

Privacy under scrutiny

Comments to the draft amendments and supplements to the Law on Electronic Communications

One of the fundamental values of the constitutional order of the Republic of Macedonia is the basic freedoms and rights of the individual and citizen, recognized in international law¹. The Constitution also guarantees to each citizen the respect and protection of the privacy of his/her personal and family life and of his/her dignity and repute².

The Constitution has also foreseen limitations to the above stated freedoms and rights, but under precisely defined conditions, such as upon a court decision authorizing non-application of the principle of the inviolability of the confidentiality of correspondence and other forms of communication, in cases where it is indispensable to a criminal investigation or required in the interests of the defence of the Republic of Macedonia³.

In the middle of 2007, the Helsinki Committee has published an analysis on the then announced amendments to the Law on Criminal Procedure and in 2009 has also analyzed the proposed amendments to the Law on Interception of Communications, when it appealed to the relevant institutions suggesting that in a state applying the rule of law and respect of fundamental human rights and freedoms, which are the basic commitments of Macedonia, one should not devalue the law and the human rights at the cost of illegally applied measures, which serve to fight against the crime in the state. Furthermore, the application of special investigation measures must be limited only to situations of higher societal danger, which is proportional and relevant to the derogation of fundamental human rights and freedoms.

With the latest changes to the Law on Criminal Procedure and the Law on Interception of Communications there is an increased number of criminal acts to which the special investigation measures are applied. However, the Law on Interception of Communications foresees **mandatory order** for application of special investigative measures that can be issued by the public prosecutor or the investigative judge in the pre-trial procedure and only by the investigative judge during the trial. However, it should be noted that this order applies only to the stage of collecting the data and the evidence for the trial, **which could not be gathered in another way** or their gathering is followed by major difficulties. Pursuant to the Law on Criminal Procedure, the evidence gathered with the application of special investigation measures will be acceptable only if used in a manner and procedure defined by this law.

¹ Article 8 of the Constitution of the Republic of Macedonia

² Article 25 of the Constitution of the Republic of Macedonia

³ Article 17 of the Constitution of the Republic of Macedonia

The novelties in the above mentioned laws regulate the duration of the use of special investigation measures, which could be **up to one year**.

As already stated, the special investigative measures are regulated with the Law on Criminal Procedure and particularly with the Law on Interception of Communications, so if any amendments are necessary in this respect they should be made by amending the Law on Interception of Communications for which two-third majority of the votes in the Parliament is required.

Unfortunately, the draft amendments and supplements to the Law on Electronic Communications are currently in parliamentary procedure. Although, these amendments should only regulate the technical part on transmission of communication, they inadmissibly and invasively enter the sphere of privacy of the citizens, seriously threatening the basic postulates of human rights.

Namely, the amendments to the law stipulate that "*the operators of public communication networks and providers of public communication services **upon request of the competent state bodies are obliged to deliver traffic data when this is necessary for preventing or discovering criminal acts, for conducting the criminal procedure or when this is in the interest of safety and defense of the Republic of Macedonia***"⁴, which is further extended with information on the terminal equipment of the subscribers⁵, thus interfering in the already adopted legal decisions on the conditions under which the special measures are applied. Due to the same reasons, we believe that these paragraphs should be further specified by simply referring to the Law on Interception of Communications, in order to be clear in which procedure and under which conditions the operators will submit data to the competent state bodies.

However, those proposing the amendments go one step further in derogating the existing legal and constitutional norms by providing unlimited power to the competent body for interception of communications (Mol) on how this data will be used, circumventing any external control.

Namely, the next paragraph⁶ provides that the operators of public communication networks and providers of public communication services are obliged to provide **permanent** and **direct** access to their electronic communication networks and conditions for **autonomous** taking over of traffic data to the competent body for interception of communications – this is the

⁴ Article 72 of the draft amendments to the Law on Electronic Communications (new paragraph 7 of the Article 112 of the law)

⁵ Article 73 of the draft amendments to the Law on Electronic Communications (new paragraph 7 of the Article 114 of the law)

⁶ Article 72 of the draft amendments to the Law on Electronic Communications (new paragraph 8 of the Article 112 of the law)

Ministry of Interior. This decision is also extended with the location of the terminal equipment of the subscribers⁷.

These decisions avoid the court, public prosecutor's office, even the operators, because MoI is allowed to take over independently the traffic data, so no one else needs to know that MoI is taking over the data, while the external control is not even mentioned, which absolutely collides with the existing legislation.

These proposals are directly against the Constitution of the Republic of Macedonia, which specifically defines the manners of limitation to the right of privacy and present severe violation of the fundamental freedoms and rights of the citizen. The proposed amendments will prevent any judicial control over the legality of applied measures and will deprive the individual from the possibility of protection in case of possible abuse, while providing for voluntary and irresponsible use of private data of citizens by the competent body for interception of communications.

Accordingly, after learning about the proposed amendments from the media, the Directorate for Protection of Personal Data, which was not consulted in the process, voiced its opinion, noting that "these legal solutions introduce highly invasive methods for data processing, which are unfair, inappropriate and too extensive in relation to the purposes for which they are gathered and processed in terms of the provisions of Article 5 of the Law on Protection of Personal Data".

Another, problematic issue in the proposed changes is the duration of 24 months for keeping the unprocessed traffic data⁸, which is against the European practice for storing data in duration of 6 (six) months, as well as the amendments that technically allow the body for interception of communications to have direct, permanent and autonomous access to the traffic data, by installing an appropriate equipment⁹.

The proposed amendments and solutions to the Law on Electronic Communications are against the international documents and norms on the right to privacy and particularly the European Convention of Human Rights (hereinafter: the Convention), which was enforced in the Republic of Macedonia in 1997, and pursuant to Article 118 of the Constitution of the

⁷ Article 73 of the draft amendments to the Law on Electronic Communications (new paragraph 8 of the Article 114 of the law)

⁸ Article 72 of the draft amendments to the Law on Electronic Communications (Article 112 paragraph 1 of the law)

⁹ Article 74 of the draft amendments to the Law on Electronic Communications (Article 115 of the law)

Republic of Macedonia¹⁰, making the Convention an integral part of the internal law of our state.

Namely, Article 8 of the Convention stipulates that everyone has the right to respect for his private and family life, his home and his correspondence. The right to respect for the private and family life is one of the most liberally formulated and most comprehensive articles of the Convention.

The practice of the European Court of Human Rights shows that the national legislation should be quite specific, allowing for possible interference of the state to a certain degree with precisely defined scope and manner of its use. When this is established by law, the national authority should absolutely stick to this law. In this respect, one should note that the justifications related only to the protection of national security are taken with reserve by the European Court of Human Rights. This means that the Court does not give right to the state for unlimited freedom in assessment referring to the secret use of special investigation measures towards people under its jurisdiction.

In accordance with the practice of the Court, in the case of Malone¹¹, the tapping of telephone conversation by the police was reviewed. According to the positive practice of the UK authorities, the special investigative measures in this case were legally used. However, the European Court of Human Rights held in the Malone case, that the English practice of interception was insufficiently grounded in law to allow it to be justified under Article 8(2).

This issue was further developed in the two cases versus France, i.e. Kruslin and Huvig¹², where the Court has noted that "***tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject, particularly taking into account the constant development and advancement of technologies used for these purposes***".

The right to privacy is also regulated in the Universal Declaration of Human Rights¹³, as well as in the International Covenant on Civil and Political Rights¹⁴, stipulating that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

¹⁰ Article 118 of the **Constitution of the Republic of Macedonia** - The international agreements ratified in accordance with the Constitution are **part of the internal legal order and cannot be changed by law.**

¹¹ Malone v. the United Kingdom

¹² Kruslin v. France 1990, Huvig v. France 1990

¹³ Article 12

¹⁴ Article 17

The Committee of Ministers of the Council of Europe has also regulated this issue in the Recommendation No. R (85) 10¹⁵ stressing the necessity to protect the individual against unjustified interceptions. The recommendation points out that the specific nature of letters rogatory for the interception of telecommunication requires detailed regulation, particularly with regard to the manner of their execution, the transmission of the records resulting from the interception and the use of those records in the requesting state.

The proposed amendments and supplements are yet to be further developed and harmonized with the Directives of the European Commission in this sphere (Directive 2009/136/EC and Directive 2002/58/EC). According to them, the state should undertake measures ensuring access to personal data only to an authorized body for the legally defined purposes as well as to undertake measures in order to protect the stored or transmitted data from illegal processing, unauthorized storing, destruction or other illegal proceeding¹⁶.

Unfortunately, those that have proposed the amendments to the Law on Electronic Communications did not take into account the national or international legal standards and postulates on developing the proposed solutions when they decided to allow permanent and free access of the body for interception of communications to the most subtle data from the private sphere of the citizens, without providing any external and independent control.

The Helsinki Committee notes that the proposed amendments and supplements to the Law on Electronic Communications present severe interference in the sphere of privacy of citizens with illegal and arbitrary access of the body for interception of communications, without any adequate guarantees against abuse. These solutions are threat for the human rights and according to the assessment of the European Court of Human Rights¹⁷ carry the risk that a secret surveillance system may undermine and even destroy the democracy in a state.

Therefore, the Helsinki Committee calls on the proposer of the amendments (the Ministry of Transport and Communications) to remove the disputed articles and to withdraw the draft amendments to the Law on Electronic Communications from parliamentary procedure.

¹⁵ Recommendation concerning the practical implementation of the European Convention on mutual assistance in criminal matters in respect of letters rogatory for the interception of telecommunications. This Convention is signed by the Republic of Macedonia on July 28, 1999 and was enforced on October 26, 1999.

¹⁶ Article 3 of the amendments of the Directive 2002/58/EC

¹⁷ In the case Leander v Sweden, ruling as of March 26, 1987.