

ADC 51

Direct Request of Data to Internet Service Providers Located Abroad

Country:

Brazil

Court:

Federal Supreme Court

Competent Court:

Full Court

Format of the Session:

In-person

Rapporteur:

Justice Gilmar Mendes

Decision Date:

February 23, 2023

Matter:


CASE SUMMARY

An Action for the Declaration of Constitutionality (ADC) concerning norms on international legal cooperation between Brazilian and foreign legal authorities for the sharing of private communication data of Internet service provider users for criminal investigation purposes. Due to the claim of constitutionality of these norms, Brazilian authorities should not be able to request data directly from foreign technology companies and their representatives in Brazil.

LEGAL REASONING

1. The legal issue raised by the action is about the possibility of the Judiciary ordering the direct disclosure of private communication to the Brazilian authorities by Internet platforms. This is because such platforms store data in different countries, which can lead to debates about the limits of Brazilian jurisdiction, as well as tensions between Brazil and other sovereign countries.
2. The understanding of data storage by large technology companies is highly complex. The information is stored in “clouds” so there can be a decoupling between the location of the network access (and where potential illegal acts are carried out) and the location where the data is stored in different countries. This situation highlights the “non-territorial” nature of the data.
3. In this sense, article 11 of the Internet Civil Act (Law 12,965/2014)—supported by article 18 of the Budapest Convention—ensures the application of Brazilian law to activities involving the collection, storage, retention, and treatment of records, data, and electronic communications that take place in the national territory, even if the legal entity that holds this information is located or stores it abroad.
4. The prospect of a direct request under article 11 of the Internet Civil Act and article 18 of the Budapest Convention is a way to guarantee the right to information and reaffirm the principles of national sovereignty and independence (article 1, item I, and article 4, item I of the 1988 Federal Constitution). It also reinforces the State’s duty to protect the fundamental rights and public security

of Brazilian citizens or residents in the country. The direct request expedites investigations of national interest and helps guarantee the effectiveness of data protection rules.

5. In this regard, national authorities can request data and the content of private communications directly from foreign technology companies, in cases where there are: (i) data collection and processing activities in the country; (ii) possession or control of the data by a company with representation in Brazil; and (iii) crimes committed by individuals located in national territory, in accordance with article 11 of the Internet Civil Act and article 18 of the Budapest Convention.

6. The direct request for data by national authorities does not preclude requests through mutual legal assistance agreements in criminal matters signed between Brazil and other countries.

DECISION OF THE COURT

The request was upheld in part, to declare the constitutionality of the norms on international legal cooperation between Brazilian and foreign judicial authorities for the sharing of private communication data of users of internet providers, for the purpose of criminal investigation.

Without prejudice to this, the Federal Supreme Court also held that it is possible for national authorities to directly request data and electronic communications from technology companies in cases of data collection and processing activities in the country, possession or control of data by a company with representation in Brazil and crimes committed by individuals located in national territory.

ADDITIONAL NOTES

This discussion is part of the context of the activities of digital criminal organizations, a phenomenon observed in Brazil and several other countries. These organizations operate on the internet with the aim of attacking people, institutions, and the Rule of Law. National authorities find it difficult to investigate these criminal practices, among other reasons because the traditional structures of legal cooperation between countries do not yet allow for obtaining electronic data with the agility and legal certainty needed to deal with the new reality of cybercrime.



part 1



part 2



part 1



part 2



part 3



part 4



part 5