# [DE] Online Search and Monitoring of the Internet Unlawful

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*Nicole Spoerhase-Eisel*
*Institute of European Media Law (EMR), Saarbrücken/Brussels*

According to a Federal Constitutional Court judgment of 27 February 2008, computers owned by people who are suspected of committing a criminal offence may only be tapped using spying software if this is necessary for the protection of extremely important general interests.

The judgment was in response to a constitutional complaint made by a female journalist who is a member of the North Rhine-Westphalia Regional Association of the *Die Linke* party and by three lawyers, against provisions of the *Verfassungsschutzgesetz des Landes Nordrhein-Westfalen* (Constitutional Protection Act of the *Land* of North Rhine-Westphalia – VSG) adopted on 20 December 2006 by the *Land* of North-Rhine Westphalia. The provisions of that Act concerning secret access to information systems ("online search") and Internet surveillance were declared unconstitutional and void.

In the court's opinion, an online search constitutes interference with the general personality right protected by Article 2(1) in conjunction with Article 1(1) of the Basic Law. On this point, it stated that the use of IT systems, especially personal computers, had become extremely important for the development of the personality in many social classes. Moreover, the importance for that development increased when such IT systems were networked. The Internet was vitally important for the development of the personality as it not only made a huge amount of information available but also a large number of communication services with the help of which the user could actively build up and maintain social contacts. At the same time, however, that led to new dangers for the general personality right because the monitoring of the use of such systems and the evaluation of the data gathered could enable far-reaching conclusions to be drawn concerning the user's personality. The court concluded from the importance of the use of IT systems for the development of the personality and from the risks to the personality associated with that use that there was a considerable need for basic rights to be protected and declared that there was a "basic right to a guarantee of the confidentiality and integrity of IT systems" as a particular manifestation of the general personality right. It emphasised that, although interference with this right might be justified both for the prevention and prosecution of crimes, the VSG did not in the case being examined meet the constitutional requirements for a legal basis for such interference. For example,

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the secret infiltration of an IT system to monitor the use of the system and read its storage media is only permissible when there is actual evidence of a concrete danger to a very important legally protected interest (such as life and limb and individual freedom). In addition, the court called, *inter alia* , for the secret intrusion into IT systems to be subject to a judicial order and for precautions to protect the core sphere of private life.

The court held that the provision concerning the secret surveillance of the Internet was a breach of Article 10(1) of the Basic Law, which protects the privacy of telecommunications, when access-protected content is monitored by using access keys that have been obtained without the consent or against the will of the person engaged in those telecommunications. Here too, the court considered that the principle of proportionality was not observed since the Act permitted large-scale intelligence-gathering measures (including *vis-à-vis* third parties) in advance of any concrete danger and without taking into account the seriousness of possible violations of legally protected interests.

***Urteil des BVerfG vom 27. Februar 2008 (Az. 1 BvR 370/07 und 1 BvR 595/07)***

http://www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html

*Federal Constitutional Court judgment of 27 February 2008 (Cases 1 BvR 370/07 and 1 BvR 595/07)*

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