ROMANIA

Constitutional Court

DECISION no.1258[1]

from 8 October 2009

Regarding the unconstitutionality exception of the provisions of Law no.298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as for the modification of law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area,

Ioan Vida	**- president**
Nicolae Cochinescu	**- judge**
Aspazia Cojocaru	**- judge**
Acsinte Gaspar	**- judge**
Petre Lăzăroiu	**- judge**
Ion Predescu	**- judge**
Puskás Valentin Zoltán	**- judge**
Tudorel Toader	**- judge**
Augustin Zegrean	**- judge**
Simona Ricu	**- prosecutor**
Claudia Margareta Krupenschi	**- magistrate - assistant**

(procedural notes – not translated)

(Notes regarding Opinion of the parties, of the Prosecutor, of the Bucharest Tribunal, the Government and the Ombudsman – not translated)

The Court,

Examining the Tribunal Referral, the points of view of the Government and the Ombudsman, the rapport drafted by the rapporteur-judge, the opinions of the present party, the

1 The Decision was published in Romanian Official Monitor no. 789 from 23 November 2009. The original decision in Romanian is in the public domain according to the Romanian law and can also be found on the Internet. This unofficial translation was made by Bogdan Manolea and Anca Argesiu on 25.11.2009 and is available under the licence Creative Commons Attribution 3.0 Romania.

conclusions of the prosecutor, the legal provisions in dispute reported to the Constitutional provisions, as well as Law 47/1992, retains the following:

The Constitutional Court has been legally appointed and , according to art 146, letter d) of the Constitution, as well as art.1 para (2), and arts.2, 3, 10 and 29 from Law no.47/1992, is competent to decide on the unconstitutionality exception.

The object of the unconstitutionality exception is, according with the Tribunal Refferal, „the provisions of law no.298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as the modification of law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area" published in the Official Monitor of Romania, Part I, no. 780 from 21 November 2008. Although the author of the exception is criticizing law 298/2008 in its entirety, he is still individualizing the provisions of art. 1 and art 15 of the law, with the following content:

Art.1 – *„(1) The present law established the obligation of the electronic communication providers of services and public networks to retain certain data produced or processed during their activity of providing electronic communication services, in order to make them available to the competent authorities to use them in activities of enquiry, detection and proceedings against serious crimes.*

(2) The present law is applied to traffic and localisation data of the physical and legal persons, as well as to the related data necessary to identify the subscriber or the registered user.

(3) The present law does not apply to the content of the communication or information accessed while using an electronic communication network.

(4) The enforcement of the present law shall be done by respecting law 677/2001 for people's protection on processing personal data and the free movement of these data, with the subsequent modifications, as well as law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area, with the subsequent changes."

Art.15 – „The public network communication providers and the electronic communication services providers have the obligation, at the request of the competent authorities, based on the authorization issued according to art 16, to send forthwith the retained data to these authorities according to the present law, with the exception of the force majeure cases."

According with the author of the unconstitutionality exception, the following articles in the Constitution are breached: Art 25 Freedom of Movement, art 26. the Intimate, Family and private life, Art. 28 Secrecy of Correspondence and art 30 Freedom of Expression.

Analysing the unconstitutionality exception, the Constitutional Court notes the following:

The objections of the author of the exception regarding the unconstitutionality of law 298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as for the modification of law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication sector, point to some of the deficiencies of the normative act in discussion, that may affect the exercise of the right to free movement, the right to the intimate, family and private life and affect the secrecy of Correspondence and the freedom of expression.

This is because the above mentioned law authorises the retention of data necessary to determine the date, hour and length of the phone call or electronic communication, to identify the type of phone call, of the device, of the location of the communication device, without explicitly define what is understood by *„related data"* necessary for the identification of the subscriber or the registered user, data that is also processed by the communication and telecommunication service providers.

The alleged breached rights, in the exceptions author's opinion, are personal, non-patrimonial, complex rights, the common element of all those rights being the intimate space of every person. The right to privacy and family life is unanimously recognized and internationally protected, as it results from art.12 of the Universal Declaration of Human Rights, art 17 of the International Pact regarding civil and political rights, art 8 of the Convention for defence of human rights and fundamental freedoms, as well as art 26 of the Romanian Constitution.

The right to a private life necessarily implies the secrecy of the correspondence, either as part of the same text – as art 8 of the Convention, or as a distinct article – as art. 28 of the Constitution. The correspondence expresses the links a person may establish in different ways of communication, with other members of the society, so this includes both telephonic calls and electronic communications.

These rights, including the freedom of expression foreseen in art 30 from the Constitution and art 10 of the Convention for defence of human rights and fundamental freedoms, although indissoluble linked to the human existence, any person having the right to exert them freely, are, still, conditional and not absolute rights.

Law 298/2008, by regulating the obligation of the electronic communication service providers and public networks communication providers to retain certain data produced or processed during their activity, express the will of the legislator to impose certain limits as regards the exercise of the right to intimate life, freedom of expression and, especially, the right of correspondence, as explained above. Law 298/2008 implements in the national legislation Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

The legal regime of such a Community act foresees the obligation for the European Union member states related to the legal solution covered, but not to the concrete modalities on how the scope is being reached, the states enjoying a wide margin of solutions to adapt those regulations to the specificity of the legislation and national realities.

Neither the provisions of the Convention for defence of human rights and fundamental freedoms, nor the Romanian Constitution prohibit the legislative solutions of the state authorities interference in exerting the above mentioned rights, but the state intervention needs to respect strict rules, as explicitly specified in art 8 of the Convention, as well as in art 53 of the Romanian Constitution. Therefore, the legislative measure that affects the exerting of fundamental rights and freedoms must fulfil a legitimate purpose consisting of protecting national security, public safety, defence of public order, criminal prevention as well as protecting the rights and interests of other persons; to be necessary in a democratic society; to be proportionate with the situation that determined them; to be applied in a non-discriminatory way and to not affect the existence of such right or freedom.

Moreover, according with the limitation principles expressed in the European Court of Human Rights (ECHR) jurisprudence, for example case *Klass and others vs. Germany, 1978* or case *Dumitru Popescu vs. Romania, 2009,* the normative act that regulates the measures that may affect the exertion of the rights to private and family life, to correspondence and to freedom of expression must have adequate and sufficient safeguards in order to protect the person against the eventual arbitrary of the state authorities.

The Constitutional Court recognizes the possibility for the legislator to limit the exertion of

certain rights and freedoms, as well as the necessity of the regulation of certain modalities to give the law enforcement authorities the efficient and adequate tools to prevent and detect especially, terrorism crimes, as well as serious crimes. The Romanian legislation regulates, through the Penal Procedure Code, the modalities in which the public authorities may interfere with the exercise of the rights to private life, correspondence and free expression, by respecting all the safeguards that this interference imposes. By Decision 962 of 25 June 2009, published in the Official Monitor of Romania, Part I, no 563 of 13 August 2009, the Constitutional Court has foreseen that the dispositions of art 91^1 of the Penal Procedure Code that regulates the conditions and cases of interception and recording of calls or communications made by phone or any other electronic communication means, are constitutional, being justified in a democratic society threatened by a more complex crime phenomenon, by the necessity of ensuring national safety, the defence of public order or the prevention of crime.

The Constitutional Court observes that Law 298/2008, as it is drafted, may affect, even in an indirect way, the exercise of the fundamental rights or freedoms, in this case of the right to intimate, private and family life, the right to the secrecy of correspondence and the freedom of expression, in a way that does not meet the requirements established by art 53 of the Romanian Constitution.

Thus, Law 298/2008 establishes an obligation for the electronic communications services and public networks providers to retain for a period of 6 months the traffic and localisation data of physical and legal persons. These represent, according with art.3 of the law, the necessary data to "follow and identify" *the source, date, hour and length* of a communication*, type* of communication, communication *equipment* or devices used by the user, *the location* of the public communication equipment. Article 1 para 2 of the law includes in the category of traffic and localisation data of the physical and legal persons also "the related data necessary for the identification of the subscriber or registered user", without explicitly defining what it means by *"related data"* necessary for the identification of the subscriber or registered user.

The Constitutional Court considers that the lack of a precise legal provision that will exactly determine the sphere of the data necessary to identify physical and legal users, opens up the possibility for abuses in the activity of retaining, processing and using the data stored by the electronic communication services and public networks providers. The limitation of exerting the right to private life and to the secrecy of the correspondence and the freedom of expression, must also be made in a clear, predictable and unambiguous manner, so that the possibility of the arbitrariness or abuse from authorities in this field may be avoided , as much as possible.. The

subjects of the legal norm are, in this case, all the physical and legal persons in their quality of users of electronic communication services or electronic communications public networks, therefore a large and comprehensive sphere of law subjects, members of the civil society. These must have a clear representation of the applicable legal provisions, in order to adapt their conduct and to foresee the consequences that may occur from their breach. The ECHR jurisprudence goes along the same lines. For example, in the case *Rotaru vs. Romania, 2000* it has stipulated that "a rule is "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct", and in the case *Sunday Times vs UK, 1979*, it ruled that "[...] sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail" Briefly, the law has to be accessible and predictable at the same time. The same jurisprudence is made by the Constitutional Court, the relevant case for this point being Decision 189 of 2 March 2006 published in the Official Monitor of Romania, Part I , no 307 of 5 April 2006.

Also, the Constitutional Court notices the same ambiguous manner of drafting that does not comply with the rules of the legislative techniques as regards art 20 of Law 298/2008 according to which *„For the prevention and counteracting the threats to national security, the state institutions with attributions in this field may have access, under the conditions established by the normative acts that regulate the activity of national security, to the retained data held by the electronic communication services and public networks providers."* The legislator does not define what „threats to national security" mean, so that, with the lack of precise criteria, some regular, routine actions of the physical and legal persons may be appreciated, in an arbitrary and abusive way, as such threats. The law subjects might be included in the category of suspected persons without knowing this and without preventing, by their conduct, the result of applying the rigours of the law. At the same time, the usage of the collocation "may have" induces the idea that the data referred by Law 298/2008 is not held in the exclusive scope of using those data only by the state institutions with specific attributions for national security protection and public orders, but also by other persons or entities, because they „may have" and not „have" access to these data, as foreseen by the law.

Respecting the legislative drafting rules, within the specific law framework of law drafting, represents an essential factor in transposing the legislator will, so that the normative act adopted meets, also by way of writing, all the requirements imposed by the necessity of respecting fundamental human rights. Without taking the place of a legislator, the Constitutional Court observes that the accurate regulation of the scope of law 298/2008 is more necessary considering

especially the complex nature of the rights that are subject to limitations, as well as the consequences that a possible abuse of the public authorities might have on the private life of the subjects, as it is understood at the subjective level of each individual.

Beyond this aspect, the Constitutional Court notices that Law 298/2008, in its entirety, established a rule as regards the processing of personal data that is their continuous retention for a period of 6 months since the moment of their interception. The obligation of the electronic communication services and public networks providers has a continuous character. Or, in the field of personal rights such as the right to private life and freedom of expression, as well as processing personal data, the widely recognized rule is the one of guaranteeing and respecting those rights, and their confidentiality respectively, the state having in this sense mostly negative obligations to abstain, through which its interference in exerting the right or the freedom should be avoided as much as possible.. For this purpose, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, Law 677/2001 for people's protection on processing personal data and the free movement of these data, as well as law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area have been adopted The exceptions are allowed only in a limited way, under the conditions explicitly expressed by the Constitutions and the international normative acts applicable in the field. Law 298/2008 represents such an exception, as its title foresees.

The obligation to retain the data, established by Law 298/2008, as an exception or a derogation from the principle of personal data protection and their confidentiality, empties, through its nature, length and application domain, the content of this principle, as it was guaranteed by law 677/2001 and law 506/2004. Or, it is unanimously recognized in the ECHR jurisprudence, for example in the case of *Prince Hans-Adam II of Liechtenstein vs. Germany, 2001*, that the signatory member states of the Convention for the protection of human rights and fundamental freedoms have assumed obligations to ensure that the rights guaranteed by the Convention are concrete and effective, not theoretical and illusory, the adopted legal norms following the effective protection of rights. The legal obligation that foresees the continuous retention of personal data transforms though the exception from the principle of effective protection of privacy right and freedom of expression, into an absolute rule. The right appears as being regulated in a negative manner, its positive role losing its prevailing role.

In this context, the Court observes that the dispositions of art. 91^1 from the Penal Procedure Code respect the character of exception of the audio and video interceptions and recordings, these

being admitted under strict circumstances, from the moment of obtaining a justified judge authorisation, for a limited period of time that may not exceed 120 days in total, for the same person and the same act. Contrary, Law 298/2008 foresees as a rule what the Penal Procedure Code has regulated as a strict exception and obliges the permanent data for a 6 month period from its interception. These data may be used, with the justified judge authorisation, for a past time and not for the future, which will follow. Therefore, the regulation of a positive obligation that foresees the continuous limitation of the privacy right and the secrecy of correspondence makes the essence of the right disappear by removing the safeguards regarding its execution. The physical and legal persons, mass users of the public electronic communication services or networks, are permanent subjects to this intrusion into their exercise of their private rights to correspondence and freedom of expression, without the possibility of a free, uncensored manifestation, except for direct communication, thus excluding the main communication means used nowadays.

As a natural reasoning of the present the respect of the proportionality principle needs to be examined, another mandatory imperative requirement to be met in the case of limitations of the exercise of fundamental rights or freedoms, as explicitly foreseen in art 53 para 2 of the Constitution. This principle imposes the restraining measure to be in agreement with the situation that determines its application and, at the same time, to stop with the disappearance of the determinant cause.

For example, the provisions of art 91^1 of the Penal Procedure Code fully respects the exigencies of the proportionality principle, both as regards the length of the right limitation measure, and as regards the its immediate cessation as soon as the determining causes have disappeared. However, law 298/2008 imposes the obligation of a continuous retention of traffic data, from the moment of its entry into force and its application (that is 20 January 2009 and 15 March 2009 respectively, as regards the localisation traffic data related to the Internet access, electronic mail and Internet telephony services) without considering the necessity for the cessation of the limitation once the determinant cause has disappeared. The intrusion into the free exercise of the right takes place continuously and independently of the occurrence of a justifying fact, of a determinant cause and only for the scope of criminal prevention and the discovery – after their perpetration – of serious crimes.

Another aspect that leads to the unjustified restrain of the privacy right of a person is the one according to which law 298/2008 has as effect the identification not only of a person that sends a message, an information through any communication mean, but, as this results from Art.4, also on

the receiver of that information. The called person is thus exposed to the retention of the data connected to its private life, irrespective of his own act or a manifestation of will but only based on the behaviour of another person – of the caller- whose actions he can't censure to protect himself against bad faith or intent of blackmail, harassment etc. Even though he is a passive subject in the intercommunication relationship, the called person can become, without his will, suspect from the point of view of the state authorities that carry out the criminal investigation. Or, from this point of view, the intrusion into the private life of a person, regulated by law 298/2008, seems as excessive.

The Constitutional Court underlines that the justified use, under the conditions regulated by law 298/2008, is not the one that in itself harms in an unacceptable way the exercise of the right to privacy or the freedom of expression, but rather the legal obligation with a continuous character, generally applicable, of data retention. This operation equally addresses all the law subjects, regardless of whether they have committed penal crimes or not or whether they are the subject of a penal investigation or not, which is likely to overturn the presumption of innocence and to transform *a priori* all users of electronic communication services or public communication networks into people susceptible of committing terrorism crimes or other serious crimes. Law 298/2008, even though it uses notions and procedures specific to the penal law, has a large applicability – practically to all physical and legal persons users of electronic communication services or public communication networks - so, it can't be considered to be in agreement with the provisions in the Constitution and Convention for the defence of human rights and fundamental freedoms regarding the guaranteeing of the rights to private life, secrecy of the correspondence and freedom of expression.

The Constitutional Court observes that, even though Law 298/2008 refers to data with a predominantly technical character, these are retained with the scope of providing information regarding a person and its private life. Even though according to art 1 para 3 of the law this does not apply to the content of the communication or to information accessed while using an electronic communication network, all the other retained data with the scope to identify the caller and of the called party, namely the user and the recipient of an information sent by an electronic way, the source, the destination, the date, the hour and length of a communication, the type of communication, the communication equipment or the devices used by the user, the location of the mobile communication equipment, as well as other „related data" - not defined in the law – are likely to prejudice, to inhibit the free usage of the right to communication or to expression. The retaining of these data, in a continuous way, in relation to every user of electronic communication services or public communication networks, regulated as an obligation of the providers they may

not divert from without being subject to sanctions according to art 18 of law 298/2008, is sufficient to generate in the mind of the persons the legitimate suspicion regarding the respect of their privacy and the perpetration of abuses. The legal safeguards on the concrete use of the retained data – regarding the exclusion of the content as an object of the retained data, the justified and prior authorization of the president of the competent court to judge the offence for which the penal proceeding has started, under the conditions foreseen by art 16 of the law and with the application of the sanctions stipulated in art 18 and 19 – are not sufficient and appropriate to dismiss the fear that the personal intimate rights are not breached, so that their manifestation can take place in an acceptable manner.

As it was shown above, the Constitutional Court does not deny the purpose considered by the legislator as such at the adoption of law 298/2008, in the sense that there is an urgent need to ensure adequate and efficient legal tools, compatible with the continuous process of modernization and technical upgrading of the communication means, so that the crime phenomenon can be controlled and fought against. This is why the individual rights cannot be exercised *in absurdum*, but can constitute the object of restrictions, that are justified in connection with the desired scope. The limitation of the exercise of certain personal rights by considering collective rights and public interests that are related to national security, public order or penal prevention, has always been a sensitive operation from the regulation point of view, so that a fair balance may be achieved between individual rights and interests, on the one hand, and the rights and interests of society, on the other hand. It is also true, as the ECHR has remarked in the case Klass and others vs Germany, 1978, that taking surveillance measures without adequate and sufficient safeguards can lead to„destroying democracy on the ground of defending it ."

In conclusion, essentially taking into consideration the broad range of applicability of Law 298/2008 as compared to the continuous character of the obligation to retain the traffic and localization data of the physical and legal persons as users of public electronic communication services or public communication networks, as well as other „related data" necessary for its identification, the Constitutional Court observes, for the reason shown above, that the examined law is unconstitutional in its entirety, even though the author of the exception individualises especially art 1 and 15 of the law.

For the above mentioned reasons, based on art.146 letter d) and art.147 para.(4) from the Constitution, as well as art.1-3, art.11 para.(1) letter.A.d) and art.29 of Law no.47/1992, with majority of votes

THE CONSTITUTIONAL COURT

In the name of the law

Decides:

Admits the unconstitutionality exception raised by the Civil Society Commissariat in the Bucharest Tribunal – Commercial Section File no. 2971/3/2009 and observes that the provisions of Law no.298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as the modification of law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area are not constitutional.

Final decision and generally binding.

Shall be notified to both Chambers of the Parliament and to the Government.

Delivered in public hearing on October 8, 2009.

PRESIDENT OF THE CONSTITUTIONAL COURT,

Univ. Prof.. dr. Ioan Vida

MAGISTRATE-ASISSTANT,

Claudia Margareta Krupenschi