[CY] Provisions of the Law on Retention of Telecommunications Data Declared Unconstitutional

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The Supreme Court of the Republic of Cyprus decided on 1 February 2011 that Arts. 4 and 5 of the Law on the Retention of Telecommunications Data for the Investigation into Criminal Offences (L.183(I)2007) are in breach of the Constitution; moreover, the Law appears to go beyond the scope and goals of Directive 2006/24/EC on data retention.

The Court verdict was issued in relation to petitions for a writ of certiorari by four persons against District Court orders that granted the police access to the claimants telephone communications data. The orders were issued according to Arts. 4 and 5 of L.183(I)2007, which aimed at harmonising Cyprian Law with the Directive. The petitioners claimed that both the aforementioned articles of the Law and the District Court orders were in breach of the Constitution as they violated their rights of privacy and family life (Art. 15.1) and of secrecy of communications (Art. 17.1). Based also on the decision of the European Court of Justice issued on 10 February 2009 (Ireland, C-301/06; see IRIS 2009-8/102), they claimed that the Directive created no obligation for States to introduce a law for the fight against crime.

The Supreme Court noted that in its deliberations it did not take into account the 6th amendment of the Constitution, that in certain cases allows an interference of the right of secrecy of communication by the authorities, since the orders were issued before the promulgation of this amendment (4 June 2010).

After an examination of the provisions of Directive 2006/24/EC, the Court deliberated that from both the title and the content of the Law it appeared that its goal was broader. While the Directive aims at the retention of descriptive communications data, the Law links the obligation for the retention of data not only to the investigation of serious criminal offences, but it additionally rules on issues regarding access to the data. At the same time, the Court noted that the legislator expressed through Art. 22 its will to maintain the existing state of affairs regarding the protection of the secrecy of communications. The case-law, which was created in connection to the enforcement of the Law on the Protection of the Secrecy of Private Communications (monitoring of communications, L.92(I)/1996), was recalled by the Supreme Court, which noted that “monitoring or information that is connected to or comes from the communication between citizens and that

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falls out of the exceptions of Art. 17.2 of the Constitution cannot be accepted by the Courts as evidence".

The provisions of L.183(I)2007 on ways of access to telecommunications data by police authorities were introduced not for harmonisation purposes, since no such obligation on the Republic derives from Directive 2006/24/EC; therefore, they are not covered by Art. 1A of the Constitution, which establishes the superiority of EU directives over the Constitution. Thus, the Supreme Court examined the constitutionality of the relevant provisions, on the basis of which the orders on the disclosure of data were issued by the District Courts.

It found that:

a. Both the Constitution and Art. 8 of the ECHR protect privacy of communications, while case-law has established that any interference with an individual's telephone communication is a violation of his rights to privacy of communication.

b. Access to telephone call data by police authorities without the knowledge or consent of the persons affected constituted a breach of the secrecy of communications.

c. Access to telecommunications data was not a legitimate constraint on their right, since Art. 17.2 of the Constitution provides that such a limitation can only be imposed on convicted persons or such under pre-conviction or in the professional correspondence of bankrupt persons. At the time of the orders, one petitioner was free, therefore the orders infringed her rights; two petitioners were under pre-conviction. However, the orders allowed access to telecommunications data of periods prior to their arrest, which violated their rights; however no retroactive restriction was allowed by the Constitution or case-law. The fourth petitioner was serving a sentence of several years in jail and communicating via a mobile telephone was not allowed by law; therefore, he could claim no constitutional protection.

The Supreme Court issued writs of certiorari for the Courts orders concerning three of the petitioners and rejected the petition of the convicted person.

Αποφάσεις Ανωτάτου Δικαστηρίου - Αιτήσεις - Απόφαση σχετικά με την εφαρμογή του Ν. 183(Ι)/2007 για την αποκάλυψη τηλεπικοινωνιακών δεδομένων

http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/5B67A764B86AA78EC225782F004F6D28?OpenDocument

Cyprus Supreme Court (Civil applications 65/2009, 78/2009, 82/2009 and 15/2010-22/2010)

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