



## **ECJ: IP addresses can be personal data. But not always.**

### **Statement by ePrivacy on the ECJ's decision of 19 October 2016**

**Hamburg, 10/2016** In one of the most important judgements of the European Court of Justice in years for the online sector, the ECJ gave its view on the issue of whether dynamic IP addresses are personal data or not (judgement of 19 October 2016, C-582/14). The background to this was an order to refer the matter from the German Federal Court of Justice ["Bundesgerichtshof" or "BGH"] of 28 October 2014. The BGH dealt with this question in particular: Is an IP address, which a provider of online services stores in connection with an access to its website, personal data for the provider, even if only one third party (here: an access provider) possesses the necessary additional knowledge to identify the person concerned?

This issue is of course of crucial importance to the online sector. If an IP address were personal data, then each person who processes and, for example, stores such an IP address, would then require a statutory justification or the consent of the person concerned. If, on the other hand, an IP address were anonymous data, the laws on data protection would not apply. It would then be permissible to process an IP address without the consent of the party affected.

The ECJ came to the result that a dynamic IP address represents personal data for the provider of a website if it possesses the "legal means" which allow it to determine the person concerned on the basis of additional information which the internet access provider possesses about this person. The providers of websites could however have a "legitimate interest" in storing such data. A national rule such as Section 15 TMG ["Telemediengesetz", the German tele media act], which prohibits such storage, would therefore breach European law.

But a dynamic IP address is indisputably not information which refers to an identified natural person, because neither the identity of the natural person to whom the computer which accessed a website belongs nor the identity of another person who could use this computer would result directly from it. The IP address does however represent information about an identifiable natural person under certain conditions. This is the case if a dynamic IP address is connected with additional information which the internet access provider possesses and

which can be used “reasonably” to identify the person concerned. A dynamic IP address is therefore personal data if the provider of online services “possesses the means, which could reasonably be used” to identify the person concerned on the basis of the stored IP address with the help of third parties and indeed the responsible authorities and the internet access provider. This is the case for the provider of a website because it possesses the legal means which allow it to identify the person concerned on the basis of information which the internet access provider possesses about this person, such as within the framework of criminal proceedings.

The ECJ made it clear, however, that where these legal means do not exist; it is to be assumed that the corresponding data is to be considered as anonymous. This qualification may be of extraordinary importance for the online sector. The ECJ has opened up scope to consider online identifiers, such as cookie ID’s, as anonymous data because in these cases there are no legal means which would allow somebody to identify the person concerned on the basis of information which another party possesses. The ECJ made it clear that only the theoretical possibility of re-anonymization is not sufficient for it. In plain language, the ECJ therefore turned away from the so-called “absolute theory”, which has also been applied in Germany. Some literature sources have therefore already drawn the conclusion that the ECJ permits the processing of anonymous online identification numbers, such as within the framework of Big Data, for the processing of health data or - much more importantly - within the framework of advertising measures (e.g. for re-targeting, OBA, etc.). Whether the ECJ actually wanted to go so far remains to be seen. But one thing is certain: Since the ECJ’s decision, it is more than doubtful whether the absolute theory applied by the German supervisory authorities can still be maintained. Just as doubtful is whether the ECJ’s explanations on IP addresses can be transferred offhand to online identifiers like cookie ID’s.