

Jurius

Use of Personal Telephone Data by an Investigating Judge

ECHR – In the Chamber judgment of 8 November 2016 in the case of *Figueiredo Teixeira v. Andorra* the European Court of Human Rights held, unanimously, that there had been no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The case concerned the storage and communication to the judicial authority of data from telephone calls made by the applicant, who was suspected of the serious offence of drug trafficking. (Judgement 72384/14)

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[Rz 1] The Court found in particular that since the impugned interference was prescribed in Andorran law under Article 87 of the Code of Criminal Procedure and Law No. 15/2003 on the protection of personal data, a person holding a prepaid mobile phone card could reasonably have expected those provisions to be applied in his case. Furthermore, Andorran criminal procedure provided a wide range of safeguards against arbitrary actions, given that a judge (a *batlle*) assessed the necessity and proportionality of the data transmission order in the light of the evidence gathered and the seriousness of the offence in question. The Court found, in the instant case, that the balance between the applicant's right to respect for his private life and the prevention of criminal offences had been respected.

[Rz 2] The applicant, Bruno Figueiredo Teixeira, is a Portuguese national who was born in 1983 and lives in Andorra La Vella (Portugal). Mr Figueiredo Teixeira, who was suspected of the serious offence of drug trafficking, was arrested on 5 December 2011. The judge (*batlle*) responsible for the criminal investigation asked Andorra Telecom to hand over a list of incoming and outgoing calls from two telephone numbers pertaining to Mr Figueiredo Teixeira over the period from 15 August to 4 December 2011, and to inform him of the identities of subscribers holding the numbers set out in the list.

[Rz 3] Mr Figueiredo Teixeira filed an application to set aside that decision, alleging that he had sustained a breach of his right to the secrecy of his communications. On 22 November 2012 the *batlle* dismissed that application. Mr Figueiredo Teixeira then brought urgent proceedings for termination of the consequences of the allegedly unlawful use of the data gathered and for the destruction of the documents in question. The duty *batlle* and then the Higher Court of Justice dismissed his appeal.

[Rz 4] Subsequently, relying on the constitutional rights to a fair trial, to respect for private life and to the secrecy of communications, he lodged an *empara* appeal with the Constitutional Court. By a judgment notified on 19 March 2014 that court dismissed the appeal. The Constitutional Court found that the storage of customers' data was provided for under Andorra Telecom's general terms and conditions of sale, which had, in principle, been accepted when the customer had subscribed to the telephone company's services. It also cited Articles 47 and 87 of the Code of Criminal Procedure authorising the investigating judge to adopt the requisite measures in the framework of an investigation, including, under certain circumstances, requesting the interception of telephone calls.

[Rz 5] By judgment of 29 September 2015 Mr Figueiredo Teixeira was sentenced to a four-year prison term (including two years unsuspended) for the serious offence of sale and possession of large quantities of drugs for commercial purposes. The Higher Court of Justice upheld the impugned judgment. That court rejected Mr Figueiredo Teixeira's request to stay the execution of the unsuspended prison term on the basis of Rule 39 of the Rules of Court.

[Rz 6] Complaints, procedure and composition of the Court Relying on Article 8 (right to respect for private and family life), the applicant complained that the storage of data relating to his telephone communications amounted to an unjustified interference with his right to respect for his private life.

[Rz 7] Relying on Article 6 (right to a fair trial), the applicant submitted that insufficient reasons had been provided in the domestic decisions in his case. Moreover, he contested the use in evidence before the Constitutional Court of the telephone company's general terms and conditions on the ground that they had not been presented before the lower-level courts.

[Rz 8] The primary question in the present case was whether the interference, that is to say the storage and communication to a court of the applicant's personal data, had been sufficiently foreseeable. Assessing whether the interference was prescribed by law, the Court observed that although a holder of a prepaid telephone card could reasonably have inferred from the Decree of 19 September 1996 on the establishment and modification of telephone rates, published on 25 September 1996, that his personal data had in fact been stored, it emphasised in particular that the impugned interference was covered in Andorran law by Article 87 of the Code of Criminal Procedure and Law No. 15/2003.

[Rz 9] As regards whether the effects of the current regulations were sufficiently foreseeable, the Court noted that Article 87 of the Code of Criminal Procedure in force at the relevant time had detailed the conditions under which interference with the right to respect for private life was authorised. In particular, Article 87 § 5 of the Code of Criminal Procedure had required the courts to give a reasoned decision explaining the necessity and proportionality of the measure and mentioning the evidence obtained and the seriousness of the offence under investigation. The Court considered that the Order of 30 August 2012 had complied with those requirements, particularly in view of the requirements of the investigation, the seriousness of the offence in question (drug trafficking) and the practicalities of the intrusion into the applicant's private sphere.

[Rz 10] The Court emphasised that the Andorran procedure provided a wide range of safeguards against arbitrary actions. These included the involvement of a judge (*batlle*) to grant prior authorisation for the measure, exclusively applicable to very serious offences; a statutory time-limit on the measure; and finally, the fact that the applicant could at any time contest the lawfulness of evidence gathered during proceedings.

[Rz 11] The Court emphasised that section 5 of Law No. 15/2003 on the protection of personal data clearly excluded from its scope the processing of data relating to the prevention of criminal offences. Along similar lines, section 16 provided that the subject data could not oppose the communication of his or her personal data on the basis of a judicial decision.

[Rz 12] As regards the application of these concurrent rules to the situation of the applicant holding a prepaid card, the Court observed that the aforementioned rules drew no distinction between mobile telephone contract holders and prepaid card users. The Court therefore took the view that it was reasonable to consider, in line with the prosecution submissions during the *empara* appeal and reprised by the Constitutional Court, that those laws and statutes were applicable to both types of telephone services.

[Rz 13] The Court held that the application of domestic law to the present case had been sufficiently foreseeable for the purposes of Article 8 § 2 of the Convention.

[Rz 14] As regards whether the interference had pursued a legitimate aim, the Court had no doubt as to the fact that the impugned interference, which had been geared to combating drug trafficking, had pursued one of the legitimate aims listed in the second paragraph of Article 8 of the Convention, that is to say the prevention of crime. As regards the proportionality of the measure, the Court pointed out that the impugned interference had been authorised for a shorter period than that originally requested by the police. Moreover, the offences charged had been committed at most six months before the period covered by the impugned measure. The Court considered that the Andorran authorities had thus respected «proportionality between the effects of the use of special investigation techniques and the objective that has been identified», and that they had used an unintrusive method to «enable the offence to be detected, prevented or prosecuted with adequate effectiveness».

[Rz 15] The Court therefore found that there had been no violation of Article 8.

Judgement of the ECHR no. 72384/14 of 8 November 2016 in case Figueiredo Teixeira v. Andorra

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