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Technical supervision in criminal proceedings

Buzescu Gheorghe

Faculty of Law and Administrative Sciences, Ovidius University of Constanta

gheorghe.buzescu@365.univ-ovidius.ro

Abstract. The principle of finding out the truth is one of the fundamental principles of the criminal process. Within it, the reactions of the individual who harm the values protected by criminal norms are analyzed, aiming to guarantee the rights of the parties and other participants, as well as the efficient exercise of the duties of the judicial bodies. Although the purpose of criminal proceedings is no longer effectively enshrined in the Code of Criminal Procedure, the notion is nevertheless found in Article 8 of the Code of Criminal Procedure under the title "Fairness and reasonable term of criminal proceedings". It stipulates that criminal prosecution and trial must be conducted in compliance with procedural guarantees and the rights of parties and procedural subjects in such a way that facts constituting criminal offences are ascertained in a timely and complete manner, no innocent person is held criminally responsible and any individual who has committed a crime is punished according to law, within a reasonable time. According to Article 97 para. (1) Code of Criminal Procedure, evidence is those realities, events, circumstances that serve to establish the existence or non-existence of a crime, as well as to the identity of the person who committed it. Thus, evidence comprises three interconnected and interdependent elements: evidence, means of proof and evidentiary procedures. The literature states that by introducing this system, "a more effective control over the manner of taking evidence can be established. Moreover, the analysis of the evidence will be possible only in terms of form, so that it complies with the law, while the analysis of the evidentiary procedures will concern the technical operation by which that means of evidence was obtained." The use of technical supervision as an evidentiary procedure in criminal proceedings is a topical topic, given the technological leap in communication and information that has taken place in recent years. We note that in the title dedicated to evidence (Title IV) of the New Code of Criminal Procedure we find a new chapter (Chapter IV), which refers to special surveillance or investigation techniques. This legislation seeks to strike a balance between ensuring the State's right to use new evidentiary procedures and respecting the right to privacy and the secrecy of correspondence. Thus, Article 138 para. (1) The Code of Criminal Procedure expressly and exhaustively provides for special technical surveillance techniques, as follows: letter (a) interception of conversations and communications; lit.(b) access to an information system; lit.(c) video, audio or photographic surveillance; (d) tracking or tracing by technical means; lit.(e) obtaining data on a person's financial transactions. Interception is defined as the intervention of authorized bodies in any kind of conversations or in any other electronic means of communication involving the idea of confidentiality. The results of the technical surveillance activity are recorded in the report, which will thus become a genuine means of evidence, being concluded in accordance with the provisions of Article 143 of the Criminal Procedure Code. Also, Articles 139-146 of the Code of Criminal Procedure provide for the cases that allow such restrictive measures against human rights and freedoms to be taken, the conditions to be met, the bodies authorized to carry out these activities, as well as the ways of verifying these means of evidence. Obtaining evidence by means of these special evidentiary procedures requires a carefully organized activity consisting in tracking the data subjects, the activities they carry out,

the individuals with whom they come into contact, as well as the interception of any communication dip between them. This type of evidence was appreciated as a real modernization of the evidentiary system in criminal proceedings.

Keywords. material evidence, judicial bodies, criminal investigation, court, respect for human rights

Authorisation procedure for technical surveillance measures

As regards the authorisation of technical surveillance measures, the power to order the issue of the warrant lies with the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade within whose jurisdiction the seat of the public prosecutor's office to which the requesting prosecutor belongs.

The doctrine states that "the judge is the key figure of this investigative technique, since he is responsible both for authorizing the measure and for renewing or extending it¹." The reason for this choice is to reserve to the judge the power to resort both to coercion and to take certain measures which may prejudice individual rights and freedoms. Until the entry into force of the current Code of Criminal Procedure, authorisation for technical surveillance measures was vested in the president of the court competent to hear the case at first instance or at the corresponding court in its grade within whose jurisdiction the seat of the prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs, and only in his absence, by another judge appointed by the President. That legislation, however, derogated from the general principle prohibiting listening and recording communications, giving the president of the court special power, while at the same time allowing him not to specialise in criminal law, which infringed the principle of specialisation.

As regards the requirement of impartiality, the current legislation also resolves issues concerning the incompatibility of judges who approved interception of communications or who dealt with applications for extension of the measure, to judge the merits of the case. Articles 53, 54 and 64 of the Code of Criminal Procedure expressly provide for the incompatibility of the judge of rights and freedoms to adjudicate on the merits of the case, as well as the incompatibility of the preliminary chamber judge who dealt with complaints against the order not to bring the case to trial.

In Romania, a system similar to those in Germany and Italy has been adopted, combining the rule that "a judge may order interceptions and recordings of conversations, except that the prosecutor may also take such a measure provisionally and only in exceptional situations²", in which case we will encounter what is called emergency jurisdiction. Where delay in obtaining authorisation through the common procedure would seriously prejudice the prosecution activity, the public prosecutor may provisionally order, by reasoned order and for a maximum period of 48 hours, technical surveillance measures. The reasoning for choosing the 48-hour time limit over the 24-hour period provided for in the previous legislation is to ensure that the necessary evidence can be gathered in situations requiring urgency and where obtaining authorisation is prevented by the place where registration is carried out or by the court's opening hours.

¹ Gh. Mateuț, Criminal Procedure Treaty. General part, vol. II

² G. I. Olteanu, Criminal structures and illicit activities carried out by them – collection of online articles, AIT Laboratories Publishing House, Bucharest, 2008

Also, the current regulation defines for the first time the term "serious prejudice to criminal prosecution", meaning a substantial delay in investigative acts, as well as alteration, loss or destruction of evidence or endangering the injured person, witnesses or their family members. It is also noted that the deadline of 48 hours from the expiry of the measure is waived, in order for the prosecutor to refer the matter to the judge of rights and freedoms in order to confirm the measure, which confers certain guarantees in terms of ensuring the rights provided for in the European Convention, thus limiting the duration of the intrusion into private life not advised by the judge. In relation to the European requirement of "harmonization of national legislation with international standards in the field of human rights protection"³, the legal norm stipulates that the judge will benefit from exclusivity in authorizing interceptions, the prosecutor being able to order the measure only in emergency cases and provisionally, and its merits and legality will be examined within 24 hours by the judge of rights and freedoms. The latter shall give its decision by reasoned conclusion, given in the council chamber, without summoning the parties. If the measure is found to be legal and well-founded, the judge will order the confirmation of the order in compliance with the conditions provided by Article 141 paragraph (1) of the Code of Criminal Procedure. Otherwise, the application for a declaration of supervisory measures will be rejected. The judge of rights and freedoms also has the role of ordering the extension of the technical supervision mandate, at the request of the prosecutor, in compliance with the provisions of Article 139 of the Code of Criminal Procedure.

Another novelty element of the current Code of Criminal Procedure in terms of technical supervision is related to the situation of invalidation of the order by the judge. If in the previous regulation it was required the immediate cessation of recordings and interceptions, those already made being deleted or possibly destroyed by the prosecutor, in the current regulation the legislature expressly provides for the obligation to destroy the evidence obtained under the order in question by the prosecutor and to conclude a report to this effect. In this way, confidentiality guarantees are increased, at the same time, the possibility of information resulting from recordings appearing in the media is avoided.

Another improvement compared to the old regulation can be found in paragraph 3 of Article 141 of the Code of Criminal Procedure. It provides for the obligation of the prosecutor to notify the judge of rights and freedoms, no later than 24 hours after the expiry of the measure, in order to confirm the measure and at the same time submit a summary report of all technical surveillance activities and the case file. This provision ensures compliance with the time limit in which we find ourselves in the presence of unauthorised interference.

As regards the subject of legality and merits of the order ordering technical supervision measures, their assessment involves verification of the factual and legal grounds. In the specialized literature it was argued that "the ordinance must reflect the urgency of authorizing by the prosecutor certain interception and recording activities. It must be apparent from the grounds of the order and from the content of the records made that, without authorisation and performance, the taking of evidence or the identification of participants would have been compromised and, in those circumstances, the application to the court for authorisation would have been late"⁴.

In practice, situations have been encountered where, following the emergency authorisation of the technical surveillance measure, the interception itself could not be carried

³ D. Dâmbu, *Interception and recording of conversations or communications*, in R.D.P. nr. 3/200

⁴ A. Petre, C Grigoras, *Audio and audio-video recordings. Means of proof in criminal proceedings. Judicial expertise*, Ed. C.H. Bееck, Bucharest, 2010

out due to technical problems. In this case, if the conditions imposed by law have been complied with, the court will confirm the prosecutor's order and find that the interception or recording could not be carried out due to technical failures.

Procedure for carrying out technical surveillance

The procedure for obtaining data resulting from the use of technical surveillance measures is carried out by complying with all conditions regulated by legal norms.

Technical surveillance shall be carried out only on the reasoned mandate of the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade within whose jurisdiction the seat of the public prosecutor's office to which the requesting prosecutor belongs. The referral to the judge is made by the prosecutor who must also substantiate his request, thus providing the judge with all relevant information.

The necessity of the institution of the judge of rights and freedoms is motivated by the fact that "during the criminal investigation, the criminal investigation body may propose to take certain measures regarding human rights and fundamental freedoms, or, in relation to ECHR jurisprudence, they can only be ordered by an independent magistrate, specialized in this regard, who may be able to assess whether such restrictions on individual liberty are necessary and not by any judge in a court of law⁵."

There are two exceptions to the rule of authorising technical surveillance measures. The first refers to the situation in which the recordings are submitted by the parties, and the second is represented by situations requiring the removal of imminent dangers to national security. In the latter case, authorisation must be applied for subsequently, but no later than within 48 hours. From a practical point of view, authorisation cannot be carried out post factum, so it will actually serve as a confirmation of the act performed without authorisation.

In order to respect the principle of equality of arms, the court may not disregard audio-visual recordings made by parties or third parties, as long as their use as evidence is permitted by law. As regards the authorisation of recordings made by the injured party himself, the prosecutor may request the judge to authorise interception of communications or their recording, on the basis of a reasoned request and irrespective of the nature of the crime under investigation. However, if the conditions of Article 139 para. (1) Code of Criminal Procedure, censorship of the injured party's application shall be required. Even if, from certain perspectives, such recordings should not have probative force, it is undoubted that they can constitute a genuine basis for establishing the necessary framework for obtaining flagrante⁶ or as a basis for authorising wiretapping, in order to verify the veracity of the facts complained of.

As regards the prosecutor's request, we note certain differences between the previous and the current regulation. The doctrine states that the prosecutor was obliged to substantiate his request, even if the former rules did not expressly provide for this. Also, the renunciation of the phrase "conducting or supervising criminal prosecution" provided in Article 91 para. (1) The Code of Criminal Procedure of 1968 does not aim at the possibility of any prosecutor to make the request, but at the simple fact that it would have been pleonastic, given that the stage of preliminary acts is waived. This phrase was used because the legislature provided that the interception could not be ordered outside the proceedings. Upon request by the public prosecutor, he/she may request authorisation of one or more supervisory measures. The judge,

⁵ I. Gârbulet, Judge of Rights and Freedoms, a new institution of criminal procedural law, in Law nr. 11/2009

⁶ Anane Ivan, *Management of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

by the same conclusion or by warrant, may order their approval. Unlike the current regulation, which expressly provides for the participation of the prosecutor in the settlement of the application for the consent of supervision measures, the old Code of Criminal Procedure did not provide for the obligation of the prosecutor's participation in the settlement of such a request.

In the request for a technical surveillance warrant, it must be indicated how these measures will be carried out and the obligation to minimise interceptions unrelated to the case. It is also necessary to specify the evidentiary material to be obtained and the reasons why such information cannot be obtained by another less intrusive means. In addition, the names and other identification data of the persons against whom the measure is proposed shall be added, as well as data or other evidence from which reasonable suspicion that the offence has been committed.

If the application proves to be well founded, the judge of rights and freedoms will order by conclusion the admission of the prosecutor's request and will issue the technical supervision warrant, the preparation of the minute being mandatory. The conclusion of the judge and the warrant issued must include: the name of the court; date, place and time of issue; the full name and capacity of the person who gave the termination and issued the warrant; an indication of the measure granted; the period and purpose of authorisation of the measure; the full name of the person subject to the measure and his identification data. Depending on the nature of the measure ordered, in some cases other information, such as phone identifiers or any other such data, will also be indicated⁷.

Technical surveillance will be ordered for a maximum of 30 days, and may be extended for justified reasons at the reasoned request of the prosecutor, but not exceeding 6 months, respectively 120 days for video, audio or photographic surveillance in private spaces. All special supervision measures will be ordered only during the criminal investigation, i.e. only after the start of criminal proceedings. Thus, the suspect's guarantees of the right to a fair trial are respected. This could be a disadvantage in terms of the effectiveness of the measure. Once the criminal investigation begins, the prosecutor has the obligation to inform the suspect of the accusation, and the latter, being aware of the investigation, could become much more careful and cautious, the measures risking to be ineffective. The provisions of Articles 305 and 307 of the Criminal Procedure Code come as a compromise solution in this respect, ensuring both the party involved in the criminal proceedings a minimum of rights and the right of the state to take the necessary measures to ensure the rule of law. Thus, in paragraph 1 of Article 305, the legislature expressly mentions the possibility of criminal proceedings in respect of the act committed or being prepared, even if the perpetrator is known. Notification of suspect status will no longer take place 'immediately' as provided for in the 1968 Code, but before the first hearing. Article 10 para. (3) However, the Code of Criminal Procedure retains the right to be informed, before being heard about the act for which it is being investigated and its legal classification. At this point, the competent authorities are also obliged to inform the person concerned of his procedural rights. Even if the criminal investigation was initiated in personam, the interception or video surveillance activities can be carried out, and the accusation will be brought to the attention after their termination, but not later than the hearing of the suspect and provided that no other evidence is administered. Otherwise, the defence could raise the objection of nullity of the initiation of criminal proceedings.

Another important aspect to mention, which comes as an improvement compared to the old regulation, is that, in the case of audio-video surveillance or photography in private spaces,

⁷ Anane Ivan, *Investigation of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

it is mandatory to request that the criminal investigation bodies be allowed to enter private spaces. Under the former legislation, this could be done by virtue of authorising the interception of environmental conversations, which was considered unlawful given that only intrusion into private life for the purpose of surveillance of conversations was allowed, not with regard to the violation of the right to the inviolability of the home.

As regards the possibility of challenging the conclusion of the judge of rights and freedoms, it "is not subject to any appeal, but it is possible to examine its legality if the exclusion of unlawfully administered evidence is requested⁸". The legality of the conclusion may be examined only at the preliminary chamber stage. Thus, either the defendant personally or the defence counsel chosen will be able to raise by way of exception the question of the illegality of the conclusion and of the mandate, requesting the exclusion of any data or information obtained through technical surveillance measures.

As mentioned before, the competence to order technical surveillance measures belongs to the judge of rights and freedoms and, by way of exception, to the prosecutor. However, the enforcement of the technical surveillance mandate also requires the participation of criminal investigation bodies or specialised police officers, as well as specialists, depending on the nature of the case. The latter are called upon to give a technical examination and are bound to maintain the secrecy of the operations carried out, which is an essential condition for ensuring the effectiveness of such evidentiary procedures. "The practical activity of carrying out interceptions from a technical point of view requires logistical support from specialists from institutions operating in the field of intelligence gathering⁹." In Romania, this attribution belongs to the Romanian Intelligence Service (S.R.I.). Article 12 of Law nr. Law no. 14/1992 provides that, at the request of the competent judicial bodies, certain designated personnel belonging to the Romanian Intelligence Service may provide support in carrying out the criminal investigation activity, but only in the case of crimes concerning national security. These bodies may not carry out criminal investigations or take measures of detention or preventive detention. The possession and use of special means of verification, processing and storage of information is allowed to the following institutions: Romanian Intelligence Service; The Ministry of Internal Affairs, through the General Directorate for Intelligence and Internal Protection, the General Anticorruption Directorate and the General Directorate for Combating Organized Crime, and through the Ministry of National Defence through the General Directorate for Defence Intelligence. Also, within the National Anticorruption Directorate, there is a Technical Service that has among its attributions the enforcement of authorizations for interception and recording of conversations and communications. Following the conclusion of collaboration protocols with the organizational structures of the criminal investigation bodies, the Romanian Intelligence Service holds the prerogatives of sole interception authority.

According to Article 142 para. (6) Criminal Procedure Code, data obtained from carrying out surveillance measures that do not concern the act that constitutes the object of investigation or that do not serve to locate or identify the perpetrator, if they are not used in other criminal cases, shall be sealed and archived in special places, at the headquarters of the Prosecutor's Office, with the obligation to maintain confidentiality. If, in the course of the criminal proceedings, new evidence emerges that part of the archived data nevertheless concerns the act, the judge or panel hearing may request that data either *ex officio* or at the request of the parties. They are destroyed one year after the case has been resolved. The

⁸ M. Udrouiu, *Criminal Procedure, General part. The Special Part*, Ed. C.H. Beck, Bucharest, 2010

⁹ I. Dascălu, F. Cotea, *Methodology of investigating crimes*, Ed. Sitech, Craiova, 2010

provisions of the above-mentioned article have the role of ensuring the observance of the person's right to privacy from the perspective of confidentiality of communications that do not concern the investigated act. Another aspect that supports this right is the introduction in the new regulation of the term of one year from the settlement of the case, for the destruction of data considered irrelevant for the object of investigation. The previous code allowed them to be simply deleted, and activity could be postponed sine die.

With regard to the practical implementation of technical supervision, I shall note that it involves numerous preparatory activities, both technically and procedurally. Before all these operations, a technical study will be carried out to establish the exact conditions under which interception will be carried out. The specialized doctrine states that "technical surveillance can be continuous, in the case of interception and recording of a telephone or sequential conversation, for example, in the case of audio or audio-video recordings made in the environment and made by criminal investigation bodies to capitalize on operative moments¹⁰." Any activity will be fixed by means of procedural acts, which will then serve the court to form an accurate picture of the content and chronology of the transaction from which the evidence was obtained. The public prosecutor is obliged to stop the technical surveillance before the expiry of the mandate, if the grounds justifying it no longer exist, immediately informing the court that issued the warrant. If the term of office has not been extended, supervision shall cease on expiry of the duration for which it was issued.

All the equipment used to carry out surveillance operations is called "operative technique". A wide range of equipment, systems and devices are used, depending on the type of communication intercepted. In case of a direct conversation, wired microphones or microtransmitters will be used, for example. For interception of a telephone conversation, methods such as interception by relay, derivation, radio system, induction, etc. will be used. For optimal efficiency of operations of this kind, it is necessary for judicial police officers and technicians to receive a series of information on the criminal activity carried out, the persons intercepted, as well as the methods used by them. Such data shall enable an effective action plan to be made and the technical means to be used to be selected accordingly. Interception of communications can be carried out either with the knowledge of one of the participants or without any of the participants knowing it. In the latter case, at present, the interceptions are carried out within the national system for interception of telephone communications, under the administration of the Romanian Intelligence Service.

As regards non-compliance with the various aspects concerning the authorisation of technical surveillance measures, it is appropriate to mention a few cases relevant from a practical point of view. Article 102 para. (2) The Code of Criminal Procedure provides for the prohibition of using illegally obtained evidence. If such evidence is presented to the court, sanctions will be applied in this regard, the most common being the invalidation of the evidence. There may also be situations of illegality as regards the approval of the technical surveillance measure. An example of this may be the application for authorisation by a non-competent body (the requesting prosecutor has no task of conducting or supervising the prosecution or is not part of the unit where the case under investigation is located) or the ordering of the warrant by an illegally designated or incompetent body. In the latter case, the sanction will be the absolute nullity of the conclusion of the authorisation. Another important aspect relates to the situation where supervision is carried out without respecting the deadline for which the measure was

¹⁰ M. Udriou, R. Slăvoiu, O. Predescu, *Special investigation techniques in criminal justice*, Ed. CH. Beck, Bucharest, 2009

ordered. In these cases, any evidence obtained outside this time limit will be removed from the evidentiary material (e.g. a record for which an extension of authorisation has not been ordered).

¹¹ Another problem is the non-compliance with the legal norms regarding the use of data resulting from technical surveillance in a case other than the one for which the measure was ordered. According to Article 142 para. (5) Code of Criminal Procedure, such data may also be used in other cases if their contents result in conclusive information regarding the preparation or commission of another crime.

Where it is established that it is impossible to execute a warrant for preventive arrest or execution of a custodial sentence because the person against whom these measures have been taken has not been found, the legislature provides for the possibility of technical supervision for the prosecution procedure. To order the special investigative procedure, it is necessary to have a prosecution order, and technical surveillance must be absolutely necessary to identify, locate or apprehend the individual. If these conditions are met, the judge of rights and freedoms will order authorization for a maximum period of 30 days.

Certification of data resulting from technical surveillance activities

The general rule of thumb with evidence is that evidence has no predetermined value. Consequently, "they can contribute to finding out the truth only to the extent that they form confidence that they correctly reflect the existence and content of conversations or the image of persons, objects, places¹²". Given that technical surveillance represents an interference in human privacy, in order to guarantee the principle of equality of arms, the legislator has provided a series of guarantees in this regard, including the certification of records, provided for in Articles 1421 para. (3) and 143 para. (4) Code of Criminal Procedure.

Certification is an act confirming the veracity of facts or data by means of a document that will have to meet all the requirements of the law for the validity of a legal act. The seat of the matter is represented by Articles 1421 and 143 of the Code of Criminal Procedure. Within them, we will notice the use of three notions: extended electronic signature based on a qualified certificate issued by an accredited certification service provider; certified copy of a medium containing the result of the technical surveillance activity; Report certified for authenticity by the prosecutor. Certification for authenticity consists of three stages. First, the prosecutor will select conversations or communications concerning the crime, to be recorded in a report by the prosecutor or by the police officer delegated by him. Then, the minutes will be certified for authenticity by the prosecutor, with a copy of the medium containing the recording of the conversation attached. The justification for certification for authenticity is that it removes the possibility of subsequent manipulation or counterfeiting of procedural acts. Any person certifying data under electronic signature will be responsible for their integrity and security. The verification of compliance with the conditions regarding the application of the extended electronic signature will be carried out *ex officio* by the court in the preliminary chamber procedure.

In the technical supervision activity, the prosecutor has three absolutely essential duties. He initiates the procedure, has the role of control over the persons who actually carry out the interceptions, and after they are carried out, he is the one who will prove the legality and authenticity, which is achieved through the certification of the records. Thus, communications, conversations, photographs acquire evidentiary valences, the means by which they are attested being the written rendering report. Prior to the entry into force of Law nr. 356/2006, the role of

¹¹ Anane Ivan, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

¹² G. Theodoru, *Treatise on Criminal Procedural Law*, Hamangiu Publishing House, Bucharest, 2007

certification belonged to the court. Also, the old regulation provided for the playback in full form of interceptions, unlike Article 143 para. (4) in which it is noted that the obligation to play conversations and communications in their entirety has been waived, only communications and conversations that are related to the act or that contribute to the location and identification of participants may be selected. The rest of the conversations remain non-public, and their content is classified by archiving in a sealed envelope at the prosecutor's office. The reason for this regulation is to respect the secrecy and non-public nature of records unrelated to the case. Moreover, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides for their exclusion if the prosecutor orders the playback of recordings that do not concern the criminal case for which the measure of technical surveillance has been authorized.

As regards the penalty for failure to comply with the certification procedure, that is the exclusion of the playback report, since it was not obtained in compliance with the principle of lawfulness of the administration of evidence. The role of verifying that this procedure has been carried out lies with the preliminary chamber judge. If there is a need to use an interpreter, he will have to fully translate the intercepted conversations and communications and certify their authenticity by signing and initiating on each translation page. An important point to remember is that, in the absence of the selection of records with probative value, their transcription into minutes and the attestation of their validity, the recordings have no evidentiary power. The role of selecting communications or conversations related to the crime lies either with the prosecutor or with the judicial police body delegated by him. This aspect is quite controversial, supporting the possibility that certain passages that could reveal innocence can be omitted. However, the legislator offers a solution in this regard, giving the judge or the panel of judges the possibility to request the subsequent sending of archived data and information, based on Article 142 para. (6) Code of Criminal Procedure.

The preparation of the report for any kind of technical surveillance activity and the playback of recordings is carried out either by the prosecutor or by the criminal investigation body delegated by him.¹³ The legal rule does not mention the obligation of delegation. Thus, in practice, certain activities will be carried out *ex officio* by the criminal investigation body, and the obligation to have a delegation order will arise only when the competence to carry out criminal prosecution lies with the prosecutor. If this obligation is not respected, it will be necessary to restore the minutes, which are liable to the sanction of absolute nullity. When the transcript is made by the criminal investigation body, it will be verified and countersigned by the prosecutor supervising the prosecution. Documents in which intelligence workers record the results of interceptions are called fact-finding acts and can constitute evidence only if the facts are perceived personally by the person drawing up the document. In the case of interception and recording of communications, legally relevant elements are not considered to be the result of personal observation because they originate from conversations subject to surveillance. Thus, it can be stated that the information contained in the fact-finding documents cannot be used as evidentiary material, but can tactically contribute to obtaining relevant evidence through other sources, for example, *flagrante*.

The purpose of recording communications and conversations on different storage media is to facilitate listening and subsequent viewing of information in written form, to verify the identity between the content of a call and written playback, and to certify authenticity. They

¹³ Anane Ivan, *Elements of theory and tactics of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

have a dual role in the criminal process. On the one hand, they have probative value as documents, in the form of minutes and conversations rendered in written form, and, on the other hand, they represent material evidence, by the medium on which they are stored. The playback report shall contain an extensive and detailed description of the technical surveillance activity and the transcript of the resulting recording. The written playback of the content of a conversation must be done in literary form, preserving, as much as possible, the specificity of the participants' speech. The elements of phraseology, the way punctuation marks are used, the speech pauses, but also the tone of voice, which can sometimes change the connotation of the conversation, must also be taken into account. Certain words (regionalisms, archaisms, acronyms, technical terms, slang, jargon, slang, etc.) will require further explanation to avoid a possible subjective interpretation of the message conveyed by the interlocutors¹⁴. If for some reason (jamming, background noise, etc.) some words or sentences are indistinguishable, it will be necessary to note them as unintelligible. The following elements must also be mentioned in the playback report: date and number of the authorisation, issuing court, name of the public prosecutor's office, file number, names of the subjects of the conversation and the circumstance in which it took place, identity and capacity of the persons concerned¹⁵, date and time of the call and its duration. The minutes of rendering must comply with the form required by Article 199 of the Code of Criminal Procedure, otherwise the provisions on procedural nullities become incidental. Based on the minutes, the entitled persons may challenge its content by means of a complaint at the criminal investigation stage or by means specific to the judicial investigation, at the trial stage. The minutes shall be attached, in a sealed envelope, a copy of the medium on which the conversation is recorded. If during the interception activity new offenses are discovered, other than those subject to surveillance, the report will represent a finding document for the new offenses.

At the request of the supervised person, the public prosecutor is obliged to provide him or her with minutes containing the activities carried out. It will also ensure, upon request, listening to conversations or communications or even viewing the photos taken. The supervised person will be informed of the intrusion into his/her private life within a maximum of 10 days. After this moment, the supervised person shall have the right to become aware of the contents of the minutes within 20 days of being informed. This aspect is regulated by Article 145 of the Code of Criminal Procedure, representing a genuine guarantee of the rights of defence. By virtue of this right, the person concerned is given the opportunity to challenge the acts of the prosecutor by lodging a complaint under Article 339 et seq. Code of Criminal Procedure. The public prosecutor has the right to postpone information or presentation of the medium on which the activities undertaken or minutes are stored. From this, it can be concluded that the 10-day period is one of recommendation, not of revocation, its non-observance being a harmful one only if the existence of an injury is proved. In order to ensure respect for human rights and freedoms, it is necessary to inform also third parties who are not connected with the case and whose conversations have been listened to and recorded. With regard to respect for the completeness and intactness of the recordings, the European Court of Human Rights held that "the person concerned must be given the opportunity to hear the recordings or to challenge their veracity. Hence the need to keep them intact until the criminal proceedings are concluded¹⁶." In

¹⁴ S. Grădinaru, *Technical supervision in the New Code of Criminal Procedure*, Ed. C.H. Beck, Bucharest, 2014

¹⁵ Anane Ivan, *Elements of computerized evidence of the person*, Pro Universitaria Publishing House, Bucharest, 2015

¹⁶ ECHR, Dumitru Popescu v. Romania, judgment of 26 April 2007

case of non-compliance with the obligation to submit the playback minutes, the sanction will be relative nullity, which will lead to the unlawful notification of the court, the file being returned to the prosecutor, if within 5 days from the date of service the irregularities of the act of service are not remedied.

Exploitation of data resulting from technical surveillance

The minutes referred to in the preceding chapter shall constitute written evidence of facts and circumstances discovered by means of technical surveillance measures. It shall specify the outcome of the surveillance operation, the identification data of the medium on which the results of the activities undertaken are stored, the names and occupations of the persons intercepted and the date and time at which the surveillance activity began and ended. Intercepted communications, conversations and conversations are also recorded in a playback report, either by the prosecutor or by the criminal investigation body. For the entire surveillance activity to be considered evidence, it is an absolute requirement that the data and information obtained are not altered in any way. According to the requirements of ECHR case-law, the original data storage medium must be retained. An extremely important role of the prosecution bodies is to ensure the security of this evidence.

Another task of the prosecution is to consider the risk of possible falsification of records. This can be achieved by several methods. Generally, we will find ourselves in the position of taking only certain fragments of a communication or conversation, or even by removing or transposing images. An audio recording will be considered authentic only if it has been realised at the same time as the acoustic elements that make it up and if it does not show any modification or intervention (counterfeits, insertions, intercalations of sentences or phrases, etc.). In case of doubt, Articles 172 et seq. The Code of Criminal Procedure provides for the possibility of technical expertise regarding the authenticity and veracity of a recording. If the expertise reveals any kind of non-compliance with reality, the records will not be able to constitute evidence, so they will not have probative value.

Since evidence has no predetermined value, its assessment is left to the discretion of the judicial bodies (principle of free assessment of evidence). Recordings of conversations or communications of any kind may constitute evidence only when their content reveals facts or circumstances which contribute to finding out the truth. Their mere existence shall not constitute evidence until such time as they are recorded in a playback report. Although rare, there are situations in which intercepted communications or conversations may constitute direct evidence, when all the constituent elements of the offence are met, as well as the guilt of the person concerned. Any evidence obtained in violation of the legal provisions will be considered without probative value, the existence of an injury not being necessary. If the playback report is not certified by the prosecutor or by the body delegated by him, it will be considered null and void and will be removed from the evidentiary material. To illustrate such a situation, we indicate the practice of a court, according to which "the procedure for administering evidence contained in telephone conversations was vitiated by the prosecutor's lack of certification of the playback minutes [...]. The court notes that the certification operation took place only in March 2007, 5 years after the interceptions were carried out and 2 weeks before the indictment was issued. Therefore, the entire prosecution was carried out on the basis of unlawful evidence, during which, not being verified by the prosecutor, it provided almost all the indications of guilt. It follows that all procedural and procedural documents based on the minutes of the

conversations held by the defendant N.Ş.E., up to the moment of certification, are null and void, which also entails the nullity of the document instituting the proceedings¹⁷.

The way in which the information obtained through the use of technical supervision is used differs depending on the way in which they come to the knowledge of the criminal prosecution bodies. For example, information of interest for national security, intercepted by the Romanian Intelligence Service, when indicating either the preparation or commission of any criminal act, will be ascertained in writing, then transmitted to the competent criminal investigation bodies, in compliance with the provisions of Article 61 of the Criminal Procedure Code. These acts will represent ascertainment acts and will be the basis for notifying the criminal investigation bodies. Any document in which the results obtained from the interception and recording operations carried out under Law 51/1991 are transposed will not be assimilated to the transcription or certification report, having the legal nature of a document. As a consequence, these types of data will not be used in the evidentiary process, but will have a significant contribution in terms of organizing the framework necessary to obtain evidence through other sources. In practice, however, there may be overlaps between the intelligence gathering process of the secret services and the evidentiary process within the criminal proceedings, the playback note being often kept in full. Due to the special nature of the data obtained from interceptions carried out by the Romanian Intelligence Service, they cannot be used in another criminal case. They may form the basis for the initiation of criminal prosecutions and the public prosecutor may use them to justify the request for authorisation of interception or the interim order ordering interception.

Another relevant situation in the field of data recovery relates to the evidential power of those data used in other cases. Paragraph 5 of Article 142 of the Code of Criminal Procedure provides that information resulting from surveillance measures may be used in another criminal case if it indicates preparation or commission of another offense provided by Article 139 para. (2) Code of Criminal Procedure. The doctrine emphasizes that, regardless of their nature (data concerning the subject matter of criminal prosecution or collateral data), they may be used as evidence in other cases. A particular case concerns the situation of third parties communicating with people whose communications or conversations are intercepted. In this case, the question arises of the violation of the right to privacy and the guarantees provided by the Constitution and the European Convention. Such conversations will not be used as evidence against third parties but may form the basis of an ex officio referral.

With regard to the records submitted by the parties, pursuant to Article 139 para. (3) Code of Criminal Procedure, they may constitute evidence. In general, their performance precedes the moment of prosecution. They shall constitute evidence only when they concern the parties' own conversations with third parties. There are opinions criticizing the legal provisions regarding this situation, claiming that the provisions of Article 26 para. (1) of the Constitution and that these types of records could be obtained by provocation. It is also supported to obtain them secretly, the purpose being sometimes even to induce the subject to commit the crime. Other topics of interest are the one related to the use of telephone listings as evidence with written value, as well as the problem of direct reading of data contained in a telephone (messages, photos, call list, etc.). As regards the latter situation, the reading of such data is allowed, being motivated by the fact that the telephone is not considered a computer or storage medium, and consequently, the reading or viewing activity will not involve access to a computer system.

¹⁷ Iasi Court, Criminal Section, criminal sentence nr. 627/27.10.2008 (www.jurisprudenta.org)

Evidential value of records obtained in preliminary acts in the old Code of Criminal Procedure

According to Law no. 135/2010, technical surveillance measures can be ordered only after the initiation of criminal investigation, the stage of preliminary acts being eliminated. The taking of evidence may take place only within the framework laid down by the statutory rule, that is to say, after criminal proceedings have begun. Any evidence obtained outside these provisions will be considered illegal. Unlike the provisions of the old Code of Criminal Procedure, which qualified preliminary acts as stand-alone acts, independent of the criminal process, the current Code of Criminal Procedure completely eliminates this distinction. Thus, all operations undertaken by criminal investigation bodies will be carried out within the framework of criminal investigation. Cases are still present before the courts from an evidentiary point of view based on recordings that were made at the stage of preliminary acts, the reason for which we considered it necessary to address this subject.

According to Law no. 135/2010, the criminal investigation phase has three stages: the investigation of the act, the investigation of the person and the resolution of the case by the prosecutor¹⁸. The investigation of the crime is initiated by notifying the judicial police or the prosecutor and is concluded by charging an individual. When, from the investigations carried out, reasons are identified to form certainty that a person has committed an act provided for by criminal law, the decision to indict that person who will become a defendant will be made, which is achieved by initiating criminal proceedings. In this way, the phase of preliminary acts was removed, which could have been unduly prolonged until the moment of identification of the perpetrator, a period during which activities similar to the taking of evidence would have been carried out, without ensuring compliance with guarantees. We can say that the current Code of Criminal Procedure simplifies the procedure for initiating criminal prosecution. Thus, if the notification addressed to the judicial bodies reveals the existence of an offence, the criminal investigation bodies will be able to order immediately the initiation of criminal proceedings in respect of the notified act.

The rationale for carrying out the preliminary acts was to verify and complete the information contained in the notification document in order to find out whether there was a need to initiate criminal prosecution, respectively whether any of the cases of non-initiation of criminal prosecution were present (Article 10 of the Code of Criminal Procedure 1968). We can say that these preliminary acts were limited both qualitatively and quantitatively to the execution of the operations necessary to achieve the legal purpose, which is to supplement the information and data already existing, thus taking the form of decisive findings in the initiation of criminal prosecution. They could be transposed into evidence only in compliance with the provisions of Article 224 para. (3) Code of Criminal Procedure 1968. The findings obtained as a result of the preliminary acts were subsequently materialized in a report that could constitute evidence, but only on condition that they present circumstances or facts that could lead to finding out the truth, and those facts were personally ascertained by the body that drew it up. The literature states that "given the position and qualification of the persons who draw them up, the minutes offer a higher degree of confidence, without having a legal regime differentiated from the rest of the documents and from the other means of evidence¹⁹". At that stage, apart

¹⁸ M.Udroiu, Some considerations on the regulation of the procedural system in the draft of the New Code of Criminal Procedure, in Legislative Information Bulletin no. 1/2010

¹⁹ A. Crișu, Criminal Procedural Law, revised and updated edition according to Law nr. 202/2010, Bucharest

from the report, no procedural act constituting evidence could have been carried out concerning a person suspected of having committed the offence.

As regards the admissibility of audio-visual recordings at the stage of preliminary acts, there are contrary opinions in doctrine and practice, taking into account the lack of clarifications in this regard. 962/2009 on the rejection of the exception of unconstitutionality of the provisions of Article 911 of the Code of Criminal Procedure 1968, stating that interceptions and audio-visual recordings could be admissible as evidentiary procedures, respectively as evidence, only in the event of criminal prosecution. The abovementioned article provided that audio-visual interceptions were to be carried out in the alternative, only when the identification of the perpetrator or the establishment of the circumstances of the commission of the offence could not be carried out otherwise and only on condition that no other classical means of evidence could facilitate finding out the facts. In those circumstances, I shall observe that the authorisation to order the interception given by the judge was a preliminary act, his involvement at this stage being difficult to sustain. The question was whether judges were competent to propose restrictions on rights outside criminal investigation. Given that criminal proceedings were not ordered at this point, an intervention by the judge could be regarded as conferring investigative powers, which did not fall within the scope of judicial activities. As an element of similarity with the current regulation, the judge had the obligation to justify his conclusion of authorization of interceptions and audio-visual recordings. Such reasoning may be provided only where provision is made for the possibility for the court to request from the prosecution authorities the data necessary for the approval of the application for authorisation. This element is specific to the active role of the judge, which can only be exercised in criminal proceedings. Per contrario, in the given situation, criminal proceedings must have already been initiated.

Another argument supporting the above-mentioned Constitutional Court Decision is that, when referring to the certification of records, the old Code of Criminal Procedure specifies that "the report is certified for authenticity by the prosecutor conducting or supervising the criminal investigation". It follows that the status of preliminary acts remains uncovered by certification. Also, the ordering of interceptions and recordings in an extra-trial setting was contrary to Article 98 of the 1968 Code of Criminal Procedure, which regulated the retention of correspondence, but only with regard to the accused or accused. Thus, any interpretation of the law would not have been justified, since the essence of the measures is identical.

All these arguments regarding the inadmissibility of using as evidence the recordings obtained at the stage of preliminary acts, are in agreement with most of the expert opinions, as well as with the current Code of Criminal Procedure and with a part of the jurisprudence that has removed those means of evidence obtained prior to the initiation of criminal investigation. The preparatory acts were carried out before the start of the criminal investigation, of which the perpetrator was not yet aware. Consequently, acts that would harm the rights or interests of an individual cannot be initiated to carry out such an activity. The opinion according to which the interceptions could not be authorized at the stage of preliminary acts is also supported by the Constanta Court of Appeal, Criminal Section and for cases involving minors and family, in the criminal sentence no. 59/P of 30.04.2009. It examines the legality of the taking of evidence, i.e. environmental recordings deemed to be illegal. In motivating the solution, it was noted that, in accordance with Article 64 para. (2) Code of Criminal Procedure 1968, evidence must be obtained lawfully, otherwise it cannot be used to support guilt. Thus, the court established that, "as regards the minutes of playback of the conversation held in the ambient environment between the whistleblower and the defendant and the medium containing the copy of the recording of the conversation held by the two, these will not be taken into account, the

motivation of the defense being based on the recording prior to the initiation of the criminal investigation, the provisions of Article 911 of the Code of Criminal Procedure 1968 being not observed²⁰.

However, there are also opinions supporting the admissibility of interceptions at the stage of preliminary acts. A unitary practice of the High Court of Cassation and Justice in this regard was noted, holding that the legality of interceptions and audio-video recordings must be assessed strictly in relation to the provisions of Article 911 of the Code of Criminal Procedure 1968, the initiation of criminal prosecution not being a condition for its establishment, and if the legislature wanted the evidence in question to be administered only in criminal proceedings, He made that point, as he did in the case of the house search. It was also held that the use of the phrase "prosecutor conducting or supervising the criminal investigation" is attributed to the need to particularize the judicial body in charge of investigating the case. Another argument that would support the above-mentioned opinion would be that informing the accused of the initiation of criminal proceedings would provoke a defensive reaction on his part and taking measures to circumvent his discovery by the authorities, such as avoiding the use of means of communication or even his disappearance. The authorisation of technical surveillance measures in the preparatory acts would thus have streamlined the conduct of the investigation.

After analysing those opinions, it can be concluded that we are faced with a non-uniform case-law on the conduct of interceptions at the stage of preliminary acts and their transposition into evidence. We can observe, however, a unanimous practice of the High Court of Cassation and Justice, based on the idea of admissibility of using such means of evidence obtained before criminal prosecution begins. Other courts in the country, as well as the Constitutional Court, continue to support the view that these types of evidence should be excluded from the evidentiary material of such a case. This interpretative dissociation of legal provisions leads to violation of the principle of equality before the law, different solutions being given in similar cases. Also, in terms of substantive jurisdiction, some rulings made by a Court of Appeal that will remove from evidence a recording made before the start of criminal prosecution will contradict the practice of the High Court of Cassation and Justice.

As regards the evidential value of the interceptions carried out at the stage of the preparatory acts, if we refer to the view that technical surveillance could not have been lawfully carried out prior to the commencement of criminal proceedings, I may conclude that such interception would have been devoid of any evidentiary value. We can add that this situation is also encountered if there is no interception authorization, the procedure for obtaining it is not integrated into the legal provisions and when the information resulting from the ordering of technical supervision is obtained by provocation.

Despite this, the importance of such recordings cannot be disputed, as they have great power in terms of their ability to produce trust in judicial bodies assessing evidence. This is due to the way they are obtained, namely without the knowledge of the registered people. If we make a comparative analysis, the Anglo-Saxon criminal procedural system does not allow the use of audio-video recordings in court, the motivation being that, in this way, the way the recordings were made would be revealed, which would decrease their efficiency in the future²¹.

On the other hand, if the use of recordings made at the stage of the preparatory acts is allowed, we will be faced with the need to differentiate between the minutes of playback and

²⁰ Constanta Court of Appeal, Criminal Section and for Juvenile and Family Cases, criminal sentence no. 59/P of 30.04.2009 (www.mateut-budusan.ro)

²¹ A. Sanders, R. Young, *Criminal Justice*, Third edition, Oxford University Press, 2007

the minutes of finding. The preparatory acts were necessary in order for criminal prosecution to be initiated. They were also considered when changing the legal classification or even initiating criminal proceedings, being recorded in the report establishing the performance of the preliminary acts. This being the only means of evidence, I can conclude that, in its absence, it was not possible to initiate criminal prosecution, extend it, change the legal classification and initiate criminal proceedings. Therefore, the indictment ordering the indictment was null and void, the procedural remedy being to return the file to the prosecutor to rebuild the criminal investigation. It follows the statement of findings provided for in Article 224 para. (3) The Criminal Procedure Code 1968 was the only instrument for capitalizing on audio-video recordings made during the preliminary acts. Thus, all communications and conversations rendered in full by the competent body had to be contained in the abovementioned statement of findings. However, an indictment based solely on wiretapping or wiretapping is not considered to be sustainable, and that evidence needs to be corroborated with other evidence, thus eliminating the possibility of abuse.

Compensation for damage caused to supervised persons or third parties through the use of surveillance measures

Sometimes, in judicial practice, persons subject to interference that does not comply with Articles 26, 28 and 53 of the Constitution have limited possibilities to remedy the damage caused. Articles 297 and 298 of the Criminal Code regulate the possibility of filing a criminal complaint against a judicial body that has committed a criminal act in the exercise of official duties. In practice, these situations are quite rare, most convictions for such acts existing under the conditions of competition of corruption offenses.

The specialized literature attests that "in case of violation of certain rights, criminal rules are not capable of ensuring by themselves an effective and adequate compensation, this being achieved in reality by civil means of protection (non-patrimonial remedies, compensation, etc.)²²". In this connection, State liability materializes through actions for damages under tort. The formulation of such an action may be initiated only from the perspective of Article 538 of the Criminal Procedure Code, in relation to Article 52 para. (3) of the Romanian Constitution. However, Article 538 covers only the situation of acquittal following a retrial, i.e. after the moment of final conviction and the situation of unlawful deprivation of liberty. In these cases, the violation of rights and guarantees arising from technical surveillance procedures does not contain express rules on compensation for damage to the injured party by the unjustified intrusion of State authorities into his private life. The only solutions in this field are pronounced by the ECHR, some of them being *Craxi (2) vs. Italy*, *Cășuneanu v. Romania*, etc.

The use of special monitoring techniques does indeed raise certain problems, both with regard to the authorisation procedure to be followed and with regard to the exploitation of the results thus obtained. Given that the interference of the authorities is an *in personam* measure, there is a need for possible new regulations providing for the issuance of interception warrants only with regard to the act and person, thus avoiding the situation of surveillance of "unidentified" phone numbers of persons who were initially not targeted by the investigative bodies, which would infringe the principle of proportionality.

An essential element in the just conduct of criminal proceedings is represented by the obligation of the judge, when requesting the technical surveillance warrant, to take into account the fact that taking these special measures in relation to an individual requires a thorough and

²² F. Streteanu, Decriminalization of insult and libel offenses. Unconstitutionality (DCC no. 62/2007), in C.D.P. nr. 1/2007

thorough analysis, and they can be ordered only if other means of evidence or evidentiary procedures, the administration of which would involve less interference with privacy, could not contribute effectively to establishing the facts, discovering the crime and identifying and locating the perpetrator. Sometimes, in practice, there are situations where warrants are issued in a relatively poor manner and the factual and legal grounds are not thoroughly verified. In other cases, there is a lack of reasoning for the proportionality of the measure as well as its subsidiary nature. Thus, during pronounced conclusions, the aspects reported by the criminal investigation bodies in connection with the preparation of the act provided for by the criminal law are sometimes encountered, the verification by other methods and means being omitted.

In my opinion, one situation that requires particular attention is that of extending the term of office for more than 30 days. In this case, the prosecutor must explain to the judge to support the need to extend the duration of technical supervision. Extensions are often authorised until the previous deadline, and the merits of the results obtained from the implementation of the initial mandate are no longer analysed, the measure being sometimes extended in this way for the entire duration provided by law.

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