

LIFTING OF SECRECY OF COMMUNICATIONS

1. APPLICABLE PROVISIONS AT CONSTITUTIONAL AND SUPRALEGISLATIVE LEVELS (INTERNATIONAL AND EUROPEAN)

Pursuant to article 19 of the Greek Constitution:

“1. Secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guarantees, under which the judicial authority shall not be bound by this secrecy for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law.

2. A law shall determine matters relating to the establishment, operation and powers of the independent authority that ensures the secrecy under para.1.

3. The use of evidence obtained in violation of this article and of articles 9 and 9A shall be prohibited”.

It is recalled that article 9 ensures the sanctuary of the home and the inviolable character of private life, while article 9A protects personal data of any individual residing in Greece.

The secrecy of communications is also protected by article 8 of the European Convention of Human Rights, article 17 of the International Covenant on Civil and Political Rights of 19 December 1966 (Law 2462/1997), article 12 of the UN Universal Declaration of Human Rights and article 17 of the EU Charter of Fundamental Rights. The relevant right has two components: first, the freedom of correspondence or communication, both by letters and any other method. Second, the secrecy of all forms of communications, as long as all communicating parties wish to maintain the secrecy. If one communicating party does not wish to maintain the secrecy, it is not protection of correspondence, but freedom of expression.

If secrecy is sought by one communicating party, then it is protection of his/her privacy. In any event, the freedom of communication is a necessary condition for the protection of the secrecy of communications.

Any form of monitoring, search and recording of correspondence or communication, any form of obstruction of communication and any use of evidence obtained in breach of the constitutional protection of secrecy are contrary to the provisions of article 19 of the Constitution.

The secrecy of communications is protected for any medium of communication, present or future, as long as this medium is, by nature, appropriate for communication in conditions of intimacy, namely non-publicity. Beneficiaries of the right of article 19 of the Constitution include all individuals, irrespective of nationality and citizenship and irrespective of communications within the country or with other countries.

Beneficiaries also include all legal entities in private law and those legal entities in public law that meet the requirements for being beneficiaries of constitutional rights (e.g. universities).

As regards legal entities in private law (e.g. enterprises), the protection of the secrecy of communications is associated with the safeguarding of other rights, such as the secrecy of their commercial correspondence and their free business activities.

The recipients of the operation of the right include both the State power agents and the members of society and/or courier services or fixed or mobile telephony providers.

2. PROTECTION OF SECRECY AT LEGISLATIVE LEVEL

Articles 248-250 of the Penal Code lay down sanctions for the violation of secrecy by post officials and employees of telecommunication companies. Articles 370 and 370A of the Penal Code lay down sanctions for the violation of secrecy of letters and telephone calls, respectively.

Law 2225/1994 established the “National Commission for the Protection of the Secrecy of Communications”, which consists of MPs and is provided with powers of control and supervision. This commission was replaced by the “Authority for the Protection of the Secrecy of Communications”, pursuant to Law 3115/2003.

3. THE CASE LAW OF THE ECHR COURT (EUROPEAN CONVENTION OF HUMAN RIGHTS)

The increasing importance of the ECHR emphasizes the need to survey the case law of its court. It has been held that the monitoring by authorities of a telephone line that does not belong to the person who makes his/her telephone calls through such line is interference to the secrecy of communications (*Lambert v. France*). The violation is established by

monitoring alone, irrespective of whether any further use was made of the product of recordings (*Kopp v. Switzerland*).

In *Kruslin v. France*, the Court laid down the following conditions: the law must determine the categories of persons whose telephone calls may be tapped, as well as the nature of the crimes whose investigation requires the violation of the secrecy of communications. It should also provide for the Authority that will decide on the monitoring, as well as the maximum length of monitoring.

In *Contreras v. Spain*, the Court laid down the following conditions:

- a. the determination of the category of persons whose telephone calls may be monitored,
- b. the determination of the nature of the crimes for the discovery of which monitoring may be ordered,
- c. the determination of the time limit in the taking of the measure,
- d. the preparation of minutes concerning the contents of the telephone calls, and
- e. the determination of the time and method of destruction of the recordings.

To establish the clause comprised in the ECHR, i.e. the necessity of the measure within a democratic society for attaining a legitimate objective, when monitoring is carried out, it must be surrounded by a network of guarantees that ensures that the monitoring shall be made within the necessary limits to attain the objective and that the rights of the concerned person shall be duly protected. Fundamental guarantees include the body that decides on monitoring and guarantees the proper and legitimate conduct thereof and the judicial protection to which the concerned party is entitled.

Moreover, in *Kruslin v. France*, the Court demanded that the law on monitoring determines the guarantees that ensure that the monitored telephone call will be faithfully recorded and transcribed.

5. THE ARRANGEMENTS OF PRESIDENTIAL DECREE 47/2005

The recently issued presidential decree 47/2005 adds to the applicable Greek legislation by lifting the created objections and attempting to cover the legislative gaps in Greek legislation.

First, it explicitly determines the types of communication to which the lifting of secrecy applies. They are:

- a. Letters, packages, telegrams, cheques
- b. Communication by teletype
- c. Data communication via data networks
- d. Internet communication
- e. Wireless communication, closed-group communication
- f. Satellite communication
- g. Communication via any form of leased circuits
- h. Services superimposed on the previous forms of communication, such as:
 1. Automatic answering machine
 2. Faxes
 3. SMS/MMS
 4. Information services
 5. Email
6. Access to websites
7. Access to databases
8. Electronic transactions
9. Teleconferences
10. Directory information
11. Emergency services
12. Combined forms of communication that comprise more than one of the above forms of communication.

Article 4 of presidential decree 47/2005 determines the communication particulars that may be requested by the authority that orders the lifting of secrecy, while article 5 provides for special cases in which the competent authority takes knowledge by contacting authorized persons or owns a network providing communication services.

Article 6 provides for the existence or procurement of the necessary equipment by business providers in order to implement the requested lifting of secrecy, while article 7 stipulates the means and methods of personalization of information, e.g. identity of subscriber or user, call numbers etc.

Article 8 provides for a set of obligations of service providers and networks, including the obligation to immediately respond to every request for lifting the secrecy of communications, the obligation to notify and cooperate with competent authorities, the obligation to ensure secrecy when implementing the orders for lifting the secrecy, and the obligation to choose an official who can provide full guarantees, as regards both technical knowledge and personal integrity, for keeping secrecy.

5. CONCLUDING REMARKS

The applicable provisions of Law 2225/1994, Law 3115/2003 and presidential decree 47/2005 respond in a satisfactory way to the demands of article 19 of the Constitution, namely that the secrecy of communications may be lifted only for reasons of national security or for the purpose of investigating especially serious crimes.

Moreover, the above set of applicable legislation fully responds to the principles laid down in the case law of the ECHR Court (see para.3).