

PUBLIC APPEAL

on the Draft Law Proposed by the Ministry of Internal Affairs and Adopted by the Government, which Extends and Intensifies the Law Enforcement Bodies' Control over the Digital Space

*To: The Parliament of the Republic of Moldova,
The President of the Parliament, Mr. Andrian CANDU,
The Permanent Parliamentary Committees*

8 April 2016

The undersigned civil society organizations are deeply concerned about serious negative consequences for fundamental human rights, which could result following the adoption of the draft law promoted by the Ministry of Internal Affairs and [adopted by the Government on 30 March, 2016](#). The draft law provides extremely broad rights to the law enforcement bodies for an extended list of criminal offenses, to the detriment of the principles governing the protection of private life and the freedom of expression. Moreover, the entire burden of implementing legislative amendments rests on service providers, without having in place an analysis of costs and efficiency of measures to be undertaken, which could translate into significantly increased costs for on-line and Internet services.

We are well aware of the importance of preventing child sexual abuse and terrorism related offenses and do not question the need to improve the legal framework in these fields. However, **the draft law goes far beyond its declared objectives and gives room for abuse**. Thus, the social risk degree for which special investigative measures are provided vary for different types of offences, this risk being the highest in cases of sexual abuse offences against children, terrorism and even cyber crimes in comparison with infringement of copyright and related rights. We believe that special investigative measures are to be separated by different types of offenses, including social risk degree they imply, it being much lower in case of offenses relating to copyright and related rights. The draft law establishes generalized rather than specific and targeted surveillance measures. It has an extremely broad applicability and does not establish guarantees for respect of human rights. The burden of implementation of the legislative amendments rests on service providers. There is no balance between interference with human rights and implementation costs, on the one side, and the effectiveness of such measures, on the other one. Additionally, some terms are not sufficiently accurate and create opportunities for abuse.

The undersigned organizations consider that the following provisions raise concerns:

1. The draft law allows the law enforcement bodies to carry out interception and recording of digital data, digital search, seizure of devices containing digital data, controlled delivery, as well as retention, analysis, hand over, search and seizure (retention) of any electronic communications or text messages for all serious, particularly serious and exceptionally serious criminal offenses relating to sexual abuse of minors, offences that infringe copyright and cyber crimes. The list of criminal offenses for which the above-listed measures are allowed is very broad and allows too much room for unjustified interference. Moreover, the draft law provides for annulment of the damages to occur, as an element of a range of cyber crimes, easing, thus, sanctioning for such crimes. The increase in number of offences for which special investigative measures can be applied along with simultaneous amendment of cyber crimes elements seems exaggerated.
2. The draft law considerably extends the law enforcement bodies' powers in the digital field. They will be able to undertake the following actions: interception and recording of digital data, digital search, seizure of devices containing digital data, controlled delivery, as well as retention, analysis, hand over, search and seizure (retention) of any electronic communications or text messages. The consequences of such measures for human rights are unpredictable, but even at first view we can identify some concerns:

- a) In case of digital search and seizure of devices that contain digital data, the draft law provides for the possibility to seize devices containing digital data and examine them at the premises of the criminal investigation body when such examination requires additional time. The draft law does not set a deadline for seizing devices that contain digital data for examination. Taking into account peculiarities of searching a personal computer, which usually contains thousands of files, apparently examination of devices containing digital data at the premises of the criminal investigation body will be rather a rule than an exception;
 - b) the draft law provides for the possibility to carry out digital searches without any judicial authorization if the information sought is located in a computer system or data storage support other than that for which search and/or seizure of device was requested. The draft law does not limit the search of "other items", without judicial authorization, only to cases when it cannot be postponed, as required by art. 125 par. (4) of the Criminal Procedure Code. Even if the judge is to verify the legality of such action within 24 hours, the specific question of interference, without prior judicial control, may violate a person's right to private life. It has not also been assessed whether there is sufficient capacity in courts to ensure verification within very short time of materials to be presented to an investigative judge. In most of cases the volume of information that would be checked may contain thousands of files seized following the search of information in other information systems. This measure is also ineffective and violates the management of international information systems, where the information could be stored (Onedrive – Microsoft, iCloud - Apple, Dropbox etc.). These circumstances could lead to a formal judicial control. Moreover, the Republic of Moldova has already a negative experience where 98% of prosecutors' requests to conduct interception of telephone communications are admitted by investigative judges. Consequently, in 2015, judges admitted around 9,704 of phone interception requests.
3. The draft law does not provide for guarantees for respect to the private life and freedom of expression. IP blocking of addresses that contain controversial information, but do not present a real threat, may violate users' freedom of expression (art. 10 ECHR). The interception of Internet sessions and search of devices that may contain personal data and information, reading electronic messages may lead to violation of the right to private life (art. 8 of ECHR). Authorities' access to any electronic messages (e.g. e-mail, private conversations on any social networking, Skype, Viber etc.) of a person or to his/her devices containing digital data (PCs, laptops, smartphones, tablets etc.) is an interference that may provide very precise information about private life, habits of everyday life, permanent or temporary places of residence, daily or other movements, activities carried out, social relationships and the social environments frequented (CJEU, Judgement of 8 April, 2014, § 27). Thus, such measures should be allowed only in exceptional cases, which are not listed in the draft law that has an extremely broad applicability. For instance:
- a) the draft law provides for providers to block all IP addresses that are located on web pages containing child pornography, promoting sexual abuse or sexual exploitation of children, containing information with war or terrorism propaganda, calls to hatred or discrimination on ethnic, racial or religious hostility or violence, containing or disseminating instructions on how to commit crimes. There is no clarity as to the consequences of such actions – what will be blocked/deleted - comments, the abovementioned information or the entire web page? Additionally, the phrase "containing or disseminating instructions on how to commit crime" lacks clarity. In such uncertain conditions, if a person of bad faith will post such comment on a news web page, the whole web page may be blocked. Such provisions are not proportionate to the stated purpose and are not appropriate in a democratic society;

- b) The draft law does not cover how blocking is to be conducted, whether there is any judicial control or any other guarantees that would prevent abuses, as well as does not provide for any grading system of sanctions that would lead to blocking access to a web page only in exceptional cases. The ECtHR argued that there must be a legal framework that will ensue strict monitoring of the purpose a website is being blocked and a judicial control which would prevent any abuse (*Ahmet Yildirim v. Turkey Decision of 18 December 2012, § 64*).
4. The draft law does not establish sufficient guarantees as to the storage of and access to digital information. Previously, the Court of Justice of the European Union (CJEU) by its [Judgment as of 8 April, 2014](#) invalidated the Directive 2006/24/CE which provided for the obligation to store the digital information by the providers and allowed authorities' access to such data. CJEU declared that the intended purpose of fighting against serious crime is not proportionate with the interferences allowed by the Directive. The problematic aspects outlined by the CJEU were that the Directive applies to quasi-entire population, i.e. to the persons for whom there are no indications of committing a serious crime, without even exceptions to the obligation of professional secrecy (§ 56-58), and did not stipulate any link between data retained and the threat to public safety, and did not provide any criteria that would limit authorities access to such information and its subsequent use to prevent and solve a crime (§ 59-60). The draft law proposed by the Ministry of Internal Affairs in Moldova also applies to all users of digital resources without any exception and does not make any connection between data that are to be stored and categories of offenses that justify access to such data.
5. The financial expenses for keeping information are to borne by the information providers. Preservation and storage of information over a period of 6 months for internet traffic and a year for telephone communications is extremely expensive and would lead to the closure of some providers, and respectively to more expensive services with the remaining providers. The draft authors have not conducted a feasibility study of data storage requirements in terms of costs. Given the high level of poverty in Moldova, the increased costs for Internet services will seriously affect the access to information and freedom of expression of the population.
6. The draft law does not provide for a reasonable period between adoption and implementation, to allow the service providers to adjust their internal policies and acquire the necessary equipment, as well as to instruct the judges who will authorize such measures as well as any other representatives of law enforcement bodies who will apply them.

We are also concerned about other legislative initiatives related to intensifying the law enforcement bodies' control over digital space and verifying candidates for public offices. Such proposals refer to amendment of Law no. 271 of 18 December 2008 on verification of public officials and candidates for public offices, introduction of the Security mandate and reforming of Intelligence and Security Service. These laws also aim to access and store data of candidates or public officials, as well as to provide some unjustifiable powers, outside a criminal investigation process.

In conclusion, being aware of (1) the major risks of violating the fundamental human rights in case of adoption of the draft law in its current version, (2) the insufficient reasoning of the informative note, especially in so far as to the assessment of costs to implement the draft law, (3) the drawbacks of the draft law that could lead to authorities' abuses, and taking into account (4) [the lack of society's confidence in the law enforcement bodies](#), (5) [the undemocratic manner the Filip government was vested in](#), which, although there were many other more important outstanding issues, adopted this draft law rejected by two previous Governments, (6) as well as the complexity of the draft law and its potentially major implications for the society as a whole,

THE SIGNATORIES TO THIS APPEAL REQUEST THE PARLIAMENT TO:

1. send the draft law for expertise to the Venice Commission in order to verify its compliance with the European standards;
2. seek assistance from development partners for an analysis of the European best practices of implementing the Council of Europe Convention on Cybercrime (Budapest, 2001) and the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 2007);
3. widely consult the draft law with the civil society and promote initiatives that meet international standards and conduct an analysis of costs necessary to implement the draft law;
4. adjust the draft law to create an efficient legal framework to prevent and fight crimes against minors and terrorism on the one hand, and exclude from the draft law the criminal offenses for which application of special investigative measures that can seriously affect private life or freedom of expression is not justified, on the other hand.

Signatory organizations:

1. Legal Resources Centre from Moldova (LRCM),
2. Amnesty International Moldova,
3. Centre for Independent Journalism from Moldova (CIJM),
4. RISE Moldova,
5. Resources Centre DIALOG-Pro,
6. BIOS Association,
7. Foundation for Advancement of Moldova,
8. Association of Independent Press (API),
9. The Union of People with Disabilities from the Republic of Moldova,
10. Transparency International – Moldova,
11. Association Promo-LEX,
12. Association for Efficient and Responsible Governance,
13. East-European Foundation,
14. Terra-1530,
15. Institute for Public Policy (IPP),
16. National Environment Center,
17. The Independent Journalism Center (CJI),
18. Women’s Association for the Environment Protection and Sustainable Development,
19. The Association of Professional and Business Women from Moldova,
20. Resources Center “Tineri si Liberi”,
21. Small Business Association,
22. Institute for European Policies and Reforms (IPRE),
23. Association for Participatory Democracy (ADEPT),
24. Institute for Penal Reform (IRP),
25. Human Rights Embassy,
26. National Youth Council of Moldova,
27. Ecological Movement Moldova,
28. EcoContact.