a decision.

Prof. Dr. Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information, commented: "It is to be expected that yesterday's ruling by the ECJ will reignite the political debate on data retention. The ECJ has brought the 'old zombie' back to life. It is now important to carefully analyze the current judgement and the resulting consequences for fundamental digital rights as well as national security legislation in their relationship. After years of fanfare for data protection and privacy, yesterday's rulings signal at least a slight turn in the jurisdiction of the highest European court, which is now also moving closer to the national debate on security. It is to be hoped that the legislators will use the new wider scope with a sense of proportion and restraint. One way or another: the ECJ ruling will not be the last in this debate.“

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