

Romania, Curtea Constituțională a României (Romanian Constitutional Court), 424 D/2014 & 478/D/2014, 8 July 2014

Deciding bodies and decisions

Romania, Curtea Constituțională a României (Romanian Constitutional Court), 424 D/2014 & 478/D/2014, 8 July 2014

Area of law

Data protection - data retention

Subject matter

To what extent is the interference of public authorities in the private life proportionate?

Summary Facts Of The Case

The unconstitutionality exception arose in two criminal cases before Judecătoria (the common local court) Constanța and Judecătoria Târgoviște, both courts raising the exception of unconstitutionality *ex officio*, in cases where the prosecutors requested the release of data retained by electronic communications service providers. The two courts hesitated to grant the prosecutors' request, and argued that Law 82/2012 and art. 152 of the RCrPC were unconstitutional, following invalidation of Directive 2006/24/EC by the CJEU.

The Public Ministry (the authority under which prosecutors are organised) argued that despite invalidation of Directive 2006/24/EC by the CJEU, the national implementing law was still constitutional, essentially stating that the national authorities's interference with the right to private life was proportional.

In its reasoning, the RCC had little margin of interpretation.

Firstly, the RCC itself had already declared that Law no. 298/2008, the first implementation in Romania of Directive 2006/24/EC, had been unconstitutional, by Decision, no. 1258 of 8 October 2009. References to this former decision hold the only mention of the jurisprudence of the ECtHR, namely two decisions, *Prince Hans-Adam II of Lichtenstein v. Germany* and *Klass and others v. Germany*.

Comparing the first Romanian implementation of Directive 2006/24/EC with Law 82/2012, the Court found that while complementary data had been better defined, several situations may be identified where national authorities could request the retained data without any judicial review, and found that the system of administrative and criminal sanctions established by the new law was not sufficient to provide guarantees against interferences with the right to private life and freedom of expression of the persons involved.

Secondly, as the Romanian implementation of Directive 2006/24/EC was largely identical to the directive itself, the court's finding concerning the compatibility of Law 82/2012 with the rights to private life, personal data protection and freedom of expression represent a summary of the

CJEU's motivation in joint cases C-293/12 and C-594/12, the court expressly recognising the direct and compulsory effect of the CJEU's decision.

Finally, the Court found that art. 152 RCrPC was constitutional, since release of retained data was conditioned by prior approval from a judicial authority, and therefore provided sufficient guarantees concerning interferences with the rights to private life, to personal data protection and to freedom of expression. However constitutional, the Court showed that the text had remained without object following the invalidation of Law 82/2012, on which it relied for application.

In light of these arguments, the RCC found that Law 82/2012 was unconstitutional in its entirety, and art. 152 RCrPC, while constitutional, became inapplicable.

Relation to the scope of the Charter

The Charter was invoked, among others, as grounds for the review of constitutionality of several national provisions concerning the retention of data generated or processed in connection with the provision of electronic communication services.

Impact on Legislation / Policy

Pursuant to Law no. 47/1992 on the functioning of the RCC, normative provisions declared unconstitutional shall have no effect after publication of the RCC's decision in the Official Monitor. Effectively, Law 82/2012 was repealed by the analysed decision. Moreover, despite art. 152 of the RCrPC being found constitutional, as it had Law 82/2012 as its starting point, following publication of the analysed decision the text remained objectless.

Following to the immediate impact mentioned above, Law no. 235/2015 for the amendment of Law 506/2004 was adopted, establishing the conditions under which the competent authorities may require stored identification data from providers of electronic communication services. Since the stated purpose of the law was not to replace Law 82/2012 or to establish obligations for the service providers to retain data, it was decided that not all requirements of the analysed decision needed to be met by the new law.

The issue with art. 152 RCrPC was still left unsolved, since the text was reliant on the special law regulating the service providers' obligation to retain data, a special law which Law 235/2015 was not, by its own declaration. The remaining issue was finally solved by Law no. 75/2016, which amended art. 152 RCrPC in such a way as to make it self reliant, thus rendering art. 121 of Law 506/2004, introduced by Law 235/2015, almost irrelevant.

The interim period where Law 235/2015 was into force, before amendment of art. 152 RCrPC by Law 75/2016, generated a lot of inconsistent jurisprudence by the national courts, some granting prosecutors' requests to disclose retained data based on art. 152 RCrPC reliant on art. 121 of Law 506/2004, while some others found that the requirements imposed by the analysed decision were not met by the new law, and therefore denied such requests. The matter reached the Romanian High Court of Cassation and Justice (HCCJ), seised with a request for a decision in the interest of the law, aimed at harmonising national jurisprudence, compulsory to all national courts. By the time of the HCCJ's Decision 15 of 26 September 2016, published in the Official Monitor no. 892 of 8 November 2016, however, art. 152 of the RCrPC had already been amended, which led the court to stating that the issue was no longer current, so a decision in the interest of the law was not necessary.

The new art. 121 of Law 506/2004, introduced by Law 235/2015, was also contested in front of the

RCC. By its Decision no. 589 of 21 September 2017, published in the Official Monitor no. 89 of 30 January 2018, the RCC reevaluated all of the criteria raised by the analysed decision, and found that Law 235/2015 was constitutional

Sources - EU and national law

Directive 2006/24/EC
