[BG] Supreme Administrative Court Repealed Provision Contravening Article 8 ECHR

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On 7 January 2009 the Ministry of Internal Affairs and the State Agency for Information Technology and Communications adopted the Ordinance No 40 on Data Types and the Terms and Conditions for Retention and Dissemination of Data by the Enterprises Providing Public Electronic Networks and/or Services for the Purposes of National Security and Criminal Investigations ("the Ordinance"). The legal basis for this is Directive 2006/24/EC on data retention amending Article 251 of the Bulgarian Electronic Communications Act.

Article 5 para. 1 of the Ordinance reads as follows: „For the purposes of criminal investigation activities enterprises providing public electronic networks and/or services shall ensure passive technical access of the officials of the Operative-Technical Information Directorate through the computer terminal to the data retained by the enterprises". The non-governmental Access to Information Programme Foundation ("Foundation") appealed the Ordinance before the Supreme Administrative Court (SAC) as illegal since it contravenes the ECHR.

The SAC (three-member jury), as a court of first instance, rejected the claim as being without merit. This decision was appealed by the Foundation. A five-member jury of the SAC as a court of final instance repealed the previous sentence and explicitly Article 5 according to the following legal reasoning: „Article 5 does not contain any restrictions as to the type of data to which access is allowed. In addition, the term "for the purposes of criminal investigation activities" is defined too broadly and there are no sufficient safeguards that Article 32 of the Bulgarian Constitution (right of inviolability of personal life) will be observed. The Ordinance does not provide any mechanism for the observance of the constitutional principle of protection against unlawful interference in the personal and family life of individuals and against encroachments on persons' honour, dignity and reputation."

The SAC upholds the reasoning that Article 5 contravenes Article 8 ECHR which provides to everyone the right to respect of his private and family life, his home and his correspondence, and any interference by a public authority is inadmissible. It contains an exhaustive list of exceptions where the above general principle shall not apply, namely: "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public

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safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The national legislation shall adhere to this rule and introduce clear and understandable grounds for access to data relating to the personal life of individuals and the procedures for granting such access. Article 5 does not contain sufficient measures protecting individuals against any unlawful interference in their personal and family life and therefore contravenes Article 8 ECHR, Directive 2006/24/EC and Articles 32 and 34 of the Constitution of the Republic of Bulgaria.

The Parliamentary Transport and Communications Commission is discussing a Draft Law on the Amendment and Supplementing of the Electronic Communications Act. One of the proposed changes concerns its Article 251 regulating the rules for access to particular types of data. Some media groups fear that parts of the restrictive rules contained in the Ordinance will be implemented in the Draft Law, which cannot be repealed by the SAC, but only by the Constitutional Court of the Republic of Bulgaria.

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Ordinance No 40 on Data Types and the Terms and Conditions for Retention and Dissemination of Data by the Enterprises Providing Public Electronic Networks and/or Services for the Purposes of National Security and Criminal Investigations, State Gazette, issue No. 9 dated 29 January 2009

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