

The Polish CCBE delegation supports the recommendations adopted by the CCBE with respect to implementation of the directive concerning the retention of data, as well as the position of its Advocate General Pedro Cruz Villalón of 12 December 2013 concerning non-compliance of the standards stipulated in the Directive 2006/24/EC of the European Parliament and Council of 15 March 2006 concerning retention, generation and processing of data in relation to the provision of publicly available electronic telecommunications services and access to public telecommunications networks with the right to privacy and defense.

An individual's information autonomy, being a part of the right to privacy, gains in importance in the contemporary world, thus any potential interference of state authorities with this right requires fulfillment of the requirements set out in Art. 8 sec. 2 of the European Convention on Human Rights and Fundamental Freedoms. Protection of the right to privacy and personal data stipulated in Art. 7 and 8 of the Charter of Fundamental Rights requires personal data to be processed *bona fide*, for specific purposes and with the consent of the individual concerned, or on other justified grounds stipulated by statute, which ought to be subject to control by an independent body.

The European Human Rights Tribunal case law (including *S. and Marper vs. The United Kingdom*) confirms that mere collection of data about a specific person has a direct effect on his or her private life, regardless whether such data are subsequently used. Similarly the European Court of Justice, in its judgment given in the combined cases C-92/09 and C-93/09, ruled that limitations in the scope of personal data protection are only admissible in case of "strict proportionality" with the realized objective.

The current European debate about the compliance of the activities of public services involving the use of data, specifically telephone billings and data identifying electronic telecommunications users, with fundamental individual rights leads to the conclusion that these individual rights are insufficiently protected by applicable European law and national legislation. The Polish implementation of the current Directive and the national law adopted on its basis, which is the subject of an animated public debate with the participation of the Polish Bar, may serve as the best example of the high risk of abuse of individual rights that the Directive creates.

The debate has already caused amendments in some provisions of telecommunications law, a negative report of the Supreme Control Chamber and a motion to the Constitutional Tribunal for determination of incompliance of the provisions concerning access to computer data for certain public services, including the secret service, with the Polish Constitution. In a proceeding issued by the combined applications of the Ombudsman and the Attorney General the Tribunal will consider the issue of omission in the challenged regulations of provisions which exclude from the circle of entities that may be subject to operational control of certain categories of persons, who are barred by inadmissibility of evidence from divulging secret information, such as advocates, journalists, notaries, legal advisors and doctors. The Polish Bar Council has been invited to participate in the proceedings.

Already in 2011 the Human Rights Commission operating in the Polish Bar Council prepared a report concerning the implementation of the directive in Polish law, which became the starting point for a discussion of the public order issues that emerged. In the enforcement of the Directive, the Polish government, invoking among others the need to combat terrorism, adopted regulations allowing for a 24 month period of data retention without defining the catalogue of cases to which it may be applied, which enabled requests for data also in civil cases, especially divorces. Moreover, some secret services are not subject to any internal or external control, while data are obtained from operators without the need for a prior court order. In addition, after completing data collection it was not and still is not possible to investigate the grounds for obtaining them, for instance by means of a subsequent judicial control. Unless the data provided grounds for further action against the individual under surveillance the person whose data have been collected is not informed about such activities. It is therefore potentially possible to collect data about anyone, even an individual who is not suspected of committing any crime whatsoever.

Such regulations are contrary with the Polish Constitution and with the European Convention on Human Rights and Fundamental Freedoms as well as the Charter of Fundamental Rights. There is no doubt that it is necessary to formulate national law in such a way that it provides a compromise between the requirements of fighting crime and ensuring security and respect for individual rights on the other hand. However, neither existing legislature nor the practice of Polish public authorities have been providing sufficient protection to individuals against excessive and unjustified surveillance. Likewise the provisions do not contain any limitations on the ability to resort to or make use of telecommunications data concerning journalists,

doctors, advocates, legal advisors or notaries. The result is that in the course of a control of a journalist it was determined that his informants do not enjoy any protection of journalistic secrets, so it was possible to examine and monitor their telecommunications data, leading invariably to a breach, contrary with the authorities' position, of journalistic secrecy. Such data are obtained in the course of controls that are not subject to any court assessment, either prior or subsequent. A court ruling concerning potential waiver of professional secrecy is also not required, whereupon the scope of freedom for the secret service is far too wide.

The above situations clearly indicate that current protection of individual rights with regard to retention of data under European law is insufficient, and is further undermined by inappropriate implementation of norms stipulated in the Directive leading to a disproportionate limitation of rights and freedoms. These circumstances are of fundamental significance for ensuring adequate right to defense by advocates, as well as conducting correspondence with clients protected by professional secrecy.

Considering the underlying objectives of the Directive, the need to amend it by reducing the retention period appears to be a necessity, especially in the sphere of protecting telecommunications data until a given individual is reasonably suspected of committing a crime, and not with regard to all individuals. It would also be expedient to define the catalogue of crimes which justify data gathering, as well as to regulate the issue of external control and notifying individuals that their data are being collected. It is also necessary to formulate regulations enabling full protection of advocates' secrets which will safeguard the right to defense and maintain confidentiality, which should mark all the activities of an advocate.