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Mass Telecommunication Surveillance in Czech Republic (and in Slovakia)

Controversy related to retention of metadata related to phone calls, e-mails and other Internet communication does not spare Czech Republic, one of the most technologically advanced post-socialist countries. Legislation demanded by authorities investigating and prosecuting crimes harmonized by the European Union was criticized by activists and scrutinized by courts. Recent intervention of the European Court of Justice sparks new round of discussion about the issue.

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1 Telecommunication Surveillance in Socialist Past

[Rz 1] Totalitarian (earlier) and authoritarian (later) socialist state did not respect individual liberties to extent recognized in democratic countries. There was no freedom of speech and association. All exchange of information and opinion was controlled. This control does not spare communication among individuals. Secrecy of mail was guaranteed in constitutions. However, significant exceptions were allowed for broadly defined security reasons. In addition to it, misuse was not curtailed.

[Rz 2] Telegraph, telex and telephone originated before the war in democratic Czechoslovakia. Especially Czech part was always technologically advanced. Coverage with these services, however, extended slowly in the period of socialism. All services were provided exclusively by state post, telegraph and telephone enterprise under close government control. There were long waiting lists for their installation. Prices for phone calls were high and earnings were used for cross-subsidizing of other activities.

[Rz 3] Wiretapping was thus easy to organize under such conditions not only in Czechoslovakia,¹ but also in other countries of Eastern bloc.² Its orientation, extent, organization and techniques varied. In addition to it, dissidents, nonconformists and other «useless» and «troublesome» people could be also switched-off or denied their individual phones.

2 Democratization, Liberalization and Commercialization and Rule of Law

[Rz 4] Czechoslovakia democratized after Velvet revolution in 1989. This process enhanced emancipation tendencies of Slovakia and resulted into peaceful dissolution of Czechoslovakia in 1992. Successor countries remain close and similar. Most tendencies in Czech Republic can be observed also in Slovakia.³

¹ POVOLNÝ D., Operativní technika v rukou StB – Nejen stěny měly uši (Investigation technologies of the State Security – Not only walls had ears), <http://www.policie.cz/clanek/operativni-technika-v-rukou-stb.aspx>(all internet sources last visited in May 2014).

² For detailed analysis on telephone tapping can in German Democratic Republic see SCHMOLE A., Abteilung 26 – Telefonkontrolle, Abhörmaßnahmen und Videoüberwachung. In: Anatomie der Staatsicherheit – Geschichte, Struktur und Methoden – MfS-Handbuch (<http://www.bstu.bund.de>).

³ The Constitutional Court of Slovak Republic abrogated in Pl. ÚS 23/06 on the 2 June 2010 data retention as uncompensated duty of providers. Non-governmental European Information Society Institute (<http://www.eisionline.org>) coordinated submission of deputies to the Constitutional court analogous to Czech cases in October 2012.

[Rz 5] Newly established countries were quickly liberalized. Individual rights and liberties were introduced quickly with new legislation and finally guaranteed with Charter of Fundamental Rights and Liberties. This second constitutional act is since then enforced by a strong constitutional court empowered to interfere in legislation in both individual cases and in framework of politics.

[Rz 6] Attention to privacy quickly increased to extent unknown in the past. Collectivism and slow modernization of society postponed individualization necessary for underlining of privacy in many spheres such as consumption, housing or healthcare. This quick change of attitudes has consequence for evaluation of surveillance of electronic communication. Elder generation had limited understanding for concerns, objections and demands raised by younger generations related to privacy, including surveillance of communication.

[Rz 7] Market economy was introduced in Czech Republic and Slovakia. Commercialization and privatization quickly included providers of services of electronic communication.⁴ Interests of providers which differ from interests of government and consumers are usually identified and pursued by them, but often poorly analyzed and understood by others.

[Rz 8] Czech Republic acceded to International Organizations of democratic and developed countries as the Council of Europe, the Organization for Economic Cooperation and Development and the North Atlantic Treaty Organization. Membership in the first organization results in requirements for attention to European standards of fundamental rights, membership in the second organization eases exchange of experience related to problems related to developed countries and membership in the third organization led to increased involvement of worldwide engagement for security consisting now foremost in combatting of terrorism. Standards and recommendations of all these organizations shall be considered in regulation of electronic communication.

[Rz 9] This integration was finalized in 2004 with accession of Czech Republic and Slovakia to the European Union. The most important external influence on electronic communication results from the membership in this supranational entity established for economic integration of growing number of member states.

[Rz 10] However, Czech Republic is a post-socialist country with inefficient administration, slow and complicated adjudication.⁵ Corruption is suspected in many activities. Relatively stable political system deteriorated during the last years. Populist movements reshape political landscape.

[Rz 11] Czech law is compromised with quickly changing of legislation and extremely divergent interpretation of statutes caused by different thinking of lawyers of various generations. Reflection of law and legal practice is often limited and of poor quality. Unpredictability of legal framework is result of all these features in many cases of daily economic, social and political life.

[Rz 12] Internationalization and Europeanization of Czech law was necessary in above mentioned situation. Nevertheless, influx of rules of international and supranational laws contributed significantly to mentioned complexity of Czech law and complicated further its application.

⁴ For Overview of milestones of liberalization, privatization and regulation see Novák S., APVTS Telecommunications Liberalization in the Czech Republic, powerpoint presentation, Zagreb 21. February 2007, <http://www.slideshare.net/tzombix/telecommunications-liberalization-in-the-czech-republic>.

⁵ See World Economic Forum, Global Competitiveness Report 2013–2014, p. 30: «Concerns remain about the quality of the country's public institutions, with public trust in politicians ranked an extremely low», http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

3 Technological and Economic Modernization of Czech Telecommunications

[Rz 13] Telecommunication technologies modernized quickly since 1990 in Czech Republic. Stationary telephones were gradually flanked and later largely replaced with mobile phones. Similarly, personal computers were bought by thousands by companies and institutions. Internet entered Czechoslovakia in 1992. Lower purchasing power and comparatively high prices resulted not only from necessary immense investment, but also from oligopoly of providers delayed introduction of modern technologies of electronic communication.

[Rz 14] Nevertheless, Czechs enjoy since the beginning of the 21st century technologies of electronic communication to extent comparable with the most developed countries. All technologies have been mastered by Czech experts and adopted creatively by numerous fans of modern technologies.

4 Legislative Framework for Retention of Telecommunication Metadata

[Rz 15] Social, economic and legal problems related to the most developed countries are thus also in Czech Republic. Methods of mass surveillance of electronic communication caused considerable attention. Selective phone and Internet surveillance is expected as method of criminal prosecution. Temporary retention of metadata related to telephone and Internet communication – identification of connections and localization of mobile phones and of similar data of Internet communication – has been required by Czech legislation⁶ already before adoption of Data Retention Directive.⁷

[Rz 16] Czech law thus complied with requirements of the European Union without intentional implementation. National legislator was obliged to retain this compliance since deadline for its implementation.

5 Criticism and Judicial Interventions

[Rz 17] This legislation was criticized heavily as interfering too much into privacy of clients of communication services by human rights activists⁸ and by several journalists. Fortunately, this criticism was accompanied with extraordinarily intensive academic attention to legal aspects of the problems by legal experts familiar with modern technologies and modern interpretation of

⁶ § 86 of Act on Telecommunications (zákon č. 151/2000 Sb., o telekomunikacích) required since 2001 retention of defined metadata for two months until entry into force of Act on Electronic Communication (zákon č. 127/2005 Sb.) whose § 97 (3) are recasted rules for data retention together with the Decree of the (then existing) Ministry of Informatics (Vyhláška č. 485/2005 Sb., o rozsahu provozních a lokalizačních údajů, době jejich uchování a formě a způsobu jejich předávání orgánům oprávněným k jejich využívání.

⁷ 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 communication services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13: 4. 2006.

⁸ Among others, human right watchdog group Iuridicum remedium o.p.s. shall be mentioned with its permanent coverage of various forms of incursions into privacy, see its web pages <http://www.slidilove.cz> («snoopers») and the Big Brother Award for the biggest invasion in privacy.

complex legal rules⁹ and human right activists.¹⁰ Nevertheless, nor support for this legislation neither its criticism was connected with any political party. The issue has not become fuel for confrontation between opposition and governing coalition. Such new aspects of privacy form minor topic for most politicians.

[Rz 18] The Constitutional Court largely accepted objections of group of deputies and senators aware for the problem representing both governing parties and opposition. The court abrogated provisions of the Act on Electronic Communication requiring retention of metadata related to phone and internet communication for investigation of criminality.¹¹ It identified exaggerated intervention into privacy of customers of providers of services of electronic communication in such data retention. It was underlined by the Constitutional Court that collected metadata are of limited importance for investigation and prosecution of serious crimes and required routinely by the police.

[Rz 19] The Constitutional Court was asked to request the Court of Justice to check the compliance of the Directive with fundamental rights of the European Union and of the Council of Europe in preliminary ruling. The court acknowledged that the Directive was ground for adoption of national legislation found unconstitutional.

[Rz 20] According to the court, however, requirements of the Directive could be met with respect to privacy of clients of communication services. It could thus easily continue its policy of refraining from direct exchange of opinions with the supreme court of the European Union.¹²

[Rz 21] Interventions of the Constitutional Court did not end with this decision. At request of one district court in Prague acting as criminal court of the first instance, the Constitutional Court abrogated¹³ a short provision of the Code of Criminal Procedure enabling easy use of retained metadata of electronic communication in criminal proceedings by the Police of the Czech Republic (national police force empowered to investigate crimes), state attorneys (offices of public prosecution) and courts deciding on criminal matters.¹⁴

6 Refinement of Legislation for Retention

[Rz 22] Abolition of duty to retain telecommunication metadata and easy access to it by legal enforcement authorities was interpreted as prohibition of metadata retention in subsequent period due to existing rules of protection of personal data which are also established as implementation

⁹ MYŠKA M., Data retention in Czech Republic: past, present and future. *Masaryk University Journal of Law and Technology*, Brno: Masarykova univerzita, 2013, vol. 7, no. 2, pp. 267–286. ISSN 1802-5943, available at <http://mujlt.law.muni.cz/> and MOLEK P., Czech Constitutional Court: Unconstitutionality of the Czech Implementation of the Data Retention Directive, Decision of 22 March 2011, Pl. ÚS 24/10. *European Constitutional Law Review*, Cambridge: Cambridge University Press, 2012, vol. 8, no. 2, pp. 338–353. ISSN 1574-0196.

¹⁰ IURIDICUM REMEDIUM, O.S., Data retention v (nejen) policejní praxi – Analýza postupů Policie ČR a dalších orgánů při vyžadování a využívání provozních a lokalizačních údajů o elektronických komunikacích v České republice, 2012 / Data retention (not only) in police practice – Analysis of approaches of the Police of Czech Republic and other institutions in requirement and use of traffic and localization data of electronic communication in Czech Republic (available at webpage <http://www.slidilove.cz/sites/default/files/dr-analyza-final2.pdf>).

¹¹ Judgment Pl. ÚS 24/10 – 94/2011 Sb. of 11 April 2011.

¹² As done one year later by Austrian Verfassungsgerichtshof in C-594/12 Seitlinger and others. The Advocate General largely accepted objections of complainants.

¹³ Judgment Pl. ÚS 24/11 – 43/2012 Sb. of 20 December 2011.

¹⁴ § 88a of the Code of Criminal procedure (zákon č. 141/1961 Sb., trestní řád) in applicable version.

of law of the European Union and widely expected internationally.

[Rz 23] Not only necessity to comply with the Data Retention Directive, but also pressure of the police and intelligence service resulted in quick reintroduction of metadata retention and its use in criminal proceedings. The Cabinet thus quickly prepared new legislation addressing objections of both judgments of the Constitutional Court. Detailed rules have been adopted for data retention¹⁵ and its use during criminal investigation and prosecution.¹⁶

[Rz 24] Nevertheless, criticism of the legislation does not disappear after adoption of reparatory legislation by the Parliament. Critics underline that the Police tends to overuse metadata related to phone calls in its investigation. Success rates of investigation of serious criminality do not support claim that metadata retention is necessary for combatting serious crimes. It was underlined that duties of providers of electronic communication services were specified improperly for numerous providers of Wi-Fi connection in hotels, restaurants, office buildings and in schools. Existing model of compensation of providers for metadata retention is also discussed whether feasible and balanced.

7 Social Conditions for Retention and Surveillance of Telecommunications

[Rz 25] Fortunately, Czech Republic has not encountered any terrorist attack during the last two decades. It is thus hard to justify in domestic political debate that metadata retention as necessary for combat of terrorism. Surely, it can be underlined that contemporary terrorist groups operate internationally and Czech Republic is described from time to time as resting place for internationally active terrorists and their collaborators.

[Rz 26] Data retention is thus justified as useful complementary tool for investigation and prosecution of serious violent and economic criminality including corruption of politicians, if any justification besides mere implementation of law of the European Union is expected.

[Rz 27] There are numerous leaks from investigation files of the Police and offices of state attorneys including information obtained by targeted wiretapping of mobile phones and surveillance of Internet communication.

[Rz 28] From time to time, metadata of phone calls are included in these disclosures. Some leaks are published by investigative journalists covering closely watched corruption affairs of politicians and important cases of both economic and violent criminality.

[Rz 29] Disclosures during police investigation and preparation for judicial proceedings are illegal. These disclosures are often criticized, but rarely result in disciplinary measures because it is difficult to investigate those guilty of leaks. Introduction of harsher punishments for journalists using these leaks¹⁷ was criticized as «muzzle law».¹⁸

¹⁵ Act 273/2012 Sb. Specified with new §88a protection of data which shall be retained by providers of electronic communication services according to §97(3,4) of the Act on Electronic Communications.

¹⁶ Act 273/2012 Sb. Introduced lengthy §88a into the Code of Criminal Procedure describing crimes

¹⁷ Act 52/2009 Sb. amending the Criminal Code.

¹⁸ Reporters without borders, Press freedom threatened by proposed phone tap amendment, 28 January 2009 (<http://en.rsf.org/czech-republic-press-freedom-threatened-by-28-01-2009,34854.html>).

8 Public and Private Communication Surveillance beyond Legal Framework

[Rz 30] No leak revealed until now any systematic analysis of retained metadata by Czech police and by the Security Information Service (civil counter-intelligence) and Military Intelligence services for purpose of tracking of individuals and groups posing security threat to the country. No systematic and large-scale activities comparable to these of the National Security Agency of the United States of America and authorities of its close allies debated hotly in the last year and similar mass surveillance realized in China, Russia and other global powers seem to be carried by any Czech authority.

[Rz 31] This inactivity reflects mentioned weaknesses of Czech government, visible among others in widespread troublesome management of informational technologies in public administration. Many projects of electronic support of administration have failed entirely or caused disappointment for poorly interconnected with existing administrative practices. High expenditures for some these projects caused underdevelopment of e-government and mistrust towards it. Similarly, the Ministry of Defense and the Army are criticized for uncoordinated and expensive purchases of weapons and other equipment.

[Rz 32] Additionally, considerable spending necessary for effective mass surveillance would lack political support in nation with widespread pacifism resulting in swift abolition of drafts and low military expenditures.¹⁹

[Rz 33] According to newspapers, police officers reluctantly admit and later refused to operate IMSI-catcher (known under female name *Agáta*) for rapid surveillance of cell phone communication in cases of utmost urgency.²⁰

[Rz 34] Similarly, there is lack of interest of United States of America and United Kingdom intelligence services. Czech Republic is labelled as irrelevant.²¹ As reported by the Security Information Service, Russian and Chinese intelligence services operate on Czech territory to considerable extent.²² Nevertheless, there is no suspicion that domestic telecommunication is monitored by these and other alien intelligence services.

[Rz 35] Another phenomenon is, however, private surveillance of mobile phones with various measures. Special cell phones with enhanced encryption are marketed and their use played role in several scandals. Police officers expressed suspicion on private operation of IMSI-catchers.²³ Theoretically, these activities are illegal and can be suppressed.

¹⁹ According to Stockholm International Peace Research Institute, military expenditures fell from 2.0% GDP in 2000 to 1.1% in 2012 (<http://portal.sipri.org/publications/pages/expenditures/country-search>).

²⁰ See reports on online version of the biggest newspaper MF Dnes, http://mobil.idnes.cz/volate-zvlastnim-lidem-agata-vas-mozna-slysi-fn3-/mob_tech.aspx?c=A040730_5265620_mob_prakticky («Do You call special people? Agata can hear You», published 31 July 2004) and http://mobil.idnes.cz/mame-manual-k-odposlouchavaci-agate-jmenuje-se-armada-a-je-z-polska-p98-/mob_tech.aspx?c=A120521_172742_mob_tech_vok («We have got instruction for use to Agata...»), published 22 May 2012)

²¹ POITRAS L., ROSENBAACH M., STARK H., Ally and Target: US Intelligence Watches Germany Closely, Spiegel Online International (<http://www.spiegel.de>, 12 August 2013).

²² Annual Report of the Security Information Service for 2012 (English version), p. 13, <http://www.bis.cz/n/ar2012en.pdf>.

²³ According to online version of newspaper *Lidové noviny* http://www.lidovky.cz/policie-zachytila-nelegalni-odposlechy-fc7-/zpravy-domov.aspx?c=A120514_193619_ln_domov_Pta («The Police spurs illegal tapping», 14 May 2012)

9 First Reactions on Recent Intervention of the Court of Justice

[Rz 36] Above mentioned request for preliminary ruling to the Court of Justice resulted in unprecedented event. Data Retention Directive was declared void. The Court of Justice found required systematic retention of telecommunication metadata as a restriction of privacy failing to comply with principle of proportionality.²⁴

[Rz 37] The Directive has already been implemented by most Member States. Early commentaries envisage two interpretations based on different understanding of the role of the Charter of Fundamental Rights of the European Union.

[Rz 38] According to narrow interpretation, the Member States can continue to apply their legislation requiring retention of telecommunication metadata, albeit many have adopted while implementing law of the European Union. Abolition of the Directive opens door to real political consideration of retention of telecommunication metadata by national parliaments and eventual judicial control whether in compliance with fundamental rights set by constitutions.

[Rz 39] Broad interpretation would result in removal of metadata retention. Member States are expected to implement supranational law of the European Union. They shall transpose directives correctly and timely. Similarly, they should remove imposed standards if found non-compliant with single standard of fundamental rights even without any impulse. Member States would surely push for possibility to continue retention. Police forces worldwide like this instrument. Expenditures have significantly decreased and become negligent now. Technical capacity for retention of content of phone calls and e-mails emerges. Otherwise, continuing data retention would gradually erode with such broad interpretation. Providers could be hardly sanctioned for cessation of metadata retention. Suspected criminals will put in question their investigation and prosecution based on retained metadata of telecommunication.

[Rz 40] Specialized journalists, legal scholars and experts on security commented the judgment in newspapers, television and in blogosphere. Scenarios summarized above were mentioned. Czech (and Slovak) activists cautiously claim that judgment of the Court of Justice must result in abolition of metadata retention.²⁵

[Rz 41] According to unofficial information, representatives of the Ministry of Industry and Trade, Czech Telecommunication Office and the Ministry of Interior which is responsible for the Police agreed that there is nothing to change.²⁶

[Rz 42] No judicial proceedings arguing with fresh case-law have been launched. It is thus hard to estimate whether the Constitutional Court would be willing to reconsider its findings.²⁷

²⁴ Judgment of 8 April 2014, points 23–72. See also articles 7 and 8 of the Charter of Fundamental Rights.

²⁵ HUSOVEC M., EUROPEAN INFORMATION SOCIETY INSTITUTE O.Z. (Slovakia), Stanovisko k návrhu podľa čl. 125 ods. 1 písm. a) Ústavy Slovenskej republiky na posúdenie ústavnosti § 58 ods. 5, 6, 7 a § 63 ods. 6 zákona o elektronických komunikáciách, § 116 Trestného poriadku, § 76a ods. 3 zákona o Policajnom zbore po rozhodnutí Súdneho dvora EU vo veci Digital Rights Ireland C-293/12 a Kärntner Landesregierung C-594/12 (Opinion to petition for evaluation of constitutionality of certain provisions of the act on electronic communication, the code of criminal procedure and the act on police corps after judgment of the ECJ C-293/12 and C-594/12, <http://www.eisionline.org/images/projekty/sukromie/VyhlasenieSDEU.pdf>).

²⁶ See PETERKA J., Uchovávať provozní a lokalizační údaje už EU nenařizuje. My v tom ale pokračujeme. (EU does not require further to retain data We continue to retain), published 28 April 2014 at <http://www.lupa.cz> (Web pages about Czech Internet).

²⁷ Constitutional Court of Slovakia is expected to adjudicate on action for annulment of Slovak implementation of the Data Retention Directive with. It temporarily halted on 23 April 2014 application of this act. It is generally expected that the Court will address relation of the Charter and catalogue of fundamental laws of the Constitution of Slovak

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