

REPUBLIC OF SERBIA
PROTECTOR OF CITIZENS
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Belgrade

REPUBLIC OF SERBIA
NATIONAL ASSEMBLY
BELGRADE
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NATIONAL ASSEMBLY OF THE REPUBLIC OF SERBIA
- Committee on Transportation and Communications –
Attn: President

BELGRADE
14 Kralja Milana Street

Dear Mr. President and Members of the Committee,

Pursuant to Article 107, Paragraph 2 of the Constitution of the Republic of Serbia (*Official Gazette of RS*, No. 98/2006), Article 18, Paragraph 1 of the Law on the Protector of Citizens (*Official Gazette of RS*, Nos. 79/2005 and 54/2007) and on the basis of Article 142, Paragraph 5 of the Rules of Procedure of the National Assembly of the Republic of Serbia (*Official Gazette of RS*, No. 14/09), I hereby submit to the National Assembly – the Committee on Transportation and Communications the following

INITIATIVE
FOR
SUBMITTING THE AMENDMENTS TO ARTICLES 128 AND 130 OF THE BILL ON
ELECTRONIC COMMUNICATIONS

AMENDMENT I

Article 128, Paragraph 5 is amended to read as follows:

“The operator shall retain data in the way that they can be accessed without delay or provided without delay on the basis of court decision and in the manner prescribed by law”.

Explanation

By the proposed amendment, the Bill is harmonised with the Constitution of the Republic of Serbia. Article 41, Paragraph 2 of the Constitution allows the interference with privacy of communication (secrecy of correspondence and other means of communication) but only on the basis of a court decision. The Protector of Citizens (PoC) considers that access to the following data: with whom a citizen communicates, in which period of time, what kind of connection and what type of device he/she uses (e.g. type of mobile phone or computer), as well as the location from which he/she communicates, particularly when taken all together, represents a derogation from the principle that protects the privacy of our communication. The Constitution allows such derogations only on the basis of court decisions and laws cannot diminish the Constitutional guarantees regarding the respect for human rights.

Such position was unambiguously expressed in the Decision of the Constitutional court IUz-149/2008 of 28 May 2009, passed at the initiative of the Provincial Ombudsman for the assessment of constitutionality of Article 55, Paragraph 1 of the Law on Telecommunications (*Official Gazette of RS*, Nos. 44/03 and 36/06). By that Decision, the Court proclaimed unconstitutional and deleted from the legal system Article 55, Paragraph 1 of the Law that prohibited all activities or use of devices that threaten or interfere with privacy and confidentiality of messages transmitted via telecommunication networks, “except when the service user gives his/her consent or if these activities are performed in accordance with the law or court order issued in accordance with the law”. The Constitutional Court found that the aforementioned Article violated the citizens’ right to secrecy of correspondence and other means of communication since it was not in compliance with the provision of Article 41 of the Constitution according to which only court is competent to establish the derogations from the principle of secrecy of correspondence and other means of communication, for the determined period and in the way envisaged by the law. Inconsistence with the Constitution basically reflected in the fact that the said Article provided that it was not always necessary to have a court decision to restrict the secrecy of correspondence and other means of communication, but that it was possible to prescribe, by a special law, some other legal basis for such restriction.

The PoC, within his competences established by the Constitution and the Law, is obliged to recognise the fact that the Constitution of the Republic of Serbia establishes firmer guarantees for the protection of human rights regarding this matter than the European Convention on Protection of Human Rights and Fundamental Freedoms. Namely, Article 8 of the Convention allows the interference with privacy "in accordance with the law," which is in some countries done in the way that interference with privacy does not always and necessarily require a court decision, but a decision of other high authorities or officials. However, the national constitutions of these states do not contain a provision such as the provision of Article 41, Paragraph 2 of our Constitution, which makes such solutions possible in these countries. The principle of constitutionality (Article 194, Paragraph 3 of the Constitution) prescribes that all laws and other general acts adopted in the Republic of Serbia must be in compliance with the Constitution.

AMENDMENT II

Article 130, Paragraph 3 is amended to read as follows:

“The oversight of the fulfillment of operator’s obligations referred to in paragraph 1 of this Article shall be performed by the authority responsible for the protection of personal data and when data are provided in accordance with Article 128, Paragraph 5 of this Law, the authority responsible for overseeing the implementation of the Law that regulates the protection of personal data.”

Explanation

The amendment allows full, overall protection of citizens’ rights to the protection of personal data by the competent state authority – the Commissioner for Information of Public

Importance and Personal Data Protection, regardless of whether competent authorities accessed (or were provided with) retained data or not. It is not only a democratic European standard but also a solution arising necessarily from the Law on Personal Data Protection. At the same time, the amendment does not prevent “double” control mechanism in case where retained data are provided to or accessed by state authorities. Whereas, a special “authority responsible for protection of secret information”, as it is written in the Bill, does not exist (but all authorities are obliged to protect secret data they hold). Our legal system knows only the authority that is established, in accordance with the Law on Data Secrecy, as authority for overseeing the implementation of that Law. However, the following fact does not make the drafting of laws and amendments easier: the text of the Law on Data Secrecy determines not one but two such authorities (more precisely – one authority and one Government service), and at the same time pronounces both of them the bodies responsible for overseeing the implementation of the Law (the Ministry responsible for justice affairs, as stipulated in Article 97, Paragraph 1 of the Law on Data Secrecy, and the National Security Office, according to Article 86, Paragraph 1 of the same Law!).

PROTECTOR OF CITIZENS

Saša Janković

(sign)

(seal)

Send also:

- a copy to the Commissioner for Information of Public Importance and Personal Data Protection
- to the media