



Telecommunication Newsletter Switzerland

Federal Administrative Court Finds No Sufficient Legal Basis in the Lawful Interception Act and Ordinance for Surveillance of Mobile Internet Traffic

Facts

On September 27, 2010 the State Prosecutor ordered the surveillance of the entire internet traffic and of all available ancillary traffic data of a certain mobile number. The Surveillance Authority for Postal and Telecommunication ("Surveillance Authority") ordered the mobile service provider A. to implement the active surveillance of the internet traffic and ancillary traffic data in accordance with the Technical Requirements for Telecommunication Surveillance ("TR TS"). The authority required A. in particular to duplicate the entire IP traffic originating from a mobile device (telephone) and to relay such data to the competent authority.

A. filed an appeal against the order and requested that the order be quashed. Alternatively, A. requested a period of at least 10 months for the implementation of the surveillance solution for relaying the mobile internet traffic. A. argued that there exists no sufficient legal basis to relay mobile internet traffic either in the law, the pertaining ordinance or the TR TS. A. argued that the law in force only referred to fixed net internet, which technical structure substantially differs from the one of the mobile internet. The Surveillance Authority did not take into consideration that the mobile internet surveillance cannot be accomplished with the existing technical infrastructure and would require additional investments of at least CHF 500'000.

The Surveillance Authority requested that the appeal be quashed, arguing that A. is under a legal obligation to secure the surveillance of the traffic.

Decision

By decision rendered on June 23, 2011, the Federal Administrative Court upheld the appeal. The Court found that A. has sufficiently demonstrated that the

costs for the implementation of the technical requirements for mobile internet traffic surveillance would amount to approximately CHF 500'000.

The Court found that A. as a private company is entitled to rely upon the constitutional protection of freedom of commerce. Therefore, the Court proceeded to examine, whether constitutional rights had been violated. The Court also found that an investment in the amount of CHF 500'000 would constitute a substantial burden on A. and that it was unclear how A. had to technically realize the interception, as several solutions were possible. Therefore, the Court examined whether there is a sufficient legal basis for the surveillance method ordered by the Surveillance Authority.

Although a general obligation of intercepting any telecommunication traffic is foreseen in the law, the Court found that the interception of internet traffic was described in Art. 24 Lawful Interception Ordinance. It remained uncontested that the surveillance method ordered by the Surveillance Authority was neither listed in Art. 24 Lawful Interception Ordinance nor in the TR TS. Hence, the Court found that there was no sufficient legal basis for the Surveillance Authority to require A. to implement mobile internet surveillance and quashed the decision of the Surveillance Authority.

Comment

It is not contested that mobile internet surveillance is a must in the today's world in order to prevent crimes and/or convict criminals. However, the Court found that there must be a sufficient legal basis for an authority to be able to interfere with constitutionally protected rights such as the freedom of commerce which includes the freedom to decide on how to spend and where to invest the money. It cannot be left to the prosecutor's discretion to request third parties to make substantial investments



at their own cost and expenses in an effort to prevent or resolve crimes without an explicit legal basis.

The requirement of a sufficient legal basis for the interference with constitutionally protected rights has been and remains a corner stone of the Swiss legal system. The general public interest in combating or preventing crimes is not sufficient, to permit the Surveillance Authority infringe upon the constitutional right of freedom of commerce without a sufficient legal basis. The Court appealed to the Federal Council to remedy this loophole. Hence, a respective revision of the Lawful Interception Ordinance has to be expected.

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