Position Paper of the VATM

on the consultation of the European Commission on traffic data retention (Consultation document of DG INFSO and DG JAI of July 30, 2004)

Wettbewerb verbindet

General Remarks

The VATM expressly recognizes the need for an efficient system of defense by a state against dangers. At the same time, the VATM is very concerned about the recurring state initiatives – most recently at the European level through the draft of a framework resolution of the Member States France, Ireland, Great Britain and Sweden (EU Doc. Number 8958/94) – to constantly expand the obligation of companies to store data because this initiative threatens to restrict and violate not only rights of companies, but also the rights of individual citizens to control their own personal data.

Furthermore, the discussion on mandatory data storage falls in the conflict zone between the interest of the state in efficient state defense against dangers and preventive action against organized crime, and the interests of businesses which are to be required to preserve the data. To resolve the issue, it is important to find a reasonable balance among these interests, within the framework prescribed by law.

This is especially true in light of the development that is also identified by the consultation paper of the EU Commission, namely that more and more business models are being developed which make storage of (connection) data unnecessary for the offering companies. Accordingly, the requirement to nevertheless store the accumulated data would be imposed on them more and more exclusively in the interest of the criminal prosecution authorities. This aspect alone is not enough to make the storage of data improper – because, in general, it is possible for a state to draw upon private individuals in fulfilling its obligations. However, such measures must abide by the principle of proportionality. In the case of mandatory data storage, this means that it is a must to grant the affected companies financial compensation.

The background in the Federal Republic of Germany

Data protection enjoys a high priority in the Federal Republic of Germany. In view of the substantial legal thresholds of German constitutional law, mandatory data storage can hardly be justified. From the German perspective, the efforts to introduce data storage EU-wide can therefore only be supported insofar as neither the extent nor the duration of the data storage go beyond the limits of what is allowed under national law. Against this background, the aforementioned draft of a data storage framework resolution must be rejected.

Just recently in Germany there was a debate on mandatory data storage when amendments to the new German Telecommunications Act (TKG) were discussed. Following intensive and controversy-filled debates, the agreement was finally reached between the Bundestag and Bundesrat in May of this year to refrain from introducing mandatory date storage.

Reasons for this decision included the fact that such a requirement was contrary to the principles of data avoidance (meaning that no unnecessary data should be stored) and data economy as set forth in Section 3a of the Federal Data Protection Act. Furthermore, it was found to infringe with the rights of the affected citizens to control their own personal data. In addition, the argument was raised on the other side that the outright requirement to store data would accumulate an enormous volume of unstructured data, whereas it would remain unclear which data would actually be useful. Hence, it was deemed to be entirely open whether the data would provide any added value at all to the security authorities; thus, providing for mandatory data storage the new Telecommunications Act was out of the question because of considerations of proportionality. This decision is supported by the ruling of the Federal Constitutional Court of March 3, 2004 on the surveillance of citizens' residences, which confirms the restrictive use of surveillance measures and declared expanded activities and wide interpretations unconstitutional.

Effects on the development of the economy and social policy

Without question, a mandatory data storage requirement imposes significant burdens on the affected companies. In addition to organizational effects, financial effects in particular must be named here: The investment costs in Germany alone could already be in the hundreds of millions, and annual operating costs in the tens of millions are expected.

Moreover, the development of the telecommunication sector as a whole is at risk, since the confidence of users in the technology is an important basis for further development of the European Information Society. The e-Europe strategy is intended to contribute to making the European Union the most competitive region in the world. This goal was taken into account recently by the uniform framework of the EU guidelines on electronic communication. An obligation to store data on a mandatory basis would seriously jeopardize this goal.

A need for uniform rules Europe-wide

In principle, uniform regulation of areas relevant to the internal market can make sense. Special care is appropriate, however, when sensitive rights could be intruded. In the European Union too, the general principle of confidentiality of telecommunication applies, and this also pertains to the underlying communication data. The EU Treaty refers already in Article 6 to the European Convention on Human Rights (Article 8). According to this Convention, surveillance is always illegal unless it is allowed as necessary by a legal provision setting forth specific cases and limited purposes.

Intervention in particularly sensitive rights must never be justified by a sweeping general reference to the general danger from terrorism. Special justification is needed, which must demonstrate in appropriate detail what goal could be achieved by what means.

At the same time, it is important to take the individual characteristics of the EU Member States into account when intervening in sensitive rights. In this respect, we refer to the legal and political framework conditions in Germany above. Other Member States have also opted expressly not to provide for mandatory data storage in view of the named problems. As in Germany, often a maximum storage period is provided for customer data, for the purpose of protecting the citizens. Mandatory data warehousing has not even been introduced in the USA in the course of tightening their national security provisions. A case-by-case approach continues to be considered appropriate there.

In the interest of the safety of all citizens in the EU, the member companies of the VATM are ready to cooperate closely with the security authorities, and to grant the access to the existing data that is already provided for in the law. However, additional burdens should only be imposed on the telecommunications companies if the intended measure were to bring about a real contribution to improving the security needs in Europe and would go along with an appropriate reimbursement of costs. This goal makes it important to reconsider the discussion about mandatory data storage and to bring it more to the point.

Berlin, September 13, 2004

More than 50 of the telecommunications and service companies operating in the German market are active participants in the VATM. All are in direct competition with the former monopoly Deutsche Telekom AG. Our members post around 80 percent of the total sales achieved by private providers in the German telecommunications market.

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