



## Examination of the Provisions Governing the Interceptions of Conversations and Communications according to the European Court of Human Rights Jurisprudence

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**Abstract:** The objective of the present research consists of analyzing the requirements imposed by the jurisprudence of the European Court of Human Rights in order to establish the presence / absence of a match between the standards and regulations of the Romanian legislation in the field of audio or video interceptions and recordings. This paper joins the scientific efforts made by other authors in order to identify the existing problems in the internal law from the perspective of the Convention. The concrete results of the research focus on presenting the principles required by the European Court of Human Rights on the protection of privacy. The paper also examines the internal rules that violate the European standards in the field. The undertaken research may be useful to practitioners in the field, that will be guided to the correct application of community and national provisions, and to theorists and Romanian legislator. The research is a critical analysis of the national rules that do not meet the European Court of Human Rights standards and it reports the negative effects that may occur, as a consequence of these provisions.

**Keywords:** interceptions; New Code of Criminal Procedure; the European Court of Human Rights

### 1. Audio and Video Interceptions and Recordings according to the European Court of Human Rights Jurisprudence

In order to comply with the privacy and correspondence right, the New Code of Criminal Procedure establishes the procedural rules in the special techniques of surveillance and research matters to meet the accessibility, predictability and proportionality requirements.

There are classified and defined as special surveillance or research techniques the following:

- a) interception of conversations and communications;

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- b) video, audio surveillance or by photographing in private areas;
- c) location or GPS tracking or by other technical surveillance means;
- d) obtaining the list of telephone conversations;
- e) retention, delivery or searches of postal correspondence;
- f) monitoring the financial transactions and the disclosure of financial data;
- g) use of undercover investigators;
- h) finding corruption offence, or the conclusion of an agreement;
- i) supervised delivery;
- j) identification of the subscriber, the owner or the user of a telecommunication system or an access point to a computer.

Also it is defined the notion of technical supervision regarding the use of one of the techniques referred to in letter a)-c) and f).

In all cases of authorization of such measures, the New Code of Criminal Procedure requires the need for a reasonable suspicion of committing a crime, the compliance of the subsidiarity principle - being revealed the exception character of interference with the right to privacy - and the principle of proportionality of the measure by restricting the right to privacy in relation to the particularity of the circumstances, the importance of information or evidence to be obtained or the seriousness of the offense.

Also in order to ensure the right set by article 8 of the European Convention on Human Rights and Fundamental European Human Rights, the New Code of Criminal Procedure establishes, as a matter of principle, the obligation of the prosecutor that, after ceasing the technical supervision measure, he would inform in writing as soon as possible every subject of the warrant on the technical surveillance measure which has been taken in his case.

The way in which there were regulated in the Code of Criminal Procedure the interceptions and the audio or video recordings are part of the constitutional provisions (article 53 of the Romanian Constitution), especially because the restriction did not affect the existence of the right, being proportional to the situation that caused it (Theodoru, 2007, p. 396).

However, the new regulation does not solve the existing provisions of special laws. These provisions have been appreciated both in the internal law<sup>1</sup> and the

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<sup>1</sup> Trial Bucharest, Section IV Civil Code civil sent. no. 709/2007, Bucharest Court of Appeal, Civil Section III, dec. no. 1/2009 cases S.R.I. vs Patriciu.

jurisprudence of the Court<sup>1</sup> as being contrary to the principles laid down in the Convention. In what follows, we provide an overview of the arguments underlying the proposal: the Law implementing the New Code of Criminal Procedure providing expressly that the provisions of special laws that undermine the right to privacy would be repealed.

The free communication between two or more persons represents an integral part of the notion of “correspondence” and “privacy”. In the current context if the society development, the communication between two or more persons may be held, in addition to the classical forms: discussions between the persons presented in the same place, letters, telegrams, telex or fax, through a variety of other ways: by mobile telephony<sup>2</sup> (that in addition to voice transmission, it can also provide data transmission as SMS<sup>3</sup> or images), communications made by broadcasters of fixed or portable reception (e.g. “walkie-talkie” systems), transmission of electronic messages via pager or Internet communications (in all its forms: text messages, sounds, pictures). (Volonciu & Barbu, 2007, p. 130)

Restrictions on the inviolability of telephone conversations and communications, on respecting the private and family life, home and correspondence are required also by the European Convention on Human Rights and Fundamental European Human Rights<sup>4</sup>.

Article 8 of the Convention on European Human Rights, entitled “the Right to respect the private and family life”, provides:

*“Everyone has the right to respecting his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except to the extent where this mixture is required by law and if it represents a measure that, in a democratic society, it is necessary for national security, public safety or the economic well-being of the country, defense of order and preventing the criminal acts, protecting the health or morals, or the protection of rights and European Human Rights of others.”*

The possibility for phone call interception by state authorities is provided virtually in all signatories States of the Convention on European Human Rights, being

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<sup>1</sup> Elena Pop Blaga v. Romania, the European Court of Human Rights, November 27, 2012.

<sup>2</sup> For more details check (Bogdan, 2006, p. 106).

<sup>3</sup> *Short Message Service* - Short Messages sent via mobile phones.

<sup>4</sup> Romania ratified the EUROPEAN HUMAN RIGHTS Convention by Law no. 30/1994, published in Official Monitor no. 135 of 31 May 1994.

related generally to the fight against crime. The democratic societies are threatened by complex forms of espionage and terrorism and to effectively combat such threats it should allow states to monitor the subversive elements operating in their territory.

The European Court of Human Rights (following the European Human Rights Court) admitted that there are some legal provisions allowing the interception of mail under exceptional circumstances which are necessary in a society in order to ensure the national security, defending the public order and prevention of committing crimes.<sup>1</sup>

On the other hand, any excess in carrying out some interceptions of telephone conversations involves not only the risk of harming the individual, but it can have negative consequences for the democratic society as a whole. That is why the guarantees against the abusive interceptions are indispensable. (Berger, 2005, p. 407)

In dealing with cases analyzed by the European Human Rights Court it followed a certain natural order, in order to discover the incidence of the provisions of article 8 from the Convention:

**a. The applicability of article 8 in the domain of telephone communications interceptions.** The European Human Rights Court has stated that the guarantees of article 8 of the Convention must be respected under *all circumstances*, and only where the interference has as aim proving a crime. It is irrelevant in this regard the way of using the records (the immediate purpose of interception).

**b. The conditions of applicability of article 8 paragraph 2:**

- *the existence of an interference*<sup>2</sup>;
- *the interference is provided by law* (besides the mere existence of the legal law it seeks the quality of the law, its *affordability and predictability*),<sup>3</sup> it is necessary for the rules to be known, under reasonable terms by the person to whom it is applied. *Accessibility* is assessed by reference to the possibility of a

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<sup>1</sup> European Human Rights Court, September 6, 1978, no. 5029/1971, Klass and others v. Germany, A no. 28.

<sup>2</sup> The European Human Rights Court, April 24, 1990, Kruslin v. France, Huvig v. France, A 176-A.

<sup>3</sup> European Human Rights Court, 2 august 1984, no. 8691/1979, Malone v. UK, the European Human Rights Court, February 16, 2000, no. 27798/1995, Amann v. Switzerland published in RJD 2000-II; cause Prado Bugallo v. Spain, no. 58496/2000, European Human Rights Court judgment of 18 February 2003.

person to have information on the standards. The condition of accessibility of a legal rule is not met by internal unpublished regulations, instructions or directives or simply is not brought to the attention of interested persons, so it could not be invoked in order to justify the interference of the public authorities.<sup>1</sup>

- **the interference would pursue a legitimate aim;**<sup>2</sup> these aims are assessed according to the circumstances of each particular case. The commission recognized the flexibility in interception is required by the nature of the subject in question and that the concept of “*predictability*” does not require the definition of terms such as “*national security*” or “*the economic well-being of the country*” when they are used as prerequisites conditions in applying the measures.

- **interference represents a necessary measure in a democratic society.**<sup>3</sup> In adopting the measure which represents an interference in the exercise of rights protected by article 8, the states have provided a *variable appreciation reserve*, and by this condition it seeks to restrict the measures taken by the authorities to what it is “necessary in a democratic society”, obliging the states to ensure an “**adequate and effective control**” for verifying the legality of measures in relation to the specific situation of each case. The order of a magistrate for an interception does not involve regular records and compliance with article 8, so as to make unnecessary an appeal to those concerned (case Matheron v. France, judgment of 29 March 2005).

## 2. The National Legislation on Interceptions and Audio or Video Recordings

Previous to the legislation in the Code of Criminal Procedure of the potential interception and recording of telephone conversations, there were some provisions in Law no. 51/1991<sup>4</sup> on the national security (article 13), where it is regulated the procedure of interception and recording telephone conversations and other

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<sup>1</sup> Judgments in the case of Rotaru v. Romania, published in the Official Monitor no. 19/11.01.2001, Case Petra v. Romania, published in the Official Monitor no. 637/27.12.1999, Case Cotlet v. Romania, published in the Official Monitor no. 422/19.05.2005 or case Sissanis v. Romania, judgment of 25 January 2007 in terms of analyzing the accessibility condition of the law. The main way to insure the publicity of legal acts is provided by the Autonomous Administration “The official Monitor”, according to article 5, Law no. 202/1998.

<sup>2</sup> European Human Rights Court, case Campbell Christie v. United Kingdom, application no. 21482/1993, inadmissibility decision of 27 June 1994, 78-A DR 119.

<sup>3</sup> European Human Rights Court, 24 August 1998, no. 23618/1994, Lambert v. France.

<sup>4</sup> Published in the Official Monitor no. 163 of 7 August 1991.

communications in the case of preparation and perpetration of crimes that represent a threat to the national security.

Regulations on the procedure of recordings and audio or video interceptions are found in other normative acts as well.<sup>1</sup>

Looking at the provisions of the special laws by reporting to the current and future provisions of the Code of Criminal Procedure, we find that there are inconsistencies regarding the competent authority to authorize the audio or video recordings and interceptions.

Thus, in the regulations previously adopted of the Law no. 281/2003 amending and supplementing the Code of Criminal Procedure and the Law no 135 on the Code of Criminal Procedure<sup>2</sup>, it provides that the prosecutor shall be the responsible authorized body to authorize the carrying out of the audio or video recordings and interceptions.

By adopting the two laws, the Code of Criminal Procedure provides for further regulation of interception and audio or video recordings, setting another application procedure and issuing such authorization (thus the court becomes the competent body for issuing the authorizations for interception and audio or video recordings) and other limits on its duration.

In this situation it raises a question: the provisions of special laws, in which it

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<sup>1</sup> Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignities, public functions and business environment, the prevention and punishment of corruption contains provisions on the access to a computer system and interception and recording of communications conducted through computer systems (article 54-59 - authorizing the prosecutor, referring to the Code of Criminal Procedure). Law no. 78/2000 on preventing, discovering and sanctioning corruption; it also includes provisions on surveillance or tapped telephone lines or access to information systems (article 27 - authorization of the prosecutor). Law no. 143/2000 on combating illicit drug trafficking and consumption, it includes provisions on the access to telecommunications and information systems used by a person who prepares the commission of an offense under this law or has committed such an offense (article 23 - authorization of the prosecutor). Law no. 678/2001 on preventing and combating trafficking in persons, which provides in article 23 that when there is data or there are clues that a person who prepares the commission of an offense under this law or has committed such an offense uses telecommunications or computer system, the prosecution may, with the approval of the prosecutor, have access for a period of time, to these systems and to supervise. Law no. 39/2003 on preventing and combating organized crime which provides in article 15, line 1 letter c) that when there are clues on committing crimes for establishing a criminal organization, in order to gather evidence or identify the perpetrators, the prosecutor may order a maximum period of 30 days surveillance of the communications systems. Law no. 535/2004 on preventing and combating terrorism provided in articles 20-22, the authorization procedure and conducting intelligence activities, which also include the interception and recording of audio or video conversation.

<sup>2</sup> Published Official Monitor no 486 of 15<sup>th</sup> July 2010.

provides that the authorization for interception and recording of conversations is issued by the prosecutor, are they still applicable?

The Code of Criminal Procedure establishes the cases of interception and recording of conversations and communications, namely: there should be solid clues or data<sup>1</sup> that it has been committed or is preparing to commit a crime, that for that crime the criminal prosecution is carried out automatically and the use of these procedures is necessary for finding the truth.

The interception and recording is required for finding the truth when establishing the facts or identifying the perpetrator cannot be made based on other evidences, which represents a consecration of the subsidiarity principle of this measure, and *only in exceptional cases*, in accordance with the requirements of the Convention. (Case Klass v. Germany, previously cited)

The authorization is given by the president of the court to whom it would return the jurisdiction to hear the case at first trial, in closed session, which meets the requirements of the European Court of Human Rights. The Code of Criminal Procedure provides the limits of the duration of the executing measures, the need for extensions only if they are justified without exceeding the overall length of four months, motivating the decision-making measure (a motivated conclusion, which will include the concrete clues that has led to it, the person concerned, means of communication, or the place under surveillance, the period for which it was authorized, the issued revealed by the European Human Rights Court in cases Contreras v. Spain<sup>2</sup> and Venezuela Bugallo Prado v. Spain, previously cited).

Provision of article 91<sup>1</sup> paragraph 8 Code of Criminal Procedure according to which the recordings can be achieved also at the request of the victim on the addressed communications, with the authorization of the court, it represents an implementation of the provisions of the causes European Human Rights Court A. v. France (judgment of 5 March 1991) and MM v. Norway (judgment of 8 April 2003), but it is contradicted by article 916 paragraph 2 Code of Criminal Procedure, according to which the records referred to in this section, *submitted by the parties*, can serve as evidence if they are not prohibited by law, which may lead to situations such as those identified for the same reasons (obtaining the

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<sup>1</sup> According to article 143 paragraph 3 of the Code of Criminal Procedure, there solid clues when from the existing data it results the assumption that the person to whom it is applied the prosecuting action has committed the act.

<sup>2</sup> European Human Rights Court, July 30, 1998, no. 27671/1995, Venezuela Contreras v. Spain RJD 1998-V, no. 83.

registration by the person involved in the conversation, but at the request and with the support of the police) and a violation of article 8. (Volonciu & Barbu, 2007, p. 148)

Regarding the predictability of the law, we believe in the existence of contradictory laws, that is the Code of Criminal Procedure and special laws listed above, providing still the possibility for making telephone intercepts only based on the *prosecutor's authorization*; it may result in the detention of a contradiction in Romanian state law in the event of a new case to the European Human Rights Court, as happened in the case Kopp v. Switzerland.<sup>1</sup>

In the doctrine (Coca, 2006, p. 72) it was considered that although the Law no. 281/2003 has made harder the process of obtaining the authorization for interception and recording, the competent public authorities in the national security domain would meet the legal regime provided for by article 91<sup>1</sup>-91<sup>5</sup>, the procedure in other way could lead to the inability of using the unlawfully obtained evidence in the criminal proceedings.

This view is supported also by the provisions of article X of Law. 281/2003, which states that “whenever *other laws* contain provisions regarding the *disposition by the prosecutor* of making, maintaining, revocation or termination of the detention under remand measure, the provisional release and the obligation of not leaving the city, the safety measures provided by article 113 and article 114 of the Criminal Code, *the interception and recording of conversations*, searches, arrest and surrender of correspondence and items sent by the defendant or submitted to it, *shall apply accordingly, the provisions of article I of this law*” (motivated authorization of the prosecutor).

The lack of this clear framework in this field has led to the formulation of different interpretations, both in theory and in practice. Thus, it is considered that the provisions of the special laws are applicable when there are conducted specific intelligence activities and those of the Code when the interceptions are available for criminal instruction. We believe that such an approach is unsustainable and it is only possible if the special laws regulations should include *specific guarantees* on the intrusion by the intelligence services in the privacy of a person. By invoking the national security reasons for ordering the interception under a procedure, other than that of the Code, it leads, in our opinion, to a breach of article 8 of the Convention on European Human Rights, even if they would not be then used as

<sup>1</sup> European Human Rights Court, March 25, 1998, no. 23224/1994, Kopp v. Switzerland.



evidence in criminal trials. (Volonciu & Barbu, 2007, p. 137)

The above laws are special laws that fall under the report of sanctioned crimes under serious criminality, responding to the need of the state to ensure the national security, public safety or the economic well-being of the country, prevention of disorder or crime, but they are *not predictable enough*, they do not include procedural rules and guarantees required by paragraph 2 of article 8, complementing the provisions of the Code of Criminal Procedure. From this point of view, as long as they contain contradictory provisions, given the European Human Rights Court's jurisprudence and the provisions of article 20 of the Romanian Constitution, it must be established by the Code of *implied repeal* of conflicting provisions of the law.<sup>1</sup>

For this purpose the European Human Rights Court ruled the case of Dumitru Popescu v. Romania (no. 2)<sup>2</sup>, which found being respected the right to a fair trial (article 6), but violating the right to privacy guaranteed by article 8 of the Convention.

In fact, the applicant Dumitru Popescu was one of the 19 defendants prosecuted for offenses of smuggling and association to commit offenses, which were the object publicized as the "*Cigarette II*" case.

The applicant alleged, among others, the breach of article 8, where the right to privacy was violated because of his phone interceptions.

With reference to article 8 of the Convention, the Strasbourg Court found that it had been violated because the Law no. 51/1991 on national security does not comply with the European Convention, as it *does not provide a minimal protection degree against arbitrariness*, required by this Article of the Convention.

Thus, the Court noted the lack of independence of the competent authority (the prosecutor) for authorizing the recordings, the lack of time limits established by law, without any *a priori* or *a posteriori* control of the extent of listening to conversations by a judge. Thus the European Human Rights Court emphasized the fact that the internal law does not require to the intelligence services or the prosecutors to file the criminal file documentation that led to the request, or

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<sup>1</sup> In the case law it was established that by the illegal character it was understood the lack of the necessary legal authorization and quality of the person who made the recordings of telephone conversations and discussions between people (I.C.C.J., Criminal Section, Decision no. 2706 of 5 June 2003, [www.scj.ro](http://www.scj.ro)).

<sup>2</sup> European Human Rights Court, April 26, 2007, no. 71525/2001, Dumitru Popescu v. Romania.

authorize interceptions, has observed and the inexistence of the guarantees for the protection of the intact and complete records and their destruction, pointing out that the law does not require the prosecutor to state the intercepted telephone number, and it did not provide the situation where the information obtained through interception of telephone conversations could be destroyed.

The Court also noted the lack of independence of the authority that would have been able to certify the reality and reliability of the records, since it was the Romanian Intelligence Service, the same authority which was responsible for intercepting the communications, the Court considered it necessary to have a public or private authority independent of the one that made recordings.

The court welcomed the legislative changes outlined by the Government in its observations (on the fact that currently, the interception and recording are performed after obtaining a permit from the judge, and that, in matters of controlling the validity of the records, the competent authority is the National Expertise Criminology Institute, under the Ministry of Justice, where the experts have the quality of civil servants and they are independent of the competent authorities for intercepting or transcribing the heard conversations), but it also revealed that they were introduced after the time of the facts.

The court found that, despite the amendments to the Code of Criminal Procedure, currently the surveillance measures may be ordered by the prosecutor, according to the procedure laid down in article 13 of Law no. 51/1991, *which has not yet been repealed*, showing that in a recent decision<sup>1</sup>, the Constitutional Court ruled that this article is in line with the Constitution, invoking the special feature of the Law no 51/1991.

Regarding article 6 of the Convention, the European Human Rights Court found that it was not violated. Thus, the European Court held that the evidence on which the applicant states that it was obtained under the internal law and article 8 of the Convention *were not the only ones that were considered by the courts*, when they convicted the applicant and stated that the applicant himself does not dispute to the domestic courts or the European Human Rights Court the contents of recordings, but the law under which they were obtained.

Thus, the guarantees offered by article 8 of the Convention concern all possible situations, and not only the interceptions made within a criminal trial, and that

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<sup>1</sup> C.C., Decision no. 766/2006 (Official Monitor, No. 25 of 16 January 2007).

obtained evidence by violating the article 8 does not automatically lead to the violation of article 6 on the right to a fair trial. Just so happens that the interferences are found mainly within the criminal proceedings and only to the extent where the evidence was so obtained should be filed.<sup>1</sup> Introduction of the legal provisions in the Chapter Evidences and means of evidence from the Code of Criminal Procedure cannot therefore be interpreted by state authorities as a condition only for “*investing*” the evidence with a legal feature. An example of misapplication could be interception of telephone communications under the authorization of the prosecutor under special laws or under secret normative acts (orders, instructions of Ministers, Regulations unpublished in Official Monitor) for **monitoring a person's actions** (interception of conversations according to article 13 paragraph 1 of Law no. 51/1991) and then obtaining legal authorization if it finds indications of committing some crimes.

In the practice of the Romanian judicial authorities and public authorities there can be generally found violations of the Convention on European Human Rights, that is there are specialized organizations that “mask” the interception under the form of records related to the location in space and time of the phone, call duration, telephone numbers between which there were calls, including the identity of the persons that use the telephone numbers and thus excluding an audio recording for the purposes of the Code of Criminal Procedure, acting outside the law and in violation of the requirements of the Convention.<sup>2</sup>

From the documents that are often submitted that prosecution files it results that receiving the notification of a judicial body (police, prosecution, etc., without the court's authorization under the Code of Criminal Procedure) *after the commission of an offense* by a person the special interceptor units (the Special Intelligence Service or the Information Service of M.I.D) submit such information from the period previous to the notification, which is evidence in their existing database that exceed the legal framework or - at least – the proof of their free access to databases

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<sup>1</sup> The test consists in determining the existence of a “*reasonable appearance*” that the applicant had been subject to such measures or as part of a class of persons who are subject to interception, was used in the case of *Hilton v. United Kingdom*, the decision of inadmissibility on July 6, 1988, in the Case *Camenzind v. Switzerland*, judgment of 27 February 1995 or case *Halford v. United Kingdom*, judgment of 25 June 1997.

<sup>2</sup> In the case of *Malone v. United Kingdom*, judgment of 2 August 1984, the Court dealt with the registration of telephone numbers through a system connected to a printer that also recorded the time and duration of the call (not the content of the conversation), there being no provision in English law allowing this practice to Post Office (telephone operator) that transmitted the information to the police, even without a warrant, being found as a violation of the Convention.

of mobile or fixed telephone Cooperation, issues that are likely to lead to a conviction of the Romanian State on the ground of the Convention on European Human Rights, even without recording the conversation.

### **3. Conclusions**

The national law has evolved a lot in this area, the New Code of Criminal Procedure contains the provisions that are consistent with the standards set by the Convention. The development of a normalcy was possible through the adoption of related special legislation (e.g. Law no. 298/2008 on the retention of data generated or processed by providers of communications - the current one), and also by the creation of effective means of control and liability (criminal, civil and disciplinary) of the magistrates that broke the legal rules in the field.

Therefore, we consider that the Romanian legislator must continue his efforts to adapt the national legislation to the requirements of community rules<sup>1</sup> in the field and the jurisprudence of the European Court of Human Rights.

An important role in compliance with article 8 of the Convention had the Romanian magistrates, in particular, and the institutions in the field, who understood the importance that a modern society must grant the protection of the human right to privacy. In many cases judges have censured some actions that represented true interference in the privacy of a person, acting as the first judges of the Convention. At the same time it is necessary to highlight the fact that there were many situations where, rightly, they found that the interference by a public authority with the right to privacy was necessary to defend the rule of law.

It also should be noted that a misunderstanding of the requirements imposed by the EU or the European Court of Human Rights may give rise to serious consequences for the rule of law. Thus, incompetence or bad faith in this area could be detrimental to determine or adopt a law favorable to the crime environment or the manifestation by the magistrates of some reluctant attitudes regarding the disposal of the authorizations for audio and video interception and recording. That is why we consider that both the legislative and the judiciary power should join efforts in achieving a framework of normality in this area, thus avoiding any imbalance.

Finally, we should highlight to the legislator the existence of some special rules that are not in line with the Convention standards in the field, existing the risk of convicting Romania by the European Court of Human Rights and other causes as

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<sup>1</sup> It will be taken into account the community law incident in the field with exact reference to the Recommendation no. R (95) Council of Europe, Committee of Ministers on the protection of personal data in telecoms services and, in particular, telephone services, adopted on February 7, 1995, at the 528<sup>th</sup> meeting.

well. Therefore, we resume the proposal made in the first part of the article, which is to provide in the Law of applying the New Code of Legal Procedure the express abrogation of the contrary stipulations, which exist in the special laws.

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