



RS
US

REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-65/13-16
26 September 2013

ORDER

At a session held on 26 September 2013 in proceedings to review constitutionality initiated upon the request of the Information Commissioner, the Constitutional Court

decided as follows:

The proceedings to review the constitutionality of Articles 162 through 169 of the Electronic Communications Act (Official Gazette RS, No. 109/12) shall be stayed until the Court of Justice of the European Union adopts a decision in cases C-293/12 and C-594/12.

REASONING

A

1. The applicant requests a review of the constitutionality of Articles 162 through 169 of the Electronic Communications Act (hereinafter referred to as the ECA-1), which entered into force on 15 January 2013. By the challenged provisions the Republic of Slovenia transposed into its legal order 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 (OJ L 105, 13 April 2006, p. 54 – hereinafter referred to as the Data Retention Directive). For the purposes determined by the law regulating criminal proceedings, the law regulating the functioning of the Slovene Intelligence and Security Agency, and the law regulating the defence of the state (the first paragraph of Article 162 of the ECA-1), the challenged regulation imposes on providers of publicly

available electronic communications services and public communications networks the obligation to retain certain traffic, location, and other data necessary for the identification of an individual (Article 164 of the ECA-1). Such data are to be retained for 14 months (for data regarding publicly available telephone services) or 8 months (for other data) following the date of communication. In exception, a longer period can be determined (the fifth and sixth paragraphs of Article 163 of the ECA-1). The level of security of the retained data is determined, along with the measures that a service provider must adopt, alone or in cooperation with others, with regard to the retention of data (Article 165 of the ECA-1). The supervisory role of the Information Commissioner is also determined (Article 169 of the ECA-1).

2. The fundamental allegation contained in the request for a review of constitutionality is that, on the basis of the Data Retention Directive, the Republic of Slovenia imposed on service providers the obligation to retain as a precautionary measure the traffic and location data of all users, i.e. regardless of whether the users themselves gave rise to reasons for such an interference with their rights. Referring to the constitutional case law and the case law of the European Court of Human Rights, the applicant draws attention to the fact that not only the content of communication, but also data which constitute an integral part of communication enjoy constitutional protection and protection under the [applicable] convention. The precautionary retention of data allegedly entails inadmissible interferences with the rights to the protection of personal data (Article 38 of the Constitution) and communication privacy (Article 37 of the Constitution), and consequently also with the right to freedom of movement (Article 32 of the Constitution), the right to freedom of expression (Article 39 of the Constitution), and with the principle of the presumption of innocence (Article 27 of the Constitution). The applicant is of the opinion that, in conformity with the established constitutional case law, these measures do not pass the test of proportionality.

3. The request for a review of constitutionality was sent to the National Assembly and the Government. In its reply, the National Assembly concurred that the retention of data under Article 164 of the ECA-1 substantially interferes with an individual's privacy, however it underlined that the retention of data is an important tool for discovering and investigating criminal offences, and that most often data must be obtained for a past period of time, which is precisely what the obligatory precautionary retention of data enables. The National Assembly drew attention also to those provisions of the challenged regulation that reduce the possibility of abuse. In its opinion, the Government stated *inter alia* that in terms of substance, the applicant in fact alleged an

inconsistency of the Data Retention Directive with the above-mentioned human rights, although it explicitly challenged the provisions of the national regulation.

4. The reply of the National Assembly and the Government were submitted to the applicant. In its reply, the applicant maintained that the measure is not proportional. It is of the opinion that research carried out does not confirm that the retention of data contributes to the better investigation of criminal offences. It also draws attention to the fact that by simple technical workarounds it is possible to negate the effectiveness of such measure. Therefore, a measure that interferes to such a degree with the privacy of the users of communication services is allegedly not proportional to the pursued objectives.

B

5. The applicant explicitly challenges the obligation to retain data that follows from the Data Retention Directive, with regard to which the Directive does not offer Member States the possibility of a different regulation. Therefore, the applicant in fact alleges an inconsistency of the Data Retention Directive with human rights, which is also what the Government explicitly underlines. With regard to this, the Constitutional Court deems that the alleged unconstitutionality essentially refers, above all, to the rights to communication (Article 37 of the Constitution) and information privacy (Article 38 of the Constitution). The argumentation that due to such severe interference with the mentioned rights also the right to freedom of expression (Article 39 of the Constitution), the right to freedom of movement (Article 32 of the Constitution), and the presumption of innocence (Article 27 of the Constitution) are consequently jeopardised, essentially entails that the disproportionate weight of the interference with the right to privacy is underlined. Within the framework of European Union law, the human rights determined by Articles 37 and 38 of the Constitution are guaranteed as human rights by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26 October 2012 – hereinafter referred to as the Charter). Therefore, what is at issue is actually the question of whether the provisions of the Data Retention Directive are consistent with the above-mentioned provisions of the Charter.

6. By joining the European Union, the Republic of Slovenia transferred the exercise of part of its sovereign rights to the European Union on the basis of Article 3a of the Constitution.[1] From the third paragraph of Article 3a of the Constitution it follows that legal acts and decisions adopted within the

framework of the European Union are applied in accordance with the legal regulation of the European Union.[2] This provision also binds the Constitutional Court, when exercising its competences, to respect the law of the European Union, as such is. The challenged provisions of the ECA-1 transpose the obligations imposed by the Data Retention Directive, i.e. their implementation entails the application of European Union law. In conformity with the first paragraph of Article 51 of the Charter, Member States are bound by its provisions when implementing European Union law.

7. The Constitutional Court has already adopted the position that its competence is not excluded with regard to a review of the constitutionality of regulations that transpose directives into the internal legal order.[3]

8. With regard to the fact that the allegations regarding the unconstitutionality of the statutory provisions entail, in terms of substance, allegation regarding the inconsistency of the provisions of the Data Retention Directive with Articles 7 and 8 of the Charter, a decision on the validity of the Data Retention Directive is of key importance for a review of the constitutionality of the provisions of the national legislation. On the basis of point b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 326, 26 October 2012 – hereinafter referred to as the TFEU), the Court of Justice of the European Union has exclusive competence to review the validity of the Directive.[4]

9. The Court of Justice of the European Union has not yet decided on the validity of the Data Retention Directive from the viewpoint of its consistency with Articles 7 and 8 of the Charter. The question of the validity of the Data Retention Directive has nonetheless already been submitted to the Court of Justice of the European Union to be decided on as a preliminary question in case C-301/06,[5] however that case only referred to the issue of the legal basis of the Directive at issue. The question of the validity of the Directive from the viewpoint of Articles 7 and 8 of the Charter has also been submitted in cases C-293/12[6] and C-594/12.[7] The mentioned proceedings are already pending before the Court of Justice of the European Union; an oral hearing has already been held and also a date for the submission of the opinion of the Advocate General has been set. As the substance of the alleged unconstitutionality matches the reasons due to which the proceedings on the validity of the Data Retention Directive are already pending, the Constitutional Court does not have to submit a request for a preliminary ruling to the Court of Justice of the European Union.

10. The Constitutional Court cannot adopt a decision on the matter at issue until the Court of Justice of the European Union, which has exclusive competence to assess the validity of the above-mentioned Directive, decides on its validity. Consequently, the Constitutional Court stayed the proceedings for the assessment of the constitutionality of the challenged provisions of the ECA-1 until the Court of Justice of the European Union adopts a decision in the above-mentioned cases.

C

11. The Constitutional Court adopted this Order on the basis of point b) of the first paragraph of Article 267 of the TFEU in connection with the third paragraph of Article 3a of the Constitution and the second paragraph of Article 41 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – CCA), composed of: Dr. Ernest Petrič, President, and Judges Dr. Mitja Deisinger, Dr. Dunja Jadek Pensa, Mag. Marta Klampfer, Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, and Dr. Jadranka Sovdat. The Order was adopted unanimously.

Dr. Ernest Petrič
President

Notes:

[1] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ L 236, 23 September 2003, p. 17, and Official Gazette RS, No. 12/04, MP, No. 3/04).

[2] The third paragraph of Article 3a of the Constitution reads: "Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations."

[3] See Order of the Constitutional Court No. U-I-113/04, dated 7 February 2007 (Official Gazette RS, No. 16/07, and OdlUS XVI, 16) and Decision of the Constitutional Court No. U-I-37/10, dated 18 April 2013 (Official Gazette RS, No. 39/13).

[4] Such was also the position of the Constitutional Court in Order No. U-I-113/04, dated 8 July 2004.

[5] See the Judgment in *Ireland v. European Parliament and Council of the European Union*, C-301/06, dated 10 February 2009.

[6] Reference for a preliminary ruling that the High Court of Ireland made on 11 June 2012 – *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*.

[7] Reference for a preliminary ruling that the *Verfassungsgerichtshof* (Austria) made on 19 December 2012 - *Kärntner Landesregierung and Others*.