Today's ECJ ruling: data retention reloaded

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ECJ

In four judgments today, the European Court of Justice (ECJ) updated, specified and partially realigned its view on data retention. 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 pass them 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 operators of communications services to store and transmit communications data, the ECJ has now relaxed its 2016 case law. So far, the ECJ had always rejected a comprehensive regulation on the retention of telecommunications data as disproportionate, insofar as there are no restrictions on specific occasions due to specific objectives, for example with a view to special groups of people or local restrictions. The indiscriminate and indiscriminate retention of data continues to represent a particularly serious encroachment on the fundamental rights of those affected, because there is no connection between the behavior of the people whose data is affected and the purpose pursued with the regulation in question. However, in the opinion of the court, the protection of privacy in electronic communication, which is guaranteed by fundamental rights, does not preclude unlimited retention if the Member State concerned is faced with a serious threat to its national security which proves to be actual and present or foreseeable. This can be the case, for example, when serious criminal offenses or attacks on national security need to be investigated, or if existing attacks can at least be suspected. An order obliging the providers of electronic communications services to retain traffic and location data in a general and indiscriminate manner cannot be ruled out in such cases.

In its decision, the highest European court dealt with specific cases from France, Belgium and Great Britain. There are currently two cases still pending before the ECJ that affect the German regulations on data retention.

For this Prof. Dr. Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information: "It is to be expected that today's ruling by the ECJ will reignite the political discussions about data retention. The ECJ brought the 'old zombie' back to life. It is now important to precisely analyze the current case law, which has so far only been available in the form of a press release, and the resulting consequences for digital fundamental rights and future security legislation in their tension with one another. After years of fanfare for data protection and privacy, today's rulings signal at least a slight turn in the case law of the highest European court, which is now also moving closer to the national debate on security. It is to be hoped that the new scope will be used by the legislature with a sense of proportion and restraint. Either way, the judgment of the ECJ will not be the last in this debate."

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