Considerations on the Interceptions and Audio-Video Recordings Related to the Convention on Human Rights and Fundamental Freedoms

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Abstract: The present paper regards the issue of interceptions and audio-video recordings, in light of Article 8 of the European Convention on Human Rights. Therefore, a democratic society imposes a pressing need for respecting the right to one's "private and family life, his home and his correspondence", which is subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". Hence, the national legal framework regarding interceptions and audio-video recordings has to provide sufficient guarantees so as the right to privacy is not violated.

Keywords: privacy; correspondence; constitutionality

On one hand, the Roman legislature's goal was to make sure that the guarantees imposed by the Constitution and by the Convention for defending human rights and basic liberties were respected, through the changes made in legal provisions regarding interceptions and audio-video recordings.

But, on the other hand, law texts referring to interceptions and audio or video recordings as proofs pose problems, both from the point of view of their conformity to constitutional and European provisions and the application of these provisions.

In order to justify exceptions of unconstitutionality, it was supported the idea that the legal provisions mentioned contravene constitutional provisions from article 16 referring to equal rights, article 21 paragraph (3) concerning the right to have an equitable trial, article 24 paragraph (1) about the guarantee of the right to be defended, article 124 referring to doing justice, article 28 concerning the secrecy of

correspondence and article 53 about restriction on the exercise of certain rights or freedoms, because an obvious disproportion is created in favour of the penal investigation body, the accused are devoid of any efficient means of protecting themselves, showing that recordings and interceptions are unwarranted or unfounded.

Regarding these claims, the Constitutional Court found them unfounded; moreover, article 91^1 Criminal Procedure Code having the marginal name of "Conditions and cases of interception and recording conversations or communication made by telephone or any other electronic device for communication" and article 91^2 Criminal Procedure Code having the marginal name "Bodies that intercept and record, both from the Criminal Procedure Code", have sufficient procedural safeguards to ensure the right to a fair trial[1].

On the other hand, the Court showed that any breach of these regulations is not a question of constitutionality, but one of application, but this exceeds the competence of the Constitutional Court, while examining and solving these problems are the exclusive competence of the court vested with criminal trial settlement.[2]

Specialized literature underlines that current regulations related to interceptions and audio-video recordings show the national legislative concern for aligning domestic provisions with those of international and European standards regarding protection and defense of human rights. Thus, national provisions were put in agreement with the European Court of Human Rights in Strasbourg, showing the need for a judicial review from independent and impartial magistrates empowered to decide on the opportunity and necessity of using these investigation methods. (Dambu, 3/2007, pp. 116-119)

Taking into account article 91^1 paragraph 1 Criminal Procedure Code, interceptiona dn audio-video recording can be used only when these are needed to establish the right situation because the identification or location of participants cannot be made through other means or the investigation would be much delayed.

[1] Decision no. 956 from 25/06/2009 referring to the rejection of exception of unconstitutionality of dispositions from art. 91^1, art. 112, art. 113, art. 115, art. 116 and art. 120 paragraph 2 from Criminal Procedure Code, published in The Official Gazette no. 577from 19August 2009.

[2] Decision 410 from 10April 2008 referring to the rejection of exception of unconstitutionality of dispositions from art. 91^1 and 91^2 from Criminal Procedure Code, published in The Official Gazette no. 338 from 1 May 2008.

We notice that this express provision of law is strictly interpretable, the legislative establishes that the means of interception and recording are to be seen as additional, only if classic methods cannot lead to establishing facts or to identification of the perpetrators.

The exceptional nature of the measure is emphasized by the repetition, in different forms, of the requirement not to be authorized except for the case when the truth cannot be revealed in another way: "it is require in order to reveal the truth", "this method is essential to ascertain truth", "serious crimes which cannot be found or whose perpetrators cannot be identified through other means", according to article 91^1. Though the text contained a list of serious crimes, invoking even Law 78/2000, the list only provides examples, because in the end, it refers to any other serious crimes for which this measure is essential. (Harastasanu, 2/2004, pp. 69-74) Contrary to these ideas, it was expressed the opinion that interceptions cannot be pursued in any crime, except for the ones named *expressis verbis* in the article 91^1 paragraph 2, for which prosecution is done automatically. (Jidovu, 2007, p. 203)

Another guarantee against authorities' interference in intimate and private life of people by intercepting and recording conversations is the obligation of doing these only after having court authorization containing all the elements provided by article 91^1 paragraph 9 Criminal Procedure Code.

This authorization can be asked by the prosecutor that "performs or supervises penal investigation". In the previous regulation, it was written that interception and audio-video recordings were done on the request of the "prosecutor", this aspect strengthens the idea that legal provisions regarding interception ask for legally-started penal prosecution.

A guarantee provided by Criminal Procedure Code also establishes some rules regarding the period for receiving authorization of interception and recording audio or video materials, this period cannot be longer than 30 days, while the total amount of time for intercepting one person cannot last more than 120 days. But, if during the interception, there are solid evidence regarding the preparation or accomplishment of serious crimes, it is legally possible to ask for another interception and recording regarding the new crime. In this way, it is possible to intercept and record communication for the same person on a period longer than 120 days, as it is written in article 91^1 paragraph 5 Criminal Procedure Code.

The stipulations of article 91^1-91^6 Criminal Procedure Code were repeatedly subjected to constitutionality control, the main argument to support the idea that

these stipulations oppose the provisions from article 26, article 28 and article 53 from the Constitution in connection to article 8 from the Convention for defending human rights and fundamental liberties was that the prosecutor that carries out or supervises criminal investigation can approve audio-video interception before starting criminal investigation, before the penal trial starts or before a crime is committed.

Regarding this censure, the Court noticed through Decision no. 1556 from 17.11.2009 that these have been subjected to control or similarly criticized, being analysed when it was given the Decision no. 962 from 25 June 2009 and Decision no. 410 from 10 April 2008 that rejected similar exceptions as unfounded.

Constantly, the Court considered that relative provisions regarding interceptions and audio-video recordings provide sufficient guarantees, establishing by law the detailed justification of giving an authorization, the conditions and methods for recording, establishing some limits regarding the length of measuring, written recording and attesting the authenticity of recorded calls, the possibility of hearing the entire recording, defining intercepted characters; the possible failure of respecting these regulations is not a matter of constitutionality, but one of application that is beyond its competence.[1]

Moreover, the Court established that "precursory documents have their specificity which cannot be identified or connected to the specificity of other institutions, having as a purpose the verification and completion of information had by criminal investigation bodies in order to have a basis for penal investigation. Having a sui-generis character that does not depend on the hegemony of guarantors imposed by the specific stage of criminal investigation, it is unanimously accepted the fact that during previous investigations, it is forbidden to take court measures or to use evidence that suppose the existence of a started penal trial."

[1] Decision no. 962 from 25 June 2009 of the Constitutional Court referring to the rejection of the exception of unconstitutionality of the provisions from art. 91^1 from Criminal Procedure Code, published in The Official Gazette 563 from 13 August 2009; Decision no. 410 from 10 April 2008 referring to the rejection of the exception of unconstitutionality of the provisions from art. 91^1 and 91^2 91^1 from Criminal Procedure Code, published in The Official Gazette 338 from 1st May 2008; Decision no.1556 from 17 November 2009 referring to the rejection of the exception of unconstitutionality of the provisions from art. 91^1, art. 91^2 paragraph 2 and art. 91^5 from Criminal Procedure Code, and the provisions of art. 10 paragraph (4) second thesis from The Urgent Governmental Decree no. 43/2002 regarding The National Movement Against Corruption, published in the Official Gazette 887 from 18 December 2009.

The Constitutional Court established that The European Court of Human Rights itself validated provisions subjected to constitutionality control, in the trial Dumitru Popescu versus Romania from 26 April 2007. At that moment, on one hand, it was considered that the law was broken; precisely it was contravened article 8 from the Convention, because at the time of doing the illegal deed, the legislation was different. On the other hand, the Court in Strasbourg claimed that in the new legislative frame (through the modifications of Law no. 281/2003 and Law no. 356/2006), there are numberless guarantees regarding interception and transcription of calls, creating archives for valid data and destroying the unnecessary ones. In this respect, The Constitutional Court considered that the criticized provisions offered protection against arbitrary involvement in a person's exercise of the right to live, the law contained terms having unequivocal meaning.

We notice the description of the unequivocal interpretation according to which obtaining such proof means prior to criminal investigation, against the specific roles for a penal trial, is bound to hurt the trial's equity and the immunity of the secret of correspondence.

Connected to the appraisal of the Constitutional Court expressed above, in order to appreciate if the interference of public authorities is justified and respects the rules imposed by the provisions of article 8 from the Convention, The European Court of Human Rights envisages compliance to rules imposed by the second paragraph of the mentioned article.

The European Court of Human Rights believes that the notions "private life" and "correspondence" in the context of article 8 paragraph 1 also refer to phone calls, therefore their interception, recording data and their possible usage in a criminal investigation against a person is "an interference from public authority" while exercising the right guaranteed by article 8 from the Convention (the trials Calmanovici against Romania, Malone against the United Kingdom, Kruslin against France and Huvig against France, Halford against the United Kingdom etc.).

Just like we have previously shown, in order to provide the necessary guarantees for respecting the human right to intimate and private life, the interference of public authority must be justified in accordance to article 8 paragraph 2. The first condition to be respected is that the interference is provided by the law. This supposes not only the respect for internal right, referring also to the quality of the law which must be compatible with the system of law supremacy (the trial Khan

against The United Kingdom). In the context of secret supervising exercised by public authorities, the internal right must offer protection against an arbitrary interference in the exercise of an individual right protected by article 8 from The European Court of Human Rights (trials Malone versus The United Kingdom, Weber and Saravia against Germany).

The expression "provided by the law" implies two requirements: the accessibility and predictability of the law. From the point of view of predictability, the Court said that the law regarding interceptions and recording calls and communication must be extremely precise, the existence of clear and detailed rules seems to be indispensable (the trial Huvig against France). Thus, article 8 from the Convention is not respected, taking into account the fact that legal national provisions were not clear enough about the amplitude and ways of exercising the power for appreciating authorities in the mentioned field, and the nature of crimes and categories are not defined by people whose communication is bound to be intercepted, there is nothing specified regarding the conditions for drawing up written reports containing calls, it is not established the maximum time for recording etc.

The second condition from article 8 paragraph 2 from the Convention is that the interference of authority must be necessary in a democratic society for defending a legitimate aim. This refers to protecting national security, public safety, defending public order, preventing penal deeds and protecting the rights and interests of other people. Thus, it is mentioned that the existence of laws allowing interception of communication may be necessary to defend order and to prevent criminal deeds, but the adopted supervising system must have enough guarantees against intemperance (the file Malone against the United Kingdom).

The last necessary condition is the creation of jurisprudence of the European Court, leading to the appearance of a new principle –that of proportion. This supposes respecting proportions between interference, respectively the measure taken by public authority and the defended legitimate purpose.[1] Consequently, it is necessary to determine the existence of an imperative social need that imposed the right to private life.

[1] Camelia Bogdan, About the Opportunity of Administration Audio-Video Interception in a Trial, http://www.inm-lex.ro/fisiere/pag_34/det_416/1404.doc.

The right to have interceptions and audio-video recordings, when there are only a few data regarding the preparation or accomplishment of an illegal deed affects the principle of proportionality established by article 8 paragraph 2 from The Convention for Defending Human Rights and Fundamental Liberties, because the seriousness of the penal deed which has not been accomplished cannot be evaluated yet to be compared to the seriousness of the interference in exercising the right to private life.

In this context, the Court believes that the viable legal provisions regarding interception and audio-video recordings meet the requirements imposed by the Convention, offering sufficient guarantees in order to protect the fundamental rights of the individual. But, just like we have shown and The Constitutional Court does, too, the only problem is that of applying these provisions, it is not a matter of contents.

Treading on delicate ground, paragraph 6 article 91^1 from Criminal Procedure Code establishes that "recording calls between the lawyer and the person represented or assisted in trial cannot be used as a proof unless this contains useful data or information regarding preparation or accomplishment of a crime done by the lawyer, as paragraph (1) and (2)".

The European Court of Human Rights gave some provisions on this matter, analyzing if the difference between the professional activity of the lawyer and the other deeds of this person is clearly regulated by internal rules, lack of clear definition regarding conditions, methods and the authorized person that can make this distinction may lead to breaking the law, article 8 from The European Court of Human Rights (E.C.H.R.).[1] Moreover, taking into account the privileged relationship between lawyer and client and the fact that the professional secret of the lawyer is not opposable to judicial authorities and revealing the secret has consequences not only on the lawyer's private life, but also on the good judicial administration and on the right to defend oneself, therefore the Court recommends maximum caution and the augmentation of guarantees when such a provision is given. (Volonciu & Barbu, 2007, p. 147)

The principle of respecting the professional secret of advocates and the confidentiality of the relationship advocate-client was discussed by The Council of Bars and Law Societies from Europe that adopted two documents in this: the

[1] Trial Niemetz vs. Germany, provision from 16.02.1992,on www.coe.int.

devotion code of the European lawyer from 28 October, last modified in 2006 and the Charta of basic principles of the European lawyer, adopted in plenum on 24 November 2006.

According to the "National rapport against corruption in 2007" made by Transparency International Romania, interference in the relationship advocate-client is unacceptable, the confidentiality specific to this relation is essential to guarantee the right to defend oneself, contained in article 6 from The European Convention of Human Rights.[1] The possibility of violating the relationship advocate –client by telephonic interception is one of the concerns of the Commission of European Communities, which is in the "Rapport Regarding the Evolution of Accompaning Measures in Romania after Adhesion". (Volonciu & Barbu, 2007, p. 148)

In the attempt to rectify the mentioned problems, through the project for approving the law no. 60/2006, in the initial form sent for promulgation, it was modified paragraph 6 from article 91^1 Criminal Procedure Code, having the following content: "recording calls between lawyer and the part represented or assisted in the trial is forbidden and cannot be used as an evidence."[2]

This modification was not accepted and by requesting the re-examination of the law, the President of Romania asked for the transformation of this legal procedure, keeping its initial form, for in this form, the text limits illegally the recording of calls when the lawyer breaks one of the laws from paragraph 1 and 2 of article 91^1 Criminal Procedure Code. Moreover, the insurance and guarantee of confidentiality between lawyer and client does not justify the disappearance of the following: "the lawyer's preparation or accomplishment of a crime mentioned in paragraph 1 and 2" of the above article, thus it is not respected the principle of equal rights for all citizens from article16 paragraph 1 from the Constitution.[3]

In this respect, the solution provided by the legal viable text seems to be a try for maintaining balance between the necessity for protecting professional secret and

[1] Transparency International Romania – National Rapport on Corruption in 2007. April 2006 – April 2007.
[2] Law regarding the approval of The Urgent Government Regulation no. 60/2006 for the modification and completion of Criminal Procedure Code, and for modifying other laws– The initial form, sent for promulgation, on http://www.cdep.ro/proiecte/2006/800/20/4/pr824_06.pdf.
[3] Request for re-examination from The President of Romania concerning the law regarding the approval of The Urgent Government Regulation no. 60/2006 for modifying and completion of Criminal procedure Code and for modifying other laws on http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=7861.

efficient fight against certain forms of delinquency. But, this provision is not efficient enough, because such a general provision may touch confidentiality of all talks between other clients and the same lawyer. Therefore, for a third part which is well-intended, the professional secret between a lawyer and his/her client will no longer be guaranteed, though it is essential. [1]

According to provisions from article 91^2 paragraph 5 Criminal Procedure Code, "dialogues or intercepted and registered communication can be used in another trial if they contain precious and relevant information regarding preparation or accomplishment of another crime mentioned in article 91^1 paragraph 1 and 2".

We notice the fact that these provisions, introduced through article I point 48 from Law no. 356/2006, allow the usage of discussions or intercepted and recorded communication for other usages than the initial ones.

The law text does not underline this aspect about dialogues or communication, therefore it results that they can be used for other trials, whether they are connected to the trial for which they have been prepared or they are linked to it, this is the case of the evidence used in a certain trial and they do not bring information related to the deed in question or they do not contribute to the identification or location of the parts involved, being in the archive of the Prosecutor's Office. (Volonciu & Barbu, 2007, p. 156)

Connected to these aspects, The European Court of Human Rights considered that relative provisions to the invoked aspects represent an interference of public authorities in the exercise of right to correspondence and private life, this fact contravenes article 8 from The European Convention, if it is not used for the purposes mentioned in paragraph 2 and if it is not necessary in a democratic society[2] (trial Kruslin against France).

E.C.H.R. invoked in its cat in jurisprudence opinions from the French doctrine, supporting the mentioned point of view. Thus, if penal tracking is continued, recorded calls can be used as evidence for the facts that justify the measure of interception, but these cannot be used for bringing proofs of the crimes that do not exist in the judge's authorization. The mentioned provisions were seen as exceptions of unconstitutionality, the arguments of the authors were disputed by

[1] Gheorghita Mateut, Laws for Modification and Completion of Criminal Procedure Code 2006 (Law no. 356/2006 and O.U.G. no. 60/2006) Virtual Progression Elements or a True Return to Past? p. 59-60.
[2] E.CH.R., trial Kruslin vs. France, Decision from 24.04.1990.

the Constitutional Court. Therefore, the authors of these arguments claimed that the mentioned legal provisions contradict constitutional provisions of article 16 referring to equity in rights of article 21 paragraph (3) concerning the right to a fair trial, to article 24 paragraph (1) referring to guaranteeing the right to defence, to article 124 about doing justice and to article 28 about the secrecy of correspondence.

Again from the perspective of article 91^2 paragraph 5 Criminal Procedure Code, we must analyze the situation of the third part communicating with the person whose calls are intercepted and recorded and who may commit several abuses. As far as these persons are concerned, their right to private life is contravened, they do not benefit from enough guarantees regarding the protection of their rights; in most cases, these persons are notified about their calls being recorded.

We believe that the elision from the legal text of the words "intercepted and recorded respecting the law" or "legally intercepted and recorded" is meant to defeat both the provisions of article 6 and 8 from E.C.H.R. and those from article 21, article 24, article 26 and article 28 from the Constitution. Our support comes when the viable legal text allows and includes the usage of interceptions which have not been authorized appropriately, of recordings done by incompetent bodies and any interception which does not respect legal provisions, no trial section is mentioned in this case. Or, to allow the usage of authorized interceptions and recordings for another deed and for another person corresponds to violating all mentioned rights.

From another point of view, it is obvious the fact that, besides interfering in the private life of the person whose communication has been legally intercepted – this interference is allowed in certain conditions – it is violated the right to private life of all persons that communicate with the intercepted individual. Moreover, the European Court of Human Rights identified the violation of article 8; in the trial *Lambert vs. France,* regarding the decision of The French Court of Cassation that refused a person's right to criticize personal recorded phone calls, because they have been done by a third part's telephone line, E.C.H.R. referred to the fact that French instances "have taken the content out of the defending mechanism" of the

Convention, being able to deprive from the protection of the law those persons that communicate on the telephonic line of other persons.[1]

We believe that these persons are not offered enough guarantees in order to have their own rights protected, because it is possible that they could never be made aware of their calls having been recorded, this aspect can lead to abuses, including article 91^2 paragraph 5 Criminal Procedure Code, which allows the use of intercepted and recorded calls and communication in another trial.

In this case, the violation of article 6 and 8 from E.C.H.R. and of article 21, article 24, article 26 and article 28 from the Constitution is obvious, being motivated by the fact that these calls or communication can be intercepted illegally, not having the words "intercepted and recorded according to the law" in the legal text. Therefore, no matter if they are done lacking authorization or by incompetent bodies, the legal provisions that allow the usage of such interceptions in other trials is a serious violation of that person's rights.

We consider that it is necessary to modify and complete legal provisions form article 91^2 paragraph 5 Criminal Procedure Code, in order to offer guarantees to protect the right to private life and to a fair trial of the persons whose calls are intercepted and recorded for other trials.

According to provisions from article 91^3 paragraph 1 Criminal Procedure Code, intercepted and recorded calls and communication regarding the deed that is on trial or that contribute to the identification or location of people involved will be wholly presented in a written record.

As far as intercepting and recording calls and communication are concerned, these are not pieces of evidence by simply doing them, but only if they are consigned in a procedure document, respectively the written record of transcription and if they contain facts or contexts that are relevant for finding the truth. (Pavaleanu, 2007, p. 288) The written record above is a means of evidence regarding facts and contexts revealed after interception.

Regarding these aspects, when only the written record is the evidence means for creating the personal belief of the judicial bodies, invoking the principles of having equitable methods and guaranteeing the right to defense, in order to present communication as accurate as possible, we believe it is necessary to assure the

[1] The European Court of Human Rights, Trial Lambert vs. France, petition no. 23618/1994, Decision from 24 August 1998.

right of the defendant of the recriminated or defendant to take part in this activity of criminal tracking. Our claims are based on the fact that provisions from article 91^3 paragraph 1 Criminal Procedure Code need to be corroborated with provisions from paragraph 1 of article 172 Criminal Procedure Code, that provide the possibility that the defendant of the recriminated or defendant can assist to any activity of criminal tracking. Therefore, we believe that the nowadays version of the law text violates Constitutional provisions and the mentioned principles.

According to provisions of paragraph 3 of the mentioned article, this written record is to be given to the instance, accompanied by the copy of the recording, after the intimation of this in connection to the specific trial, the original is to be kept at the Prosecutor's office.

From this point of view, the European instance in the trial *Kruslin vs. France*, noticed that among the guarantees missing from the internal regulation was also the concern for making known all recordings without any technological interference, the judge having the difficult task to check on the spot the number and the length of the original tapes.[1]

Moreover, E.C.H.R. considers that there are not offered enough guarantees, in the context of lack of provisions regarding maintaining recordings complete and intact, for a possible control done by the instance and by the defense.[2]

In the same respect, in a recent trial against Romania, the Court underlined the importance of having regulations of real guarantees and of having intact and complete recordings which can be used by judicial bodies and by the defense[3].

Paragraph 2 article 91^3 Criminal Procedure Code establishes the way of certifying the authenticity of the written record, also referring to specific provisions for situations when state secrets must be written down, in this context it is required to have a separate written record, kept respecting legal norms regarding documents that contain classified information.

Concerning this matter, the legal obligation imposed to all people that have access to this written record is to be given the permission regarding access to classified information; the institutions must also offer adequate conditions for keeping such pieces of information.

[1] E.C.H.R., trial Kruslin vs. France, Decision from 24.04.1990, www.coe.int.
[2] E.C.H.R., trial Prado Bugallo vs. Spain, Decision from 18.02.2003, www.coe.int.
[3] E.C.H.R., trial Dumitru Popescu vs. Romania, no. 2, Decision from 26.04.2007, www.coe.int.

Regarding another matter, being a trial evidence, the defense can study the material and contest it, this supposes partial or total declassification, by allowing access to this written record both to the defendant and his/her defendant lawyer (Volonciu & Barbu, 2007, p. 159).

Regarding the provisions of paragraph 5 article 91^3 Criminal Procedure Code, we believe that these also contradict the provisions from article 26 and 28 from the Constitution, in their nowadays form, because in that trial, it was entailed the non-starting of penal tracking for situations which do not really exist, which are not mentioned by provisions or one of the component elements is missing. These entire hypothesis suppose the lack existence of the crime, therefore, there is no penal responsibility. Connected to the provision that says that the physical support which contains the recording will be put in the archive of the Prosecutor's office until the prescription term for judicial liability, we notice the impossibility of applying this purview in the given situations, the prescription term cannot be determined.

Moreover, we believe that relative legal provisions regarding the sending to archive the physical support containing the recorded communication in the trials that received decisions of not sending to be judged pose problems of security and confidentiality of data contained. Our actions come in the context when, in the moment of recording, a large number of people get acquainted with the content of the calls, including the bodies for judicial tracking, the prosecutor, the persons responsible with technical support; in practice, there are cases having interceptions done for judicial purposes, finally arriving in the hands of unauthorized people or even of the press. In this respect, there is the risk of having blackmail or vilification in the case of intercepted persons.

In connection to the presented aspects, it is obvious that law texts offer guarantees imposed by the Constitution and the Convention for Defending Rights and Fundamental Liberties, but we believe that these things remain only written. Practice has shown that applying these provisions leads to controversies, in most cases, the mentioned guarantees are not really assured.

Among the judicial guarantees for people whose calls are intercepted, there is the possibility of "verifying means of proving", in article 916, the prosecutor, the involved parts or the instance can ask for a technical expertise of interception in order to prove their authenticity and truthfulness.

Therefore, a person investigated based on telephonic interceptions or audio recordings can oppugn the fact that the respective voice is his/hers or the fact that

the recording is authentic or counterfeited. In this case, the Prosecutor's Office addresses to the National Institute for Criminal Expertise to choose an expert to establish the authenticity of interception. The expertise of audio recording is made by presenting the magnetic support containing the audio recording to a specialist in the expertise of voice and talking, in order for him/her to determine whether the recording is authentic or is a copy or counterfeit. Without having this certainty, the recording on magnetic band cannot be accepted as a proof.

But, the legislative consecration of the possibility of asking for a contra-expertise does not imply it is effectively done, because in Romania, according to the nominal table of authorized criminal experts[1] of the Government's Decree no. 75/2000, there is a single criminalist expert specialized in "the expertise of voice and talking".

The existence of a single expert, having this specialization, makes that the value, as judicial proofs of telephone interceptions, to decrease; implicitly, the same thing happens with the penal files which are based on these. Because there is no other expert on "voice and talking", the person whose calls were intercepted and recorded cannot ask for a second expertise or a contra-expertise or to hire a consulting expert.

Though the Government of Romania told The European Court of Human Rights that in the trial Dumitru Popescu vs. Romania[2], due to some ulterior legislative transformations, audio-video recordings can be controlled by The National Institute for Criminalist Expertise, because in our country there is only one authorized expert, thus such an expertise cannot be done.

The European Court of Human Rights said the same thing in the trial Dumitru Popescu against Romania, underlining the authorities' lack of independence that might have certified the truthfulness and reliability of recordings, because this was The Romanian Service of Information, the same authority in charge with intercepting calls. Thus, the Court considered *necessary the existence of a public or private authority, independent from the one that did the listening*.

Given the fact that in Romania, in the field of voice and talking expertise, there is only one expert considered incompatible regarding the expertise of communication through electronic means (e-mail, instant messaging etc.), until now, it has not been

[1] http://www.inec.ro/experti.php.

[2] E.C.H.R., trial Dumitru Popescu vs. Romania, no. 2, Decision from 26.04.2007, www.coe.int.

identified any technical judicial expert on the lists of the Ministry of Justice that has the required certificate. Lacking certified judicial experts in electronic communication, technical expertise asked for in specific trials do not receive an answer.

Therefore, verifying the interception of e-mails and calls through informatics means, referred to in article 91^6 through expertise, cannot be done as long as there is no expert in the field.

Though our legislation offers enough guarantees regarding checking written validity, guarantees that appeal to the institution of certifying, because of the insufficient number of independent, impartial experts, there are difficulties in applying provisions from article 91^6 Criminal Procedure Code, which leads to problems regarding the Constitutional principles about free access to justice and the guarantee of the right to defense.

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