



Telecommunication Newsletter Switzerland

Federal Administrative Court Finds Sufficient Legal Basis for Active Monitoring of Incoming and Outgoing Calls from and to a Specified Number Outside of Switzerland

Facts

The state prosecutor has – in connection with criminal proceedings – ordered A, a registered provider of telecommunication services in Switzerland, to scan the traffic on its networks for calls originating from or made to a specified number abroad in accordance with the Federal Law on Lawful Interception. In case there is traffic from or to the specified number, the content of the traffic will be relayed to the competent authority in real time.

A contested the legality of the order under Swiss law, arguing that the order (a) did infringe upon the privacy rights of the owners of the access numbers, (b) violates A's property rights, (c) has no sufficient legal basis and (d) violates the principles of adequacy.

Ruling

In its decision rendered on March 10, 2009, the Federal Administrative Court ("Court") rejected A's appeal. The Court first dealt with procedural issues and noted that the order for lawful interception addressed to A constituted an order which can be appealed.

No Standing to Challenge the Interception Order as Such

The addressees of the order are required to deliver the data requested, however, without having the opportunity to question whether there was a sufficient legal basis for the issuance of the interception order or whether the interception order is necessary for the purpose of the investigation and adequate under the circumstances.

Since the addressees of the interception order will not be entitled to the actual order, pursuant to which

lawful interception was permitted, such addressees would regularly not be in a position to question these requirements. This right is granted exclusively to the persons concerned by the lawful interception and who are entitled to challenge the legality and adequacy of the order afterwards.

Consequently, the Court did not hear A's arguments which contested the legality, necessity and adequacy of the interception order as such.

Interception Order Has Sufficient Legal Basis

The Court then proceeded to investigate whether the specific lawful interception obligation imposed upon A had a sufficient legal basis, was necessary and adequate.

In its appeal, A reasoned that the monitoring of all traffic on its network with a specific number abroad lacked a sufficient legal basis and argued that the Federal Law on Lawful Interception was based upon the concept of monitoring access numbers. The Court rejected A's arguments and found sufficient legal basis in the Federal Law on Lawful Interception for the order.

No Unjustified Infringement upon Right to Privacy

According to the view of the Court, such order did also not unnecessarily infringe upon all of A's customers privacy rights, since, if implemented properly, only the traffic data and communication of customers from and to the specific number will be communicated to the competent authority. The adequacy of such order as such is not for this Court to decide, but by the authorities ordering the lawful interception.



No Unjustified Encroachment upon A's Property Rights

The Court further rejected A's arguments that the implementation of the measures requested by the order did unjustifiably encroach upon its own property rights. The Court reasoned that the implementation of the technical measures for the lawful interception could be viewed as an encroachment upon A's property rights. However, the Court found the law to provide for a sufficient legal basis, the violation of the property rights in this case covered by the general public interest in the investigation of criminal actions and also found the order to be adequate. Therefore, the Court did find the requirements under Swiss law for an encroachment upon A's property rights to be met.

Interception Order Adequate for the Purposes

The Court also rejected A's argument that the measure was inadequate, because such a screening could never catch all traffic, as well as A's argument that the order was not necessary, since the same information could be obtained by intercepting the traffic at the suspect's access number.

A continued to argue that interception would be better suited if implemented at the level of the international carriers. Also this argument was rejected by the Court, since the lawful interception obligation is imposed only upon licensed and registered carriers and not their partners for international traffic which may constantly change, unless these carriers are registered.

Interception Order Not Undue Burden On A

Finally, A argued that the implementation of the order was inadequate, since it required extensive investments on its side, which are in no way commensurate with the result to be achieved by the implementation of the order. A's arguments were again rejected. The Court held that, to the extent there would be an encroachment upon A's property rights and/or freedom of commerce, it found a sufficient legal basis in the law and the encroachment to be in the public interest (criminal investigation) and the implementation of the requested interception order was adequate and reasonable under the circumstances and, therefore, no undue burden for A.

Twelve Month Period to Implement the Technical Measures Found Adequate

A argued that it did not have the technical capabilities to implement the measures required for the lawful interception and that it required a grace period of 18 months for the technical implementation. The Court argued that A's appeal had suspensive effect and that therefore, pending the appeal, A was not required to implement the order. The Court found A's arguments convincing that it had not the technical capabilities to implement the measures requested, however, did find a grace period of 12 month sufficient for the implementation.

Comment

Licensed and registered providers of telecommunication services in Switzerland are under a legal obligation to provide the information requested by the competent authorities in lawful interception orders. They will, therefore, have to ascertain that they have the necessary tools in place to supply the information requested to the competent authority.

The Court made it clear that not only a single access number can be the subject of a screening order but also the entire traffic over a provider's network.

Failure to be able to provide such information to the competent authorities could result in administrative measures being initiated against such provider which could ultimately result in such provider losing its license or permission. Providers of telecommunication services are, therefore, well advised to implement the technical means to comply with such orders.

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