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## Human Rights and Democracy Violation Early Warning *Weekly Newsletter* No. 21

*Republic Telecommunication Agency* (RATEL), a government-controlled regularity body, issued Jul. 11, 2008 so-called "technical guidelines" titled: *Technical Requirements for Authorized Surveillance in Telecommunication Regarding Internet Subsystems, Devices, Equipment and Installation* (hereinafter: *Guidelines*), a document which obliges Internet providers in Serbia to ensure within the framework of their technical systems, *inter alia*, hardware and software for passive surveillance of e-mail messages and their redirection to the "centre of competent state organs" – a peculiar euphemistic denomination for the *Security and Information Agency*<sup>1</sup> (BIA). The *Guidelines* further stipulate that "providers shall enable at their own expenses and in real time fully autonomous passive monitoring of random subscribers' Internet activities, and redirection of incoming and outgoing communications toward the competent state organ's acquisition center. This document enables full surveillance of e-mail, IP-telephony, *Instant Messenger* and other means and formats of electronic communication, which includes, for example, unlimited insight into data on sender, addressee, contents, origin and destination of any message. The *Guidelines* went into effect on July 12, 2008 – a day after adoption. This is another ground for concern, since the usual timeframe in such situation allows 8 days for the enactment of laws and similar regulations. Symptomatically, the broad public learned of the *Guidelines* only after being alerted by critical individuals and civil rights activists, several days later.

In view of the hitherto experience in bringing about effective civic control over government agencies equipped with such powers as the BIA, as well as of a high degree of intransparency in the work of other branches of the repressive apparatus, RATEL's decision was met with negative reactions primarily in the ranks of human rights NGOs, as well as many others: journalists' associations, a large number of experts in relevant fields, university professors, Church leadership. It is especially significant that the *Guidelines* had huge -- unequivocally negative -- echo abroad.

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<sup>1</sup> Formerly: *State Security Department* (RDB).





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The decision to enact the *Guidelines* and the document itself were condemned as unconstitutional, unlawful and extremely dangerous in an environment that lacks essential elements of legal regulation -- such as a *Data Protection Act* -- while the BIA remains under partisan control and represents a politicized instrument of power. It is in such environment that the *Guidelines* -- if and when implemented -- can lead to major human rights and freedoms violations.

Only one political party -- the *Liberal Democratic Party* (LDP) -- voiced its opposition and pledged to move for a parliamentary debate on the *Guidelines*, while the *Human Rights Protector – Ombudsman* began examining whether this and other RATEL documents pertaining to Internet communication oversight can infringe on citizens' constitutionally guaranteed rights and freedoms. The Ombudsman's Office took it upon itself to inform the public on its findings and recommendations. The Belgrade *Human Rights Center* and *Lawyers' Committee for Human Rights* (YUCOM) announced a petition with the *Constitutional Court of Serbia*, urging it to examine that act's conformity with the Constitution.

RATEL responded to these criticisms by insisting that the *Guidelines* fully correspond with the *Telecommunications Act*, that these regulations refer only to main network providers, and that citizens should not be concerned that their privacy can be jeopardized by this measure since surveillance would only be carried out if authorized by a competent court. RATEL went on to stress that privacy of citizens' correspondence is guaranteed by the Constitution, whereas it remains necessary to pass legislation that would refer to this particular matter. It is with this statement that the regulatory body admits that there is legal vacuum which is conducive to being used and abused for political purposes.

The *Commissioner for the Information of Public Importance* underlined that certain provisions contained in the *Guidelines* can be interpreted as permitting communication control without a court warrant -- a possibility that opens the way to violation of privacy of correspondence and communication. While the Constitution of Serbia<sup>2</sup> describes some of these conditions, RATEL's Rules of

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<sup>2</sup> Art. 41 reads: "Confidentiality of letters and other means of communication shall be inviolable. Derogation shall be allowed only for a specified period of time and based on





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Procedure contains neither privacy protection provisions nor does it stipulate that government agencies must have a court order to be authorized to take communication oversight measures.

**Slobodan Marković**, Chairman of the *Internet Development Center*, specified that while the *Guidelines* do not represent invasion of privacy, they open the way to it. It is especially dangerous that internet providers must act on security services' orders while the BIA is not obliged to provide information demanded by the *Commissioner for the Information of Public Importance*. Mr. **Marković** pointed out that Serbia is a signatory to the Council of Europe's *Convention on Cyber Crime*<sup>3</sup> and argued that "it would be ideal if RATEL withdrew the Guidelines, substituted it with the CoE Convention or at least initiated a public debate on the issue. The way things are done now, one gets the impression that [Internet] providers are associated with the BIA and the Interior Ministry".

**Lidija Komlen-Nikolić**, Public Prosecutor in charge of hightec crime, argued that the requirements enumerated in the *Guidelines* represent a list of all policemen's and prosecutors' *desiderata*, whereas the document is defined in an "at least unserious way, especially since there are CoE recommendations on the ways of cooperation between police authorities and Internet providers".

*Serbian Orthodox Church* (SPC) stated in a press release that citizens "must be fully protected from illegal surveillance technologies, while their right to privacy, guaranteed by legal instruments, must be fully respected". However, the SPC leadership's stance is consistent with its vehement opposition to the introduction of personal identification documents featuring biometric data.

It is encouraging that the public in all walks of life has reacted to the RATEL *Guidelines* so promptly. The well timed and argued reaction indicated that major problems surface when measures of that importance and of potential danger to citizens' human and political rights and freedoms are taken without adequate preparation and, especially, without a broad public debate. It

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decision of the court if necessary to conduct criminal proceedings or protect the safety of the Republic of Serbia, in a manner stipulated by the law."

<sup>3</sup> Serbia signed the Convention in April 2005 but has not ratified it yet.





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therefore seems reasonable to urge RATEL to withdraw the *Guidelines* until adequate legal framework is ensured that will guarantee citizens' protection from arbitrariness and misuse of power on the part of estranged power centers.

Although the RATEL decision was made in conformity with the legitimate and indeed indisputable need to preempt terrorist and criminal acts, one also should bear in mind the increasing misuse of the Internet for illegal purposes including frequent threats and calls for lynch of political opponents. It is for these reasons that citizens' privacy and full protection of personal data be ensured; this goal can be attained only if necessary institutional and legal framework is at hand. In a society ruled by law such guarantees can not rest upon politicians' goodwill and authorities' benevolence – what is needed is a precise legal regulation mechanism including punitive measures in the event of trespassing. Such a legal framework can be enacted only after a broad public debate which would include authorities, experts and civil society organizations, so as to keep it out of reach of anybody's arbitrariness.

The fact that Serbia is the only European country which has no legislation on data protection testifies not only to a serious flaw in the system, but also to the absence of a legal framework that would prevent primarily the security services from spying on their citizens' Internet communication. A draft *Personal Data Protection Act* has been submitted to Parliament for adoption recently. However, it should be noted that the new Parliament -- elected on May 11, 2008 -- has not yet commenced its regular legislative activity.

### **Outlook:**

Serbian Government's declarative resolve to join the European Union will amount to sheer lip service unless rule of law, respect of human rights and uphold of democratic values become part and parcel of all three branches of power and bring about a responsible legislative, accountable executive and independent and unbiased judiciary.

