

EHRAC

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Interception of telephone communications in Georgia: points of concern

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The recent case of *Iordachi & Others v Moldova* (No. 25198/02) 10/2/09 deals with the Moldovan legislation regarding phone tapping. The Georgian and Moldovan criminal systems are quite similar. Therefore, this article analyses Georgian legislation in the light of the *Iordachi & Others* judgment.

The Georgian Law on Operative-Investigative Activities (LOIA) (No. 1933, 18/5/09) sets out the legal basis for interference with telephone communications. This interference is a form of operative-investigative activity.

found that the nature of the offences which could give rise to an interception warrant being issued was not sufficiently clearly defined in legislation: more than half of the offences provided for in the Moldovan Criminal Code would fall within the category of offences eligible for interception warrants.¹ Art. 9(2) LOIA provides that phone tapping can be conducted in relation to offences carrying a punishment of greater than two years. This equates to more than half of the offences provided for in the Georgian Criminal Code.

In *Iordachi & Others* the ECtHR was concerned by the fact that the impugned legislation did not appear to define sufficiently

the period of phone tapping can be extended to a maximum of 12 months. No further extensions are allowed. However, the supervision of the extension is within the exclusive jurisdiction of the executive branch and is not subject to the judiciary's supervision. Under ECHR standards the body issuing authorisation must be either under judicial control or the control of an independent body.³

Art. 1 LOIA enumerates circumstances in which operational-investigative measures may be applied: the safeguard of human rights and freedoms or the rights of legal entities, and protection of public security. However, none of these is defined. Further, legisla-

In Georgia, phone tapping is permitted where it is authorised by an order from a judge (Art. 7(2)(h) LOIA). In an emergency – where delays could destroy important factual data for a case or investigation or make it impossible to obtain such data – a phone may be tapped by order of a prosecutor’s reasoned decision. However, in such circumstances, the prosecutor must apply to a judge within 12 hours of commencing the tapping. The latter should authorise or reject this application within 24 hours. In the event of rejection, the data obtained must be destroyed (Art. 7(4) LOIA). The data obtained from a tapped phone is secret for 25 years (Art. 5(1) LOIA).

In *Iordachi & Others* the ECtHR

clearly the categories of persons liable to have their telephones tapped. It noted that Art. 156(1) of the Moldovan Criminal Code used very general language when referring to such persons and stated that the measure of interception might be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation is given as to exactly who falls within the category of “another person involved in a criminal offence”.² LOIA does not define at all the scope of those persons whose calls can be tapped.

In para. 45 of *Iordachi & Others* the Court expressed concern that the Moldovan authorities could indefinitely seek and obtain new interception warrants. Under Art. 8(2), (3) and (4) LOIA

tion does not specify the circumstances in which an individual may be at risk of having his or her telephone communications intercepted on any of those grounds. Such vagueness was found to be incompatible with the ECHR.⁴

The judge plays a very limited role in the procedure for intercepting telephone communications. According to Arts. 7, 9 and 20 LOIA, a judge’s role is to order or authorise phone tapping. The law makes no provision for acquainting the judge with the results of the surveillance and does not require him or her to review whether the requirements of the law have been complied with.⁵ On the contrary, Art. 21 LOIA places such supervision duties on the Minister of Justice and his or her subordi-



nate prosecutors.

The ECtHR established that an appropriate degree of precision is needed in the way in which intelligence obtained through surveillance is screened; the procedures for preserving its integrity and confidentiality and the procedures for its destruction should also be clear.⁶ LOIA lacks such regulations. It only refers to data obtained through phone tapping, which do not concern a person’s criminal activity but can in some way be

compromising. Such data “cannot be stored” and “must be immediately destroyed” (Art. 6(4) LOIA).

Art. 38(7) of the Georgian Law on Lawyers (No. 976, 20/7/01) provides for the secrecy of lawyer-client communications. However there is no procedure that gives substance to this provision. There is no clear rule defining what should happen when a phone call between a client and lawyer is intercepted.⁷

Thus, it can be argued that Geor-

gian legislation regarding interference with telephone communications clearly requires a number of amendments in order to be compatible with ECHR standards.

¹ *Iordachi & Others v Moldova* (No. 25198/02) 10/2/09, para. 44.

² *Ibid.*

³ *Dumitru Popescu v Romania* (No.2) (No. 71525/01) 26/4/07, para. 61.

⁴ See *mutatis mutandis* supra note 1, para. 46.

⁵ See *mutatis mutandis* supra note 1, para. 47.

⁶ See *mutatis mutandis* supra note 1, para. 48.

⁷ *Supra* note 1, para. 50.