



Globalization, criminal law and fundamental rights

*The impact of the decisions of the
Bundesverfassungsgericht and the Curtea Constituțională*

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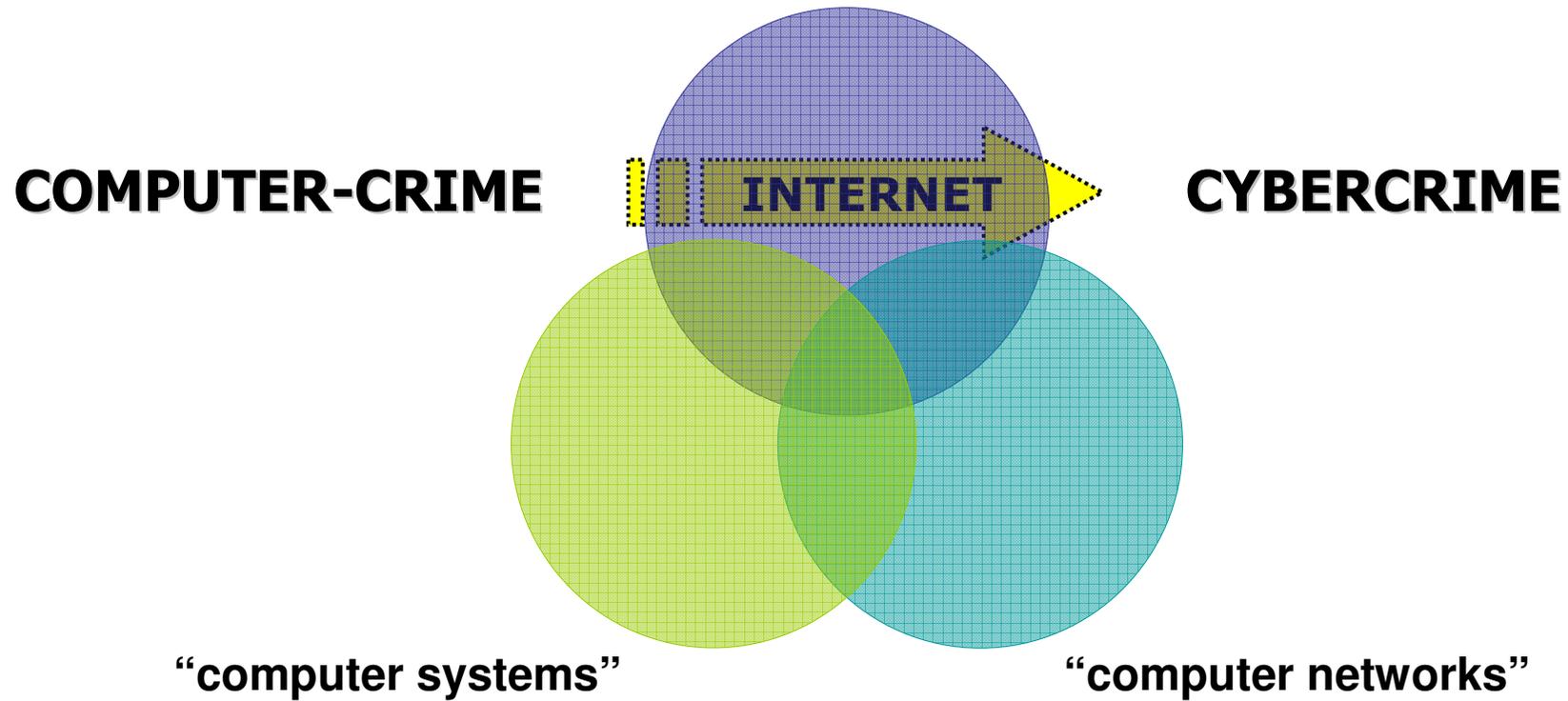
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**THE NEW DIMENSION
&
WORK IN PROGRESS**



**CONVENTION
ON CYBERCRIME**

Procedural law

**Search and seizure of
stored computer data**

**Real-time collection
of computer data**

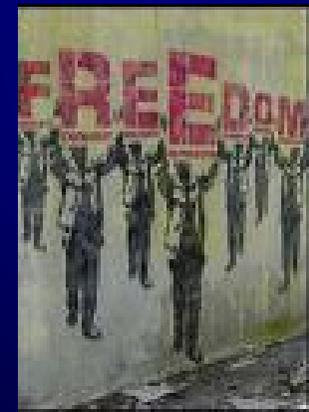
Interception of content data

**New technologies and
Internet are:**

- 1) instrument / method
to commit crimes
and**
- 2) instrument in the fight
against crime and
cybercrime**



**FUNDAMENTAL
RIGHTS**



COERCIVE POWER OF THE STATE
adopting such legislative and other measures
and limits for the protection of fundamental rights

Bundesverfassungsgericht,
370/07 –595/07, 27.2.2008
(Online Durchsuchung)

Curtea Constituțională
Decizia 1258, 8.10.2009
(Data retention)

Bundesverfassungsgericht,
1 BvR 256/08, 1 BvR 263/08,
1 BvR 586/08 , 02.03.2010
(Data retention)

COMMON ARGUMENTS OR ELEMENTS



1) Importance of the ISP

“[The challenged provisions even with respect to the storage of Internet access data and the authorisation to give information under § 113b sentence 1 half-sentence 2 TKG – encroach on the area of protection of Article 10.1 GG (secrecy of telecommunications)]”.

“The fact that the storage is effected by private service providers does not prevent this, since the service providers are merely used by the state authorities as helpers to carry out their duties”.

“There is a need for legislation which provides for a particularly high degree of security, whose essential provisions are at all events well-defined and legally binding. In this connection the legislature is free to entrust a regulatory agency with the technicalities of putting the prescribed standard into concrete terms. In this process, however, the legislature must ensure that the decision as to the nature and degree of the protective precautions to be taken does not ultimately lie without supervision in the hands of the respective telecommunications providers”

COMMON ARGUMENTS OR ELEMENTS



2) *Legitimate purpose*

“the legislative measure that affects the exerting of fundamental rights and freedoms must fulfil a legitimate purpose consisting of protecting national security, public safety, defence of public order, criminal prevention as well as protecting the rights and interests of other persons; to be necessary in a democratic society; to be proportionate with the situation that determined them; to be applied in a non-discriminatory way and to not affect the existence of such right or freedom “

Neither the provisions of the Convention for defence of human rights and fundamental freedoms, nor the Constitutions prohibit the legislative solutions of the state authorities interference in exerting the above mentioned rights, but the state intervention needs to respect strict rules, as explicitly specified in the Convention (ECHR)

***The question of legitimation:
the protection of the fundamental rights***

The limitation of a fundamental rights can be constitutionally only permissible if factual indications exist of a concrete danger to a “predominantly important legal interest”.



***national security,
public safety, defence
of public order,
criminal prevention as
well as protecting the
rights and interests of
other persons; to be
necessary in a
democratic society***



These "predominantly important interests" are the life, limb and freedom of the individual or such interests of the public a threat to which affects the basis or continued existence of the state or the basis of human existence

*The question of legitimation:
the protection of the fundamental rights*

**Freedom of Movement,
Intimate, Family and private life,
Secrecy of Correspondence
and communication
Freedom of Expression,
confidentiality and integrity of
information technology systems
guaranteed by the
general right of personality**



**Predominantly
“important interests“:
life,
limb and freedom
of the individual
or
such interests of
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the basis or continued
existence of the state or
the basis of human existence**

*The question of legitimation:
the protection of the fundamental rights - standards*

1) Principle of proportionality

(grievousness of the potential violation / important legal interests)

2) Precise legal provision

The lack of a precise legal provision opens up the possibility for abuses in the activity of retaining, processing and using the data stored by the electronic communication services and public networks providers

Demands of data security - There is a need for legislation which provides for a particularly high degree of security, whose essential provisions are at all events well-defined and legally binding



The question of legitimation: the protection of the fundamental rights - standards

Precise legal provision



The limitation of exerting the fundamental right (to private life and to the secrecy of the correspondence and the freedom of expression) must also be made in a clear, predictable and unambiguous manner, so that the possibility of the arbitrariness or abuse from authorities in this field may be avoided, as much as possible.



The principle of specifying [the fundamental right which is restricted] - a statute must specify the fundamental right which is restricted by this statute or this Act, stating the relevant Article. The function of the principle of specifying the fundamental right restricted is to provide a warning and an occasion for reflection (see BVerfGE 64, 72 (79-80)). Specifying the encroachment contained in the wording of the Act is intended to ensure that the legislature only provides for encroachments of which it is aware as such, and with regard to which it accounts to itself as to their impact on the fundamental rights concerned

*The question of legitimation:
the protection of the fundamental rights - standards*



(BverG2010)

Proportionality of the legislative formulation of the provision (standards)

Demands of data security

Requirements of the direct use of data

Requirements of the transparency of data transmission

Requirements of legal protection and on sanctions

Requirements of the indirect use of the data to identify IP addresses

Responsibility for drafting the provisions

*The question of legitimation:
the protection of the fundamental rights - standards*

3) Independent and neutral control body

Such reservation facilitates the preventive control of a planned investigation measure by an independent and neutral control body. Such control may constitute a significant element of the effective fundamental rights protection.

(the control serves the purpose of the “compensatory representation” of the interests of the person concerned in the administrative procedure – in the case, for example, concerning the secret investigation measure (“It can however guarantee that the decision on a secret investigation measure takes sufficient account of the interests of the person concerned if the person concerned himself or herself is unable to take measures in advance to defend his or her interests because of the secret nature of the measure”).



CONCLUSIONS

Conflicting relationship between the state's duty to protect legal interests and the individuals' interest in the safeguarding of their rights guaranteed by the constitution.



Balance between the conflicting interests

- **Constitution**
- **European Convention on Human Rights,**
- **Universal Declaration of Human Rights,**
- **International Pact regarding civil and political rights,**
- **Charter of Fundamental Rights of the European Union and Lisbon Treaty (1.12.2009)**

CONCLUSIONS

**Search and seizure of
stored computer data**

**Real-time collection
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Interception of content data



**Balance
between the conflicting
interests -**

Standards

**Guide lines from the decisions
of the Constitutional Courts**



THANK YOU FOR YOUR ATTENTION



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