



Searches of Attorneys' Offices

In Decision No. U-I-115/14, Up-218/14, dated 21 January 2016 (Official Gazette RS, No. 8/16), upon a petition submitted by the Bar Association of Slovenia, the Constitutional Court reviewed the constitutionality of the Criminal Procedure Act and the Attorneys Act. The petitioner's main allegation was that the Acts do not regulate searches of attorneys' offices, apartments, and personal vehicles in a manner that ensures respect for their right to privacy and the confidentiality of the relationship between attorneys and their clients.

In this case, the Constitutional Court for the first time defined the content of the privacy of attorneys (Article 35, the first paragraph of Article 36, and the first paragraph of Article 37 of the Constitution). When practising their profession attorneys provide legal assistance to their clients, *inter alia*, by representing them in judicial proceedings. Attorneys play an essential part in the exercise of the right to judicial protection, the right to a legal remedy, and in implementing the safeguards of a fair trial. Attorneys are even more indispensable in criminal proceedings, in which the defence attorney plays a crucial part in the exercise of the right to a defence and the implementation of other safeguards guaranteed to defendants by the Constitution. Attorneys may only play their part effectively if clients entrust them with their personal data and numerous other items of information, including, *inter alia*, intimate information regarding their privacy. Attorneys must protect such data and information as a professional secret. The duty to protect confidentiality is thus the foundation of the confidential attorney-client relationship, which entails an intertwinement of all aspects of privacy, ranging from general to spatial, communication, and information privacy. However, an attorney can only be obliged to protect this confidential relationship if he or she is concurrently able to protect his or her right to privacy in the professional field from unjustified interferences by the state. The privacy of attorneys is thus a collection of entitlements that are protected on the basis of Article 35, the first paragraph of Article 36, and the first paragraph of Article 37 of the Constitution. The special protection of the privacy of attorneys is necessary because it is a reflection of the privacy of their clients. It is thus not intended to privilege attorneys, but to protect and safeguard their clients.

The privacy of attorneys is not protected only in attorneys' offices as the spatial aspect of privacy protects attorneys on all premises where they carry out their work (e.g. an apartment, car, holiday home). What is protected are namely not the premises as such, but privacy on such premises. Communication privacy entails the protection of an individual's interest in controlling the remote transmission of a message and preventing the state or third parties from gaining knowledge of the content thereof. In addition, direct

communication between an attorney and a client, notes regarding such, and all drafts of documents held by the attorney are protected by the general right to privacy. However, the privacy of attorneys is not absolute. Limitations are admissible subject to the general constitutional requirements that apply to interferences with human rights (i.e. the interference must pursue a constitutionally admissible aim and be proportionate) and the special safeguards that the Constitution determines for all interferences with spatial and communication privacy (i.e. a prior court order, the presence of the proprietor, the presence of witnesses).

Ensuring the effective prevention, discovery, and prosecution of criminal offences, and the institution or course of criminal proceedings are constitutionally admissible aims for interferences with the privacy of attorneys. However, such does not apply to attorneys acting as defence attorneys in criminal proceedings. In order to protect defendants' right to a defence and the privilege against self-incrimination, investigative measures against an attorney representing a defendant in a pre-trial investigation or in criminal proceedings are not admissible. Such only applies with regard to information concerning the confidential relationship between the attorney acting as a defence attorney and the defendant. However, even the protection of this confidential relationship is not absolute. A defence attorney who is suspected of or charged with participation in the criminal offence under investigation may not rely on the privacy of attorneys. It would namely be inadmissible if criminal offences were committed under the guise of protecting the privacy of attorneys.

When an interference with the privacy of attorneys is justified in the interest of prosecuting a criminal offence, the interference will only be admissible if it is necessary. With regard to necessity, two aspects in particular have to be considered. An interference with the privacy of attorneys is necessary if the information or data that are directly connected to specific criminal proceedings can be obtained only through a search of the attorney's office, and not by means of other investigative measures. Such must already follow from the court order, as without a court order the interference is not even admissible. The second aspect of necessity refers to the execution of the investigative measure. While the challenged statutory regulation regulated certain questions regarding the execution of searches of premises and seizures of objects, it did not regulate such in a manner that prevented inadmissible interferences. The legislation namely enabled that the execution of investigative measures, which investigative judges as a general rule delegate to the police, also encompassed data that may not be accessed because such is inadmissible due to the lack of a constitutionally admissible aim (as regards defence attorneys in criminal proceedings) or data that are not necessary for the specific criminal proceedings. In addition, the presence of the attorney whose premises or electronic devices are being searched and the presence of a representative of the Bar Association during the execution of certain investigative measures was not envisaged at all. Even when they were able to be present, they could only express their objection to the search or seizure of documents or devices, but they could not prevent the interferences.

Furthermore, they were not able to ensure that the decision on whether their objection was substantiated would be transferred to an independent body that would decide on it in an impartial manner – i.e. a judge.

The Constitutional Court emphasised that the presence of a representative of the Bar Association serves for the protection of the human rights of the affected attorney's clients. The representative can only fulfil such role if he or she plays an active role during the search, which is not envisaged by the statutory regulation. Only if the representative of the Bar Association is able to effectively object to individual interferences with the privacy of attorneys could he or she effectively fulfil the role of guardian of the rights of the affected attorney's clients. If a judge had the final say on whether an interference with the privacy of attorneys was justified, such would still entail an interference with the right to privacy, however, it would be a less invasive interference than the interferences that occurred on the basis of the challenged regulation. In such manner, reviews of data and seizures that are inadmissible already with regard to their aim or which are not necessary for the criminal proceedings could be prevented. In light of the above, the Constitutional Court held that the challenged statutory regulation of searches of attorneys' premises and seizures of objects disproportionately interferes with the privacy of attorneys as it does not regulate any less invasive measure that could still achieve the aim of ensuring the effective prosecution of criminal offences (Article 35, the first paragraph of Article 36, and the first paragraph of Article 37 of the Constitution).

The Constitutional Court also reviewed the challenged regulation from the perspective of the right to judicial protection (the first paragraph of Article 23 of the Constitution) and the right to a legal remedy (Article 25 of the Constitution). It found that there existed no constitutionally admissible aim for the statutory regulation that does not ensure the affected attorney and a representative of the Bar Association the right to appeal a court order authorising an investigative measure. Consequently, it is inconsistent with the right to a legal remedy. In instances where the investigating judge delegates the execution of an investigative measure to the police, the fact that the statutory regulation does not determine judicial control of their decisions constitutes an interference with the right to judicial protection. With regard to both instances, the Constitutional Court established a so-called unconstitutional legal gap in the laws regulating investigative measures against attorneys. The Constitutional Court required the legislature to remedy the unconstitutionality within one year following the publication of its Decision in the Official Gazette of the Republic of Slovenia.

In order to prevent further violations of human rights in instances where the effective prosecution of criminal offences requires the authorisation of investigative measures against attorneys, the Constitutional Court determined the manner of implementation of its Decision (the second paragraph of Article 40 of the Constitutional Court Act). It thereby determined a transitional regulation of the manner of authorising and executing investigative measures in accordance with the constitutional safeguards as outlined in the Decision.

The manner of implementation of the Decision essentially entails that the Constitutional Court regulated the procedure for the execution of searches and seizures in a manner that enables the affected attorney and the representative of the Bar Association to effectively object to the review of documents and electronic devices by the investigating judge or the police in order to protect the privacy of attorneys. Following his or her objection, the relevant document or electronic device (or a copy thereof) is immediately sealed and brought before a District Court judge (who is not the investigating judge in charge of the criminal investigation) for a decision on whether the seizure is justified. If the judge decides that the relevant data are to be seized despite the objections, such decision may be appealed in an appropriately short period of time and the appeal hinders the execution of the judge's decision.

In addition to the review of the constitutionality of the Criminal Procedure Act and the Attorneys Act, the Constitutional Court also decided on the constitutional complaints filed by the Bar Association of Slovenia and the law firms and attorneys whose offices, apartments, and personal vehicles were searched on the basis of orders issued by the Ljubljana District Court due to the probability that objects and evidence of criminal offences important for criminal proceedings would be found. The searches were carried out by the police, who also seized documents and electronic devices containing data that were allegedly connected to the purpose of the criminal investigation.

With regard to its decision in the procedure to review the constitutionality of the challenged laws, the Constitutional Court found that the investigative measures against the complainants (attorneys and law firms) who were not suspected of criminal offences were executed on the basis of an unconstitutional statutory regulation. Consequently, the affected attorney and a representative of the Bar Association could not even be present during the execution of all of the investigative measures. Even when they were present, their objections were merely recorded in the minutes, and the police decided on the seizure of documents and electronic devices. Therefore, the Constitutional Court held that the court orders and their execution resulted in violations of the privacy of attorneys, the right to judicial protection, and the right to a legal remedy. The Constitutional Court also determined the manner of the implementation of its Decision regarding the constitutional complaints. It prohibited all further interferences with the privacy of attorneys without due respect for the safeguards that the Constitutional Court developed in its Decision. As the effective prosecution of criminal offences also requires investigative measures against attorneys, such investigative measures are not inadmissible and can thus continue; however, they have to be authorised and executed in such a manner so as to prevent further human rights violations.