Federal Administrative Court
Supreme Court
(https://www.bverwg.de/en)

Judgment of 14 December 2016 - BVerwG 6 A 9.14

ECLI:DE:BVerwG:2016:141216U6A9.14.0

Action for a declaratory judgment against the monitoring of e-mail traffic in the context of the strategic surveillance of telecommunications

Headnote

A legal relationship establishable within the meaning of section 43 (1) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*) does not exist, even taking into account the guarantee of the legal protection of rights of article 19 (4) first sentence of the Basic Law (GG, *Grundgesetz*), when a possible encroachment on the basic right deriving from article 10 of the Basic Law in the context of the strategic surveillance of telecommunications has been removed immediately and without consequence and therefore can no longer be established (following the judgment of 28 May 2014 - 6 A 1.13 – Rulings of the Federal Administrative Court 149, 359).

Sources of law

Basic Law for the Federal Republic of Germany	GG, *Grundgesetz*	article 1 (1), article 2 (1), article 10, article 19 (4), article 48 (3)
Act on the Restriction of the Secrecy of Mail, Posts and Telecommunications - Act referring to article 10 of the Basic Law - G 10 Act	G 10, *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses – Gesetz zu Artikel 10 Grundgesetz*	section 1, section 5 (1) third sentence, section 6 (1), section 12 (1) and (2)
Code of Administrative Court Procedure	VwGO, *Verwaltungsgerichtsordnung*	section 43, section 50 (1) no. 4

Summary of the facts

The claimant, an attorney-at-law, seeks to establish that the Federal Intelligence Service (*Bundesnachrichtendienst*) encroached upon his telecommunications privacy deriving from article 10 of the Basic Law (GG, *Grundgesetz*) through the monitoring of e-mail traffic carried out in 2012 in the context of the strategic surveillance of communications under section 5 of the Act on the Restriction of the Secrecy of Mail, Posts and Telecommunications - Act referring to article 10 of the Basic Law – (G 10, *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses – Gesetz zu Artikel 10 Grundgesetz*).

The claimant refers to the Parliamentary Control Panel report of 19 December 2013, in which it informed the German Bundestag pursuant to sec-tion 14 (1) second sentence G 10 of restrictions, including restrictions under section 5 G 10, in the period between 1 January and 31 December 2012 (Bun-destag printed paper (BT-Drs., *Bundestagsdrucksache*) 18/218 p. 7 et seq.). According to this report, in 2012, the Federal Ministry of the Interior, with the agreement of the G10 Commission, ordered restrictions relating to three of the areas of risk designated in section 5 (1) third sentence G 10. These areas of risk were international terrorism, arms proliferation and conventional armaments, and illegal human smuggling. For the area of risk of international terror-ism, the order specified 1,164 search concepts (76 content-related and 1,088 formal) in the first half of the year and 1,065 additional search concepts (88 content-related and 977 formal) in the second half of the year, resulting in 1,804 telecommunications fulfilling these specifications. Of these, 595 were in the form of e-mails, 290 were in the form of telefaxes, nine were in the form of telexes and 58 were voice messages. In addition, 816 communication datasets and 36 short messages were collected. As a result, 137 of the selected com-munications were categorised as relevant from the point of view of intelligence.

With regard to the admissibility of his action for a declaratory judgment, the claimant asserts that in 2012, he sent to or received from abroad far more than 1,000 e-mails via the provider that was subject to monitoring. Thus, he had con-tact to many foreign clients and colleagues in the geographic area monitored by the Federal Intelligence Service. These e-mails frequently contained matters that are subject to the secrecy obligations of attorneys and related to technical facts, the claimant asserts. In view of the large number of search concepts used in monitoring, the large number of hits and the large geographic area under surveillance, it was likely that his (professional) e-mail correspondence was collected and checked for its relevance in terms of intelligence. In the context of the guarantee of the protection of rights of article 19 (4) first sentence GG, this was sufficient to assume the existence of a specific legal relationship that could be established within the meaning of section 43 (1) VwGO.

Reasons (abridged)

9 The action for a declaratory judgment is inadmissible.

10 Recourse to the courts for the claimant's request, referring to the legality of the strategic surveillance of e-mail traffic carried out in 2012 pursuant to section 5 (1) third sentence nos. 2, 3 and 7 G 10 of 26 June 2001 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1254, 2298), here applicable in the version most recently amended by the Act of 7 December 2011 (BGBl. I p. 2576), is not excluded. Moreover, the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) has jurisdiction ratione materiae under section 50 (1) no. 4 VwGO. In both regards, reference may be made unreservedly to the statements in the judgment of 28 May 2014 – 6 A 1.13 - (Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 149, 359 para. 15 et seqq.), by means of which the Senate dismissed the claimant's action for a declaratory judgment concerning the strategic surveillance of e-mail traffic under section 5 (1) third sentence nos. 2, 3 and 7 G 10 in 2010. However, the prerequisite for a declaratory judgment of the existence of a legal relationship that can be established within the meaning of section 43 (1) VwGO was not fulfilled. To this extent, too, the result was that the Senate adheres to its decision in the preceding proceedings referred to above.

11 A legal relationship that can be established under section 43 (1) VwGO is one relating to specific facts that specifically affect the respective claimant (1.). It could be affirmed that a legal relationship within this meaning existed in the present case if, in the course of the said restriction measures in 2012 under section 5 G 10, there had been an encroachment on the claimant's telecommunications privacy protected under article 10 GG. (2.). However, such an encroachment can no longer be established and thus an establishable legal relationship does not exist because no e-mail traffic by the claimant is among the e-mails that the Federal Intelligence Service collected, classified as being relevant from an intelligence point of view and stored in 2012, and the Federal Intelligence Service properly, immediately and completely deleted all the other e-mails it had collected, but which were irrelevant from an intelligence point of view (3.). The assessment that, for this reason, admissible legal action for a declaratory judgment cannot be taken does not conflict with the guarantee of effective legal protection enshrined in article 19 (4) first sentence GG. This guarantee is admissibly limited by the constitutionally enshrined order to delete e-mails that were collected but not required for the fulfilment of the Federal Intelligence Service's tasks and the provisions of the G 10 Act for the notification of persons affected by restriction measures required under section 5 G 10 (4.). The obstruction to the judicial protection of individual rights relating thereto is acceptable for reasons including that the G10 Commission continually and comprehensibly monitors the legitimacy of restriction measures under section 5 G 10, thus guaranteeing a compensatory protection of basic rights (5.).

12 1. Under section 43 (1) VwGO, the establishment of the existence or non-existence of a legal relationship – also in the past - may be sought by means of an action on the basis of a justified interest in such establishment. The term "legal relationship" is to be understood to mean

the legal relationship resulting from specific facts on the basis of public law defining the relationship of natural or legal persons to one another or of a person to a thing (cf. only BVerwG, judgment of 23 August 2007 – 7 C 2.07 - BVerwGE 129, 199 para. 21). The parties are required to argue about the application of a legal provision to a specific, clear case specifically affecting the respective claimant and are not permitted to submit to the administrative courts for clarification merely abstract legal questions arising from facts only conceived or imagined to be possible (cf. consistent jurisprudence of the Federal Administrative Court since the judgment of 8 June 1962 – 7 C 78.61 – BVerwGE 14, 235 <236> substantiation in: BVerwG, judgment of 28 May 2014 – 6 A 1.13 - BVerwGE 149, 359 para. 20 et seq.; (...)).

13 2. If the Federal Intelligence Service demonstrably accesses a means of telecommunication in such a way as to be defined as an encroachment upon telecommunications privacy protected under article 10 GG, this is sufficient to establish the existence of a legal relationship between the authority and the telecommunications user affected within the meaning of the establishment of a legal relationship under section 43 (1) VwGO (BVerwG, judgments of 23 January 2008 – 6 A 1.07 - BVerwGE 130, 180 para. 26 and of 28 May 2014 – 6 A 1.13 – BVerwGE 149, 359 para. 23). In its fundamental judgment on strategic surveillance of 14 July 1999 – 1 BvR 2226/94 et al., Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 100, 313 <366 et seq.>), the Federal Constitution-al Court (BVerfG, *Bundesverfassungsgericht*) defined broadly the limits of an encroachment on article 10 GG, which aims to protect communications privacy. According to this judgment, any cognisance, recording and utilisation of com-munications data by the state constitutes an encroachment on basic rights. Even collecting such data constitutes an encroachment insofar as it makes the communication available to the Federal Intelligence Service and forms the basis of subsequent comparison with the search concepts ordered under sec-tion 5 (1) and (2) G 10. An encroachment is deemed not to take place only when telecommunications processes between German connections are collected inadvertently, such collection occurs only on account of the technology used, and the data are discarded technically without trace immediately after the signals have been processed. Subsequent information and data processing - particularly matching search concepts, further examination by staff of the Federal Intelligence Service and storing and utilising the data categorised as being of relevance from the point of view of intelligence – constitutes further separate violations of the basic right deriving from article 10 GG. Under section 31 (1) of the Federal Constitutional Court Act (BVerfGG, *Bundesverfassungsgerichtsgesetz*), this definition of encroachment on article 10 GG, which the Federal Constitutional Court uses in its evaluation of the strategic surveillance of telecommunications, is binding upon the Senate, particularly since the Federal Constitutional Court repeated it later in another context BVerfG, judgment of 2 March 2010 – 1 BvR 256/08 et al.- BVerfGE 125, 260 <309 et seq.>). Accordingly, the Senate is prevented from taking into account more restrictive trends that have become evi-

dent in the jurisprudence of the Federal Constitutional Court with regard to the definition of encroachments on the basic right to informational self-determination in the collection and screening of data to obtain information laid down in article 2 (1) GG in conjunction with article 1 (1) GG (for example: BVerfG, decision of 4 April 2006 – 1 BvR 518/02 – BVerfGE 115, 320 <343 et seq.>, judgment of 11 March 2008 – 1 BvR 2074/05 et al. – BVerfGE 120, 378 <398 et seq.> cf.: BVerwG, judgment of 22 October 2014 – 6 C 7.13 - (...)).

14 3. It is undisputed by the parties that among the total number of 288 telecommunications that the Federal Intelligence Service, in the context of its restrictions under section 5 (1) third sentence nos. 2, 3 and 7 G 10, collected, categorised as being of relevance from the point of view of intelligence and demonstrably continued to store in 2012, there was no e-mail traffic of the claimant. To this extent, the Federal Intelligence Service did not encroach upon the claimant's basic right deriving from article 10 GG, so that in this respect, a legal relationship within the meaning of section 43 (1) VwGO did not come into existence.

15 Moreover, such an encroachment effecting a legal relationship would not – yet – have occurred if an act of e-mail traffic by the claimant had been among the exclusively domestic telecommunications which were automatically eliminated without a trace and immediately deleted right at the beginning of the screening process used by the Federal Intelligence Service in its strategic surveillance of telecommunications i.e. immediately after the supply of the copied flow of raw data from a transmission route covered by the order of a restriction measure. Collection of this kind, which is solely for technical reasons and is promptly neutralised, does not have the character of an encroachment upon telecommunications privacy, as specifically stated by the Federal Constitutional Court.

16 In contrast, it cannot be ruled out firstly that an act of e-mail traffic of the claimant was in the data flow collected by the Federal Intelligence Service, from which exclusively domestic German telecommunications had been re-moved, which was automatically searched on the basis of the ordered search concepts without qualifying in this search as a so-called hit. Secondly, it cannot be ruled out that in the automatic processing of the search concepts, an act of e-mail traffic of the claimant qualified as a hit, but proved to be irrelevant from an intelligence point of view when immediately examined by staff of the Federal Intelligence Service under section 6 (1) first sentence G 10. In both these cases, the e-mail traffic subject to an encroachment upon the claimant's basic right deriving from article 10 GG would have been eliminated at once by the Federal Intelligence Service and immediately and completely deleted, as happened to all e-mails that were irrelevant from an intelligence point of view.

17 This deletion would have been done in a lawful manner. From the basic right as provided for by article 10 GG and the principle of proportionality derives the requirement – which is also statutorily laid down

in the special provision of section 6 (1) second sentence G 10 - that data deriving from encroachments on telecommunications privacy are deleted immediately as soon as they are no longer required for the purpose justifying the encroachment (BVerfG, judgment of 14 July 1999 – 1 BvR 2226/94 et al.– BVerfGE 100, 313 <400>; also in relation to article 13 (1) GG: BVerfG, judgment of 3 March 2004 – 1 BvR 2378/98 et al. - BVerfGE 109, 279 <380>; on article 8 of the European Convention on Human Rights (ECHR) cf.: European Court of Human Rights (ECtHR), decision of 29 June 2006 - no. 54934/00, Weber and Saravia v. Germany – para. 132; ECtHR <GC>, judgment of 4 December 2015 - no. 47143/06, Zakharov v. Russia – para. 255).

18 Because the Federal Intelligence Service fulfilled its obligation to delete e-mail traffic collected in the context of the strategic surveillance of communications but not required for the fulfilment of its tasks, it would have also removed any encroachment upon the claimant's basic right deriving from article 10 GG immediately and without consequence. Such an encroachment, insofar as it occurred, is no longer establishable. Thus, a legal relationship that can be established within the meaning of section 43 (1) of the VwGO does not exist.

19 4. The guarantee of effective legal protection enshrined in arti-cle 19 (4) first sentence GG requires no other assessment. In principle, this re-quires the possibility of a court review of encroachments on basic rights. How-ever, the constitutional guarantee of legal protection is subject to a constitution-ally unobjectionable restriction by the obligation of the Federal Intelligence Service described above to delete data in its interplay, provided for in sec-tion 6 (1) sixth sentence G 10, with the obligation for authorities to notify per-sons affected by restriction measures under section 5 G 10 laid down in sec-tion 12 (2) in conjunction with section 12 (1) G 10. The result of this statutory provision is to prevent a perpetuation of encroachments on basic rights.

20 The order to delete data that are not (or are no longer) required for the official fulfilment of tasks – which is also enshrined in constitutional law – must be aligned with the guarantee of legal protection of article 19 (4) first sen-tence GG with regard to the possible judicial control of state information and data processing measures in such a way that legal protection is not undermined or thwarted (BVerfG, judgments of 14 July 1999 1 BvR 2226/94 et al. – BVerfGE 100, 313 <364 et seq., 400> and of 3 March 2004 – 1 BvR 2378/98 et al. – BVerfGE 109, 279 <380>). The above-mentioned provisions of the G 10 Act ensure that this alignment in the area of the strategic surveillance of telecommunications takes place in an unobjectionable way.

21 In principle, restriction measures under section 5 G 10 are to be communicated to the persons affected after they have ceased pursuant to sec-tion 12 (2) in conjunction with subsection 1 G 10. Under section 12 (2) first sen-tence G 10, this does not apply when the personal data were deleted immedi-ately, however. This provision rules out a notification obligation for all those encroachments on telecommunications privacy that take place from the collection of the raw data flow from

which exclusively domestic German telecommunications have been eliminated up to and including the examination of the hits generated with the ordered search concepts on account of their relevance to intelligence. By means of the regulatory content thus described, the provision takes account of legal requirements established by the Federal Constitutional Court in its judgment on the strategic surveillance of telecommunications of 1999 concerning the notification requirement contained in section 3 (8) G 10 (old version).

22 In accordance with these standards, it corresponds in principle both to the necessity to effectively protect the basic right deriving from article 10 GG and a requirement deriving from the guarantee of legal protection of article 19 (4) first sentence GG that persons affected by secret telecommunications monitoring measures are subsequently informed of them since without such notification, unless they have learned of the collection of the telecommunications in some other way, they are unable to assert either the unlawfulness of the encroachments on their telecommunications privacy or any rights to deletion or notification. Statutory restrictions on the notification obligation are not ruled out under article 10 (2) first sentence GG and in implementation of article 19 (4) first sentence GG, however. In view of the volume of screenings and the fact that, to a large extent, the material obtained proves to be irrelevant and is immediately destroyed, it may be justified to forego notification if the collected data have been destroyed immediately as irrelevant without any further steps being taken (BVerfG, judgment of 14 July 1999 – 1 BvR 2226/94 et al.- BVerfGE 100, 313 <361, 364, 397 et seqq.>; affirming the result of the assessment according to the standard of article 8 ECHR: ECtHR, decision of 29 June 2006 - no. 54934/00, Weber and Saravia v. Germany – para. 135 et seqq.). Although the Federal Constitutional Court accordingly demands destruction of data without any further steps, it refers to the destruction of irrelevant data, thus requiring a prior examination of relevance. Only when the data collected are further utilised, placing a heavier burden on the persons affected, does it consider the required legal boundary for waiving notification to have been reached.

23 The Federal Constitutional Court reinforced these standards for the admissibility of restricting the notification obligation in a later ruling on the unnoticed collection and processing of telecommunications data. In this connection, there could be a large number of persons whose data has been collected only coincidentally together with other data and who would not themselves have been the focus of official action. In relation to such persons, cognisance of data for a short period did not have to result in traces being left or consequences for the persons affected. For this reason, with regard to the deepening of the encroachment upon a basic right that would be caused by notification in an individual case, such notification could in principle be waived even without judicial confirmation when the persons concerned were affected only insignificantly by the measure and it was to be assumed that they would have no interest in such notification (BVerfG, judgment of

2 March 2010 – 1 BvR 256/08 et al. – BVerfGE 125, 260 <337>, decision of 12 October 2011 –2 BvR 236/08 et al. – BVerfGE 129, 208 <251>).

24 The legislator could regard these conditions as having been fulfilled in accordance with the generalising point of view, the required basis for the case constellations under discussion here. In the case of the strategic surveillance of telecommunications under section 5 G 10, telecommunications are not only collected coincidentally in a strict sense, since the restriction measures specifically have the objective of filtering out a small amount of information from a very large number of collected communications. The restrictions are not targeted at individuals, however – apart from the monitoring of foreign telecommunications connections under section 5 (2) third sentence G 10, which is irrelevant to the decision in this case. Their character relates not primarily to persons but to facts (BVerwG, judgment of 23 January 2008 – 6 A 1.07 – BVerwGE 130, 180 para. 27). In the examinations of the collected telecommunications traffic immediately carried out for its relevance from the point of view of intelligence in the form of automatic comparison with the ordered search concepts followed by a check by Federal Intelligence Service staff, the persons affected remain to a certain extent hidden in the background. To enable them to be informed of the restrictions imposed, they would have to be put in the spotlight of a closer examination that could not be restricted to individual cases, which would in no way be occasioned by the objective of strategic surveillance. This would require large amounts of data, which could otherwise be deleted immediately, to be stored for considerable periods. All this would considerably intensify the encroachment of the basic rights of an incalculable number of people; at the stage of the examination of relevance, these encroachments are of only low intensity.

25 Under section 6 (1) sixth sentence G 10, data is not deleted except in cases of the initial examination of relevance within the meaning of section 6 (1) first sentence G 10, insofar as the data could be of significance for notification under section 12 (2) G 10 or for a judicial review of the legitimacy of the restriction measures. The statutory exemption from the obligation that otherwise exists to delete data that are no longer required, in this provision and required in view of the guarantee of legal protection under article 19 (4) first sentence GG, begins where the notification obligation takes effect under sec-tion 12 (2) in conjunction with subsection 1 G 10 - which, as a rule, makes legal protection possible in the first place - namely in retaining collected data beyond the period of an immediate examination of their relevance. There is just as little to criticise in the context of article 19 (4) first sentence GG that the stages of an encroachment upon article 10 GG before the time stated are not subject to a notification obligation as there are concerns on grounds of the constitutional protection of rights that the corresponding data are deleted immediately. While notification of restriction measures gives persons affected the knowledge they require to claim judicial redress, the retention of data provides the evidence for a judicial examination. On the other hand, the legislator, insofar as it is

allowed to withhold notification enabling persons affected to claim redress, is also not obliged to preserve evidence for possible court proceedings.

26 It further arises from the described connection between the obligation to notify restriction measures after the event and refraining from deleting data that the provisions in section 5 (2) sixth sentence and section 6 (1) fifth sentence G 10 on the deletion of protocol data at the end of the calendar year following the collection of such data – in this case 2013 – are also compatible with the guarantee of legal protection of article 19 (4) first sentence GG. Insofar as the Federal Constitutional Court has raised objections to comparable provisions on deletion on account of the brevity of the protocol retention period, this was only in connection with constellations where – unlike in this case - there was an unrestricted notification obligation (BVerfG, judgment of 20 April 2016 –1 BvR 966/09 et al.– *Neue Juristische Wochenschrift* (NJW) 2016, 1781 para. 205, 246, 269 in conjunction with paras. 138 and 272).

27 5. The impediment to the protection of individual rights deriving from the described provisions of the G 10 Act, which is not subject to any concerns, if only on account of the constitutionality of these provisions, is also compensated for by the protection of basic rights arising from the G10 Commission's supervisory activity.

28 The G10 Commission decides *ex officio* or on the basis of complaints on the admissibility and necessity of restriction measures pursuant to sec-tion 15 (5) G 10 in conjunction with section 1 (2) G 10. Its supervisory powers cover the entire collection, processing and utilisation of the personal data ob-tained by Federal intelligence services under the G 10 Act including the deci-sion to notify persons affected.

29 In its judgment of 1999, the Federal Constitutional Court underlined that control by independent state agencies and auxiliary bodies not bound by any instructions was a constitutional requirement on account of the impediment to legal protection - also outside the area excluded from the possibility of taking legal action under article 10 (2) second sentence GG and section 13 G 10 - resulting from the imperceptibility of encroachments on telecommunications privacy, the opaqueness of the subsequent data processing and the possibility of restricting notification (BVerfG, judgment of 14 July 1999 – 1 BvR 2226/94 et al.– BVerfGE 100, 313 <361>; on the requirement for procedural compensation for restrictions of individual legal protection in comparable cases: BVerfG, judgments of 24 April 2013 – 1 BvR 1215/07 – BVerfGE 133, 277 para. 213 et seqq. and of 20 April 2016 – 1 BvR 966/09 et al.– NJW 2016, 1781 para. 135, 140 et seq.; in the context of article 8 of the ECHR: ECtHR, decision of 29 June 2006 - no. 54934/00, Weber and Saravia v. Germany – para. 115 et seqq.; judgment of 12 January 2016 - no. 37138/14 - Szabó and Vissy v. Hungary – para. 75 et seqq.). In a new decision, the Federal Constitutional Court stated that as a neutral entity, the G10 Commission served on the one hand to involve the executive branch and on the other to repre-

sent compensatorily the interests of persons affected through ongoing and comprehensive legal oversight. Its supervisory activity procedurally ensured the legitimacy of secret state monitoring measures (BVerfG, decision of 20 September 2016 – 2 BvE 5/15 - (...)).

30 It is in accordance with these standards that the Senate in its previous decision of 2014, with reference to the powers and the specialised exper-tise of the G10 Commission, considered that effective compensatory protection of basic rights was guaranteed (BVerwG, judgment of 28 May 2014 – 6 A 1.13 – BVerwGE 149, 359 para. 40 et seq.; previously, to this effect see: BVerwG, judgment of 23 January 2008 – 6 A 1.07 – BVerwGE 130, 180 para. 44 et seq.).