



Title	The Secret Intrusion into IT Systems("Online-Durchsuchung") : Decision of the German Federal Constitutional Court, Feb. 27th 2008
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**The Secret Intrusion into IT Systems (“Online-Durchsuchung”):  
Decision of the German Federal Constitutional Court,  
Feb. 27th 2008<sup>1)</sup>**

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The author had the privilege of conducting a comparative study on European and Japanese Broadcasting Law as a visiting scholar at Osaka University Graduate School of Law and Politics in August/September 2008. This is the summary of a lecture given on September 5th 2008. The author would like to express his cordial thanks to his generous host for the outstanding support and fruitful academic exchange.

1. The constitutional general right of personality (*Allgemeine Persönlichkeitsrecht*), which is derived from Article 2 (1), Article 1 (1) Basic Law (Grundgesetz), has been elaborated by the German jurisdiction by acknowledging certain legal contents (*Schutzwirkungen*). In the field of data protection “the right to informational self-determination” (*Recht auf informationelle Selbstbestimmung*) was recognized by the Federal Constitutional Court in 1983. Now, twenty-five years later, a new basic “right to the maintenance of confidentiality and integrity of information-technology systems” (*Recht auf die Vertraulichkeit und Integrität von informationstechnischen Systemen*) has been added by the court’s ruling on online-investigations. It can be expected that this newly defined right will significantly affect the further development of data protection in Germany.
2. The judgement was given in response to complaints of unconstitutionality (*Verfassungsbeschwerden*, Article 94 [1] No. 4 a Basic Law) lodged against certain provisions of the Constitutional Protection Act of the Land of North Rhine-Westphalia (*Verfassungsschutzgesetz des Landes Nordrhein-Westfalen*). The case was brought by 1) a journalist who publishes predominantly in the Internet; 2) by an active member of the political party “Die Linke” and 3) by two attorneys. All three complainants took exception to the power granted to

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national authorities (*Verfassungsschutzbehörden*) to capture data from information-technology systems (computers and networks). They opposed the Act's permitting secret investigations of such systems. Online-investigation methods could be directed to monitor the use of a certain information system, to spy on the storage medium or even to control the system by using remote forensic software tools ('backdoor Trojan horses'). The North Rhine-Westphalian Act has been the only 'online investigation'-regulation in Germany. Recently however a federal bill has been brought before *The Bundestag* to extend the authority of the Federal Criminal Investigation Office (*Bundeskriminalamt*). It provides the authorization to secret intrusion into IT systems.<sup>2)</sup>

The Federal Constitutional Court declared the North Rhine-Westphalian provisions incompatible with the basic "right to the guarantee of the privacy and integrity of information-technology systems" and hence invalid. This right protects against interference in information-technology systems where such protection is not already ensured by other special fundamental rights, for instance by the privacy of correspondence, posts and telecommunications (Article 10 Basic Law); the inviolability of the home (Article 13 Basic Law); or the right to informational self-determination (Article 2 [1], Article 1 [1] Basic Law).

3. The Constitutional Court states that computer-networks are ubiquitous. In all areas of modern life information-technology systems are becoming ever more important for the development of the personality. Such systems create new opportunities for individuals, but they also may place the privacy of their users at risk. IT systems offer various possibilities for the production, processing and storage of personal data. Computer-generated 'user profiles' can support an unprecedented level of disclosure of personal information. The danger of unauthorized 'user profiling' has been dramatically increased by the ever more complex networking of information systems. From this new situation of endangerment a substantial basic right-protection-gap (*grundrechtliche Schutzlücke*) has resulted, which must be closed to comply with the constitutional guarantee of the general right of personality (*Allgemeine Persönlichkeitsrecht*). It is the function of the "right to the guarantee of confidentiality and integrity of information-technology systems" (*Recht auf die Vertraulichkeit und Integrität von informationstechnischen Systemen*) to close this gap.

The “right to informational self-determination” (*Recht auf informationelle Selbstbestimmung*) empowers the individual himself or herself to determine how his or her personal data are disclosed and used. However the legally protected interest of the user of an information-technology system is not only limited to private data. The complexity of such systems now renders impossible any clear distinction between private and non-private data. Infiltration of an information-technology system delivers access to all these data.

According to the definition given by the court an information-technology system can be described as a technical system which has the capacity to contain personal data to such an extent and of such a variety that an access to the system makes it possible to get a view of substantial parts of a individual’s life or a meaningful picture of his personality. Typical examples are PCs (whether private or business), mobile phones or electronic calendars. The new right protects the user’s interest in the privacy of the data produced, processed and stored by an information-technology system.

4. The privacy of telecommunications (Article 10 Basic Law) guarantees the immaterial transmission of information to individual receivers by telecommunications traffic. Article 10 however does not protect the privacy and integrity of the information-technology system, i.e., as far as the monitoring measure is limited only to the gathering of contents and circumstances of *current telecommunications* in the computer network and the evaluation of the data raised thereby, the Constitutional Court examines only the privacy of telecommunication. However, as far as the online-monitoring refers to the information-technology system as such (i.e., on contents other than current communication) the “right to the guarantee of confidentiality and integrity of information-technology systems” is applicable.
5. The Federal Constitutional Court argues that ‘online search’ might be justified both for the prevention and the prosecution of criminal offences. But such infiltration measures would require constitutional legal authorization. Among other aspects, the constitutional requirements of legal clarity (*Klarheit*) and certainty (*Bestimmtheit*) would apply. The proportionality (*Verhältnismäßigkeit*) both of the basis for authorization and the investigation measures must be examined carefully. The court stresses, that the secret intrusion into an information-technology system requires actual evidence of real danger to

outstandingly important individual or public goods (life and limb, individual freedom etc.). In addition the legal authorization of the surveillance must contain effective procedural safeguard-regulations to protect the rights of the person in question (*Grundrechtsschutz durch Verfahren*). The secret intrusion is subject to a judicial order (*Richtervorbehalt*).

Furthermore, there is a core sphere of privacy (*Kernbereich privater Lebensgestaltung*) which is taboo for any intrusion in accordance with the absolute guarantee of human dignity (*Menschenwürde*, Article 1 [1] Basic Law). This applies, for example, to diary-like recordings. The lawmaker must take precautions, that this core sphere remains untouched as far as possible, and define them sufficiently clearly.

## Notes

- 1) Judgement of the first senate (1 BvR 370/07, 1 BvR 595/07); Bundesverfassungsgericht, Neue Juristische Wochenschrift 2008, 822 pp.;  
<[http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227\\_1bvr037007.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html)>.
- 2) *Gesetzesentwurf zur Neuregelung der Kompetenzen des Bundeskriminalamtes* (Bundtag-Drucksache 16/10121 vom 13. August 2008).