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# The lives of other judges:

# Effects of the Romanian data retention judgment

The Constitutional Court of Romania has recently published a decision[1] that found the implementing law of Directive 2006/24/CE unconstitutional. The conclusions of the Romanian judges and their reasoning are already praised by human rights activists and digital rights groups as one of the most important victories in an age when privacy rights are too easily thwarted in exchange for a chymerical sense of safety. The signal is especially important in the context of its transmitter: a EU Member State which only two decades ago was in the apogee of a communist regime maintained through a police state that used mass surveillance to inflict widespread intimidation and repression and to silence debate and opposition. Unknown to the free societies of Western Europe, such memories are still haunting the political and judicial arenas where any suspicious recurrence must be curtailed through the legal tools of constitutional review, fundamental rights protection and proportionality.

I. The decision examines the law in light of its compliance with the basic rights contained in art. 26 (privacy) and art. 28 (secret of correspondence). It asserts the fundamental nature of these rights with direct reference to, *inter alia*, art. 8 of the European Convention of Human Rights to which Romania is part since 1994, art. 12 of the Universal Declaration of Human Rights and art. 17 of the International Covenant on Civil and Political Rights. Even indirectly, the law affects the right to free movement by retaining data concerning the location of the communication equipment and also the right to freedom of expression.

Admitting that limitations on the exercise of these rights are constitutionally possible, the decision subjects such limitations to the set of rules contained in art. 8 ECHR and the proportionality clause of the Romanian Constitution in art. 53. Applying the rule that a

1 Curtea Constituțională, Decizia Nr.1.258 din 8 octombrie 2009, Monitorul Oficial nr.798 din 23.11.2009.

restriction on a human right must be based on law, the Constitutional Court criticized the vagueness of several articles in the law which did not define in a clear and explicit manner the concepts of "related data" and "threats to national security", the latter being used as a justification for data retrieval on virtually everyone who may become suspects without them ever knowing the legal conditions under which to correct behavior. In order to avoid abuse, an obligation is imposed on the legislator to maintain and respect sound legislative techniques that would not restrict basic rights in vague terms. Since the implementing Romanian law failed the requirements of legal clarity, the law was considered unconstitutional on this account.

Secondly, the Bucharest Court contends that a continuous positive obligation on telecom companies to retain communication data of all citizens voids the basic rights to privacy and secrecy of correspondence of their very substance. Unlike existing provisions in the criminal procedure where data storage and retrieval are permitted exceptionally on the basis of an investigation, the implementing Law no.298 / 2008 abandoned the natural status of non-intrusion in the exercise of basic right to privacy. However loose a warrant may be given by a judge during investigation, the fact remains that such a requirement respects the principle that intrusions are only permitted when signs of criminal activity are in their place and a magistrate assumes responsibility for the interference. Replacing the natural obligation of non-interference with mandatory and indiscriminate data retention for everyone transformed the positive element of the basic right into a negative status: citizens do not normally have a right to privacy since all their communications are stored indiscriminately and in a general manner. The fact that data may be later retrieved on the basis of a warrant does not constitute a sufficient procedural guarantee because the right was already subjected to a continuous intrusion through mandatory data retention. The decision cites extensively from the caselaw of the European Court of Human Rights on Art. 8 of the Convention, inducing the idea that such alteration of the essence of a human right would not survive judicial review in Strasbourg.

Third, the law does not comply with the principle of proportionality. Not only does the law impose an obligation to retain the data of the caller which knowingly enters the communication medium, but it also requires the storage of data that belongs to the addressee who has no control over who is calling. Subjecting the addressee to data retention independently of any free will on its part to initiate the communication was considered to go beyond what is necessary to achieve the end of general prevention in the fight against crime. Drawing on the sensitiveness of data retention and the intimidating effect that such retention may have on the bahaviour of citizens, the Court ackowledged that even if the content of communication falls outside the scope of the law, mere retention of data which identify the caller and the addressee, their physical location, time and duration of communication, type and equipment used as well as other "related data" – which are not clearly defined in the law – interfere with and prejudice the free manifestation of the right to communicate and the freedom of expression. Such indiscriminate and general data retention of all citizens communications is sufficient to justify their legitimate concerns regarding respect for their privacy and the possibility of abuse. Citing the ECHR case of *Klass and others v. Germany* of 1978, the Court indicated that a just equilibrium must be maintained between the need to ensure proper and efficient respect for individual rights and the needs of the society, otherwise one may find democracy in peril under the pretext of its defence.

II. The decision started to produce legal effects on November 23rd 2009, the date of its publishing in the Official Gazette of Romania. Constitutional Court's decisions have non-retroactive *erga omnes* effects, meaning that they are generally applicable and produce effects only for the future. Therefore, a law that is found unconstitutional is actually repealed and must be replaced with a new law that is constitutionally compliant. According to art. 147 in the Constitution, the legal effects of the Romanian national law that implemented Directive 2006/24/CE have been suspended *de jure* starting November 23rd and awaiting Parliament or Government's action to adopt a new law in line with the

provisions of the Constitution as interpreted by the Court. The Romanian legislator has 45 days to adopt a new law, its failure to act leaving Directive 2006 / 24 / CE unimplemented in Romania which would eventually expose the new Member State to infringement procedures initiated by the Commission. The term expires at the beginning of January, 2010.

Considering the reasoning of the Bucharest Court, it is difficult to find a "middle way" in the form of a new law that both implements the Directive and is compliant at the same time with the Constitutional Court decision. Romanian judges have a problem with the actual result to be achieved by the Member States when implementing the Directive: that is the general, continuous and indiscriminate data retention, even for a limited period of 6 months. And this is exactly what Community law imposes on Member States by clearly stating in the preamble of Directive 2006/24/EC that:

> "[11] Given the importance of traffic and location data for the investigation, detection, and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period"

and in article 3:

> "By way of derogation from Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic

communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned."

The approach follows the conclusions of an extraordinary meeting of the Council of the European Union in Justice and Home Affairs after the dreadful terrorist attacks in London on July 7th 2005. The idea of general and indiscriminate data retention was not necessarily new, but it was the London bombings episode of 2005 that provided the justification for driving the project further. The Council, meeting in the composition of interior ministers, issued a statement condemning the attacks and commited to adopt framework decisions under the third pillar of EU to approximate their laws on mandatory general data retention.

Such a solution was later dismissed by the Commission as inappropriate on account that the Community itself should regulate on data retention, which the Council and the European Parliament did by adopting the Directive under the Community method. The European Court of Justice rightfully upheld the approach by stating that "differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market" [Case C-301/06 Ireland v. European Parliament and Council, Judgment of 10 February 2009]. The case did not concern any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24 because the action brought by Ireland related solely to the choice of legal basis. Article 95 TEC is the Union's counterpart of the *necessary and proper* clause of the U.S. Constitution and has been used as legal basis for adopting Community law in fields that are only *prima facie* related to other objectives such as fight against crime or terrorism but are in fact needed to ensure the proper functioning of the common market. Just as the U.S. Supreme Court found federal law to be necessary and proper enactments of the objective of regulating interstate commerce, the European Court found the

Directive necessary to ensure the proper functioning of the common market even if its main objective is related to fight against crime. The argument draws considerable weight when considering that only several Member States had data retention laws that needed to be harmonized in order to protect the legal uniformity of the common market whereas other Member States did not have such laws but had to enact them for the first time to attain the result of the Directive. When Romania found itself within Community law following the 2007 accession, it implemented the Directive by choosing the minimum amount of time for data retention of 6 months.

The Romanian Constitutional Court did not concern itself with the examination of data storage imposed on Member States as part of Community law. The Court did not address at all the issue mooted by the Romanian Ombudsman who referred to Art. 148 (2) of the Constitution which places Community law above national law, perhaps because the primacy clause in the Constitution concerns literally the Treaty and provisions with general and binding application. Since Community law presented itself only in the form of the result to be achieved, the Court did not engage in the old but recurrent dispute on who is the ultimate guardian of fundamental rights. In its ruling, the Court did not even expressly assert competence to review the manifestation of such result within the national constitutional framework. It simply kept silent, as if the issue was not there, and examined the implementing law in accordance with the Constitution by citing ECHR caselaw on Art.8 in its findings that the national law was vague, it failed the proportionality test and by instituting a positive obligation of continuous and indiscriminatory data storage of all citizens' communications it altered the very substance of the rights to privacy, secrecy of correspondence and freedom of expression. Were the Court to approach the manifestation of the result within the national law, the outcome of the decision should have been different since Constitutional Courts of Members States cannot invalidate Community law by recourse to constitutional law as it has been held by the European Court of Justice in its famous *Internationale*

*Handelgesselschaft* ruling in 1970:

> " Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law . In fact, the law stemming from the Treaty, an independent source of law, cannot – because of its very nature – be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called in question . Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure."[2]

Aware of the inevitable questioning of its competence to review the manifestation of Community law in light of the Romanian Constitution, the Court did not engage itself in the dispute as the German Constitutional Tribunal does in an open manner and frequently. The latter clearly stated in its last Lisbon Treaty judgment that it still holds residual powers of review for basic rights review in extraordinary circumstances even after it relinquished its guardianship of fundamental rights by entrusting the European Court with the task:

> "European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the

2 Case 11/70, Internationale Handelsgesellschaft, 1970 ECR 1125

> citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, [...]
>
> The Federal Constitutional Court has put aside its general competence, which it had originally assumed, to review the execution of European Community law in Germany against the standard of the fundamental rights of the German constitution (see BVerfGE 37, 271 <283>), and it did so trusting in the Court of Justice of the European Communities performing this function accordingly (see BVerfGE 73, 339 <38>); confirmed in BVerfGE 102, 147 <162 et seq.>). Out of consideration for the position of the Community institutions, which is derived from international agreements, the Federal Constitutional Court could, however, recognise the final character of the decisions of the Court of Justice only "in principle" (see BVerfGE 73, 339 <367>)."[3]

Though unlikely to happen in the near future, the only possible way to accord the decision of the Romanian Court with the Directive is for the Community act to be amended since the procedural door for annulment by the European Court of Justice was closed after two months from its publication in the Official Gazette. At the same time, any subsequent national measure aimed to implement the Directive should produce the same result in a subsequent reasoning of the Court[4]. A cat-and-mouse game would start between the legislator who needs to implement the Directive and avoid infringement and the Constitutional Court who asserts guardianship of fundamental rights and until the matter is put to rest, digital rights groups and human rights activists should hold their enthusiasm on the effects of the Romanian Constitutional Court's decision.

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3 BVerfG, 2 BvE 2/08 vom 30.6.2009 Para. 249 and 337 http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

4 [unless, of course, it reverses and finds next year that the right to privacy is actually not voided of its substance by mandatory general data retention]

The decision of the German Constitutional Tribunal which is waited in December 2009 may strongly influence the outcome of these judicial politics. A clear and precise finding of an Art. 8 violation by the European Court of Human Rights would finally cut the knot and recast the message that fundamental human rights protection rank superior to societal interests of general prevention. The entry into force of the EU Charter of Fundamental Rights may hold a special significance since the right to privacy in the Charter is pegged to the content and interpretation of Art. 8 in the European Convention on Human Rights and that the European Union as a single entity shall accede to the Convention after the entry into force of the Lisbon Treaty.

Regardless of difficulties in hailing the practical outcome of the decision for the long run, the Bucharest Court decision is important on other aspects and must be defended with regard to Judges' peculiar approach to issues that were only marginally examined in the past. The test of proportionality, reaffirmed in a subsequent decision on public salaries diminuation for 3 weeks in times of economic crisis, the idea that a law may not be “law” because it is unconstitutionally vague with the correlative obligation on the legislator to strictly observe legislative techniques and the fact that a legal provision may actually deny the very substance of a basic right are concepts of Western constitutional adjudication which the Court is likely to hold to in the future, thus ensuring the principle that the Romanian polity is based on the rule of law in which fundamental rights are protected.

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