

Flash Briefing Note

Judgment of the German Constitutional Court on Data Retention of 2 March

I. Summary

- The Constitutional Court annuls the German legislation transposing Directive 2006/24 on data retention. **Retention of telecommunications data is not in principle impossible;** but its modalities as organised in the legislation violate the principle of proportionality of the German Constitution.
- **The Court finds no problem with the Directive as such:** that Directive leaves wide margins of transposition to Member States, and allows a transposition in keeping with the fundamental rights of the German Constitution.
- The Court expressly admits the possibility of it make preliminary references to the European Court of Justice. But presently this was not necessary.

II. Aspects of the judgment relating to Union law (see in particular points 185 – 187, 218)

The Court discards a preliminary reference to the Court of Justice as unnecessary.

It stresses that Directive 2006/24 leaves a wide margin of transposition to the German legislator, since it is in essence limited to laying down the obligation to retain telecommunications data, but does not regulate access to or use of these data by public authorities.

Retention of telecommunication data is not per se impossible under the German Constitution. The Directive can be transposed by Germany without any violation of fundamental rights of the Constitution. Consequently, the question of validity and primacy of the Directive (which would be the object of a preliminary reference) does not arise in the present case.

The Court also stresses that legislation on retention of telecommunication data must stay an exception and must not be seen as paving the way for further legislation allowing the State to comprehensively foresee retention of all kinds of personal data useful for repression of crime or prevention of dangers. The citizens' exercise of freedom must not be totally screened and registered; this is part of Germany's constitutional identity which Germany must uphold also in European and international contexts. Legislation on retention of telecommunication data thus reduces the scope of legally possible future legislation providing for a general retention of other kinds of data, including if foreseen by the EU.

III. Aspects of the judgment relating to the modalities of data retention provided for under German law

(brief summary)

The Court finds that, while a general retention of telecommunication data for 6 months is not per se contrary to fundamental rights, it constitutes a severe limitation of such rights. Therefore, in order to respect the principle of proportionality, its modalities must live up to high standards. These are :

- Specific provisions to guarantee security of data - they were lacking in the law.
- Rules limiting access to and use of data by public authorities. In essence, the Court requires to limit such access / use to individual cases where there is a concrete suspicion of a serious criminal offence; moreover, the legislator must define an exhaustive list of such offences. Access for preventive purposes by police or secret services must be limited to preventing a concrete danger for life, physical integrity or liberty of a person, state security or a public hazard. Moreover, the legislator must define a narrow field of communications deserving particular protection and therefore not subject to access by public authorities (such as telephone lines by churches and social organisations offering advice for persons in need). - The legislation did not respect various of these limitations.
- Transparency of data use: such use without knowledge of the data subject can only be provided for where strictly necessary. This can be presumed in the area of preventive use, but not for repressive use (i.e. for investigation and prosecution of crime). Moreover, the data subject must have a right, controllable in court, to be informed subsequently. - The legislation did not respect various of these requirements.
- Judicial protection: any access / use must in principle presuppose a prior authorisation by a judge. Moreover, the data subject must have effective judicial remedies allowing subsequent control of access / use. - These requirements were largely respected.

IV. Line to take

The Commission welcomes the fact that the judgment:

- finds no problem with Directive 2006/24
- very clearly distinguishes what is foreseen by the directive, and what is regulated by Member States' legislation
- expressly admits the possibility of preliminary references by the Bundesverfassungsgericht to the ECJ where necessary.