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Poland: New surveillance law a major blow to human rights

A new law governing surveillance powers by police and other agencies in Poland will seriously undermine the right to privacy in the country. The law, which could come into force in a matter of days, was approved after a fast-track process, which brought only minor changes to the draft law, despite strenuous opposition from civil society groups and other experts.

The purpose of the new legislation is ostensibly to implement the Constitutional Court judgment from July 2014 concerning the agencies' surveillance powers, but in fact the law further expands these powers in many areas and conflicts with Poland's international human rights obligations.

The measures envisaged in the upcoming law will expand access to telecommunication and other digital data and allow for greater surveillance by police and other agencies, and offers scant guidance as to when such powers could be used.

Key problems with the law include:

- It allows the use of intrusive surveillance measures and extends the scope of the so-called "covert investigative methods" on the basis of vague conditions and an unspecified catalogue of crimes
- It allows the use of surveillance tools that capture "online data", that collect and analyse the personal data of internet users, without the obligation to submit an application before each instance of data collection
- The law does not contain a requirement of obtaining prior approval from a judge or other independent authority for obtaining telecommunication and online data
- The law lacks guarantees for protection of information covered by professional confidentiality obligations such as attorney-client privilege or privilege for journalistic sources
- It will be very difficult, if not impossible, for people to find out whether they are being unlawfully spied on, or to expose abuse of surveillance powers, as the draft does not contain an obligation to notify targeted persons following the conclusion of surveillance

The provisions of the new law run counter to Poland's international and regional human rights obligations. The European Court of Human Rights has twice in recent months ruled states' surveillance laws to be in violation of European human rights law. In *Zakharov v. Russia*, the Grand Chamber specifically noted the importance to human rights that surveillance be based on individualized reasonable suspicion of wrongdoing, that laws define the scope of secret surveillance measures, that surveillance be authorized and overseen by a judicial or other independent authority and that laws contain notification requirements so that people subject

to unlawful surveillance may seek remedies. Such safeguards appear to be missing from the new law.

The new surveillance law in Poland will put the right to privacy at risk, and with it, other human rights, the realization of which depends on the right to privacy. Unlawful surveillance undermines the right to freedom of expression, potentially leading to self-censorship and limiting the right to seek and impart information of all kinds, regardless of frontiers.

Background

In the months following the electoral victory of the Law and Justice Party in parliamentary elections in October 2015, the Polish government has passed several controversial laws which have been heavily criticised by civil society, experts and the European Commission.

In December 2015, amendments to the Constitutional Tribunal Act, among other things, limited the ability of the Constitutional Court to rule on the constitutionality of newly passed laws, by requiring a two-thirds, rather than simple majority. It also introduced a “waiting period” for cases before the court.

Also in December, the “small media law” was passed, which brought public broadcasters under ministerial, rather than independent control, and allows government to appoint and dismiss supervisory and management boards of public service TV and radio, triggering criticism, among others, from the Commissioner for Human Rights of the Council of Europe who raised concerns over potential threats to the independence of media from political interference.

On 13 January, the European Commission (EC) announced the beginning of a structured dialogue under the Rule of Law Framework, which was created in February 2014 by the EC for addressing and preventing systemic threats to the Rule of Law in any of the European Union’s 28 member states.

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