

Wiretapping and Secrecy: Institutional Framework and Policy Proposals

Executive Summary

**Report
ON
ETERON**

1. Scope of the study:

- (a) The analysis of the Greek legal framework for the lifting of the right to secrecy of communications for reasons of national security.
- (b) The outline of solutions to the above issue by the European Court of Human Rights and other European legal systems, such as the French.
- (c) The submission of proposals for the reform of the currently existing framework.

2. Method of study:

- (a) The analysis of the provisions (Constitution and formal laws) that regulate the issue of lifting the right to secrecy of communications for reasons of national security.
- (b) Highlighting the indeterminacy of said provisions.
- (c) The identification of the distinct ideologies of the various expositors, which leads to contrasting interpretations and applications of the current framework (liberal ideology vs. the ideology of “protection of the State” or *raison d’État*).
- (d) The distinction between “valid law” (the law that ought to be applied) and “law in force” (the law that actually applies).

3. Conclusions on the current framework and the recently drafted Bill (which was put up for public consultation by the Ministers of Justice and State)

- (a) The current legal framework (Law 2225/1994) is entirely dominated, especially at the level of the law in force, by the ideology of the protection of the State.
- (b) The only guarantee of protection of the right to secrecy is the unjustified prosecutorial order by the prosecutor seconded to the National Intelligence Service (EYP).
- (c) For various reasons, the Hellenic Authority for Communication Security and Privacy (ADAE) has not yet been able to effectively monitor or control the current situation or act as an institutional counterweight.
- (d) The Parliament (in particular the Permanent Committee on Institutions and Transparency) has also failed to act as an effective monitoring mechanism.
- (e) Not only does the Bill not introduce additional monitoring mechanisms, but it also further undermines the jurisdiction of ADAE.

4. ECHR and French legal system: lessons learned

- (a) The ECHR leaves a wide discretion to national authorities in matters of balancing the right to privacy with national security concerns, but it sets some minimum essential and procedural requirements (such as the existence of effective supervisory bodies, the setting of time limits for the lifting of secrecy, ensuring that the subject of the surveillance is informed accordingly after the surveillance period has been completed given that the purpose for which the

communications' secrecy was lifted is not at stake, and, finally, the additional protection of specific professional groups, such as journalists).

(b) In short, the French legal system regulates the issue as follows: The approval of a request to lift the secrecy of communications is given by the Prime Minister, but both the approval and the execution of the wiretapping are closely monitored by the National Oversight Commission for Intelligence-Gathering Techniques (CNCTR). There is special protection for specific groups (members of both houses of parliament, judges, lawyers, journalists), as well as special remedies that the affected parties can take before the Council of State. On the other hand, there is no right to ex post information for grieved parties.

5. Policy proposals

In view of the above, the following proposals are made for reforming the current framework in a liberal and constitutional direction:

- (a) Adopt a clear and restricted definition of the concept of national security.
- (b) Any demand by the requesting authority to be reasoned and evaluated by a judicial panel, the way it is in cases of requests for lifting secrecy for the investigation of serious crimes.
- (c) Any lifting of secrecy order to include a full name and be thoroughly justified specifically for each individual case.
- (d) Establish specially protected political positions and professional groups (e.g. political persons, judicial and prosecutorial officials, lawyers, journalists), where the lifting of the secrecy of their communications would be justified provided that special guarantees apply (such as a recommendation/ opinion by ADAE and a decision by a special formation of the Council of State).
- (e) Retroactively reinstate the possibility of the affected persons to be informed by ADAE.
- (f) Provide for the creation of a special legal remedy before the Council of State to identify the illegitimacy of an ongoing procedure to lift the secrecy of communications and to take all appropriate measures in order to stop it.
- (g) Initiate a broad public consultation process on the upgrading of ADAE.
- (h) Amend article 43A of the Parliament's Rules of Procedure, which regulates the control of EYP by the Permanent Committee on Institutions and Transparency, as follows: "The Head of the National Intelligence Service (EYP) may not invoke the obligation of confidentiality under Article 14 of Law 3649/2008". A similar phrasing should be incorporated into articles 146 and 147 of the Parliament's Rules of Procedure, which regulate issues relating to the collection of information and documentation and the use of other types of evidence by the Parliament's Investigation Committees.