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SOME CONSIDERATIONS REGARDING THE EXTENT OF TECHNICAL SUPERVISION AVAILABLE TO A PERSON WHO DOES NOT ACQUIRE THE QUALITY OF THE DEFENDANT IN THE CASE

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Abstract: *The special methods of surveillance or research represent evidentiary procedures, being regulated by the legislator to ensure the collection of evidence useful for the criminal prosecution of those who commit crimes. On the other hand, it is necessary that in the probation activity carried out by the judicial bodies during the criminal process, all the criminal procedural guarantees in the matter of respect for individual rights and liberties during a criminal process are ensured, which is intended to guarantee the freedom of the person, so that, on the basis of the evidence administered in the criminal case file, it is possible to bring to criminal responsibility the one who is guilty of committing an act provided for by the criminal law, but at the same time, if it is proven on the basis of the evidence, that a person is innocent, to submit to him, either a solution of classifying or renouncing of the criminal prosecution, in the criminal prosecution phase, or a solution of acquittal or termination of the criminal process in the trial phase.*

Keywords: *defendant; criminal trial; surveillance measures; rights and liberties; evidence*

1. General Considerations Regarding Surveillance Measures

With a view to the normal development of the criminal process and the achievement of its purpose, criminal procedural provisions have been established that regulate the disposition of surveillance measures, which ensure the achievement of its immediate purpose, respectively, the timely and complete ascertainment of the facts that constitute crimes in view of holding the party accountable.

Thus, we find that society's reaction to those who come into conflict with the criminal law is not arbitrary, but widely regulated by the provisions of the law, so that, between the

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commission of the crime and the application of a punishment to its author through a criminal trial, the development of which should be carried out is based on the principles provided by the legislator in the provisions of Art. 2-12 of the Criminal Procedure Code. In this sense, the criminal procedural provisions legitimize the prerogative of the state to punish (*jus puniendi*), having at the same time the role of establishing the framework in which this prerogative can be exercised, this right not being a discretionary one, it can be exercised only in the content and in the limits provided by law. In order to achieve these objectives, it is necessary that the principles of the criminal process are not applied in isolation, but in a continuous interaction and mutual conditioning, each principle separately, as well as all of them, contributing to finding the truth in a criminal case[1].

In accordance with the need to comply with the most demanding international standards in criminal procedural matters, respectively the standards of the European Court of Human Rights, the provisions of Art. 3 of the Criminal Procedure Code regulates the manner in which the following judicial functions are exercised during the criminal process: criminal investigation (through the criminal investigation bodies and the prosecutor), disposition of fundamental rights and freedoms during the criminal investigation (through the rights and freedoms judge), verification of the legality of sending or not sending to court (through the preliminary chamber procedure) and trial (by the courts).

This separation of judicial functions does not represent the materialization of a concept of organic separation of the representatives of the state authority, vested with the function of bringing to criminal responsibility those who commit crimes, but a practical way to give the judicial bodies the ability, according to their competence, to order through procedural acts, those measures, which, although they affect fundamental rights through their disposition, being restrictive of rights and freedoms, as is also the case with surveillance measures, which can be ordered during the criminal process, ensuring its smooth development, in accordance with Art. 12 of the Universal Declaration of Human Rights, according to which no person can be the object of arbitrary interference in his private life, in his family, in his domicile or in his correspondence, nor of attacks on his honor or reputation, any person having the right to the protection of the law against such interferences or infringements, the provisions of Art. 17 of the International Covenant on Civil and Political Rights, of Art. 7 of the Charter of Fundamental Rights of the European Union, as well as of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that "every person has the right to respect for his private and family life, his home and his correspondence"[2]

2. Disposition of Surveillance Measures

[1] G. Negruț, A. Boroi (2024), Criminal Procedural Law, 4th Revised and Updated, Hamangiu Publishing House, Bucharest, p. 55.

[2] C. Bîrsan (2005), European Convention on Human Rights. Commentary on Articles, Vol. I. Rights and Freedoms, C.H. Beck Publishing House, Bucharest, p. 203

The following activities are qualified and defined in Art. 138 of the Criminal Procedure Code as special methods of surveillance or research: interception of communications or any type of remote communication; access to a computer system; video, audio or photography surveillance; locating or tracking by technical means; obtaining data on a person's financial transactions; detaining, surrendering or searching postal items; the use of undercover investigators and collaborators; authorized participation in certain activities; supervised delivery; obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public.

Through this evidentiary procedure, the aim is to obtain data other than those generated or processed by the providers of public electronic communications networks or the providers of electronic communications services intended for the public[1].

Technical supervision is an evidentiary procedure of using one of the methods provided in Art. 138 para. (1) let. a)-d) of the Criminal Procedure Code, namely:

– interception of communications or any type of remote communication. Interception of communications or any type of remote communication means the interception, access, monitoring, collection or recording of communications carried out by telephone, computer system or any other means of communication, according to Art. 138 para. (2) of the Criminal Procedure Code;

– access to a computer system. By access to a computer system we understand the penetration into a computer system or computer data storage medium, either directly or remotely, through specialized programs or through a network, in order to identify evidence. Computer system means any device or set of devices interconnected or in a functional relationship, one or more of which ensures automatic data processing, with the help of a computer program. Computer data means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program capable of determining the execution of a function by a computer system, according to Art. 138 para. (3)-(5) of the Criminal Procedure Code;

– video, audio or photography surveillance. Video, audio or photography surveillance means photographing people, observing or recording their conversations, movements or other activities, according to Art. 138 para. (6) of the Criminal Procedure Code;

– locating or tracking by technical means. By locating or tracking by technical means we understand the use of devices that determine the location of the person or the object to which they are attached, according to Art. 138 para. (7) of the Criminal Procedure Code.

According to Art. 140 of the Criminal Procedure Code, the technical supervision can be ordered by the judge of rights and liberties from the court competent to hear the case at first

[1] I. Neagu, M. Damaschin (2020), Treatise on Criminal Procedure. General Part, 3rd Edition, Universul Juridic Publishing House, Bucharest, p. 535

instance or from the corresponding court in its level in whose district is located the headquarters of the prosecutor's office of which the prosecutor who made the request is a part of, taking into account the provisions of Art. 53 related to Art. 35 and following of the Criminal Procedure Code, or by exception, for emergency situations, by the prosecutor, for a maximum duration of 48 hours, as provided by Art. 141 para. (1) of the Criminal Procedure Code.

3. The Conditions Regarding the Disposition of Technical Supervision

Art. 139 of the Criminal Procedure Code establishes the concrete conditions under which technical supervision can be ordered, respectively the use of one of the evidentiary means provided by Art. 138 para. (1) let. a)-d) of the Criminal Procedure Code. Thus, in order to initiate and perform technical supervision, the following conditions must be met[1]:

- there must be a reasonable suspicion regarding the preparation or commission of a crime from those provided in para. (2) of Art. 139 of the Criminal Procedure Code, namely: in the case of crimes against national security provided by the Criminal Code and special laws, as well as in the case of drug trafficking crimes, crimes under the regime regarding doping substances, carrying out illegal operations with precursors or other susceptible products to have psychoactive effects, crimes regarding to the non-compliance with the regime of weapons, ammunition, nuclear materials, explosive materials and precursors of restricted explosives, traffic and exploitation of vulnerable people, acts of terrorism, money laundering, forgery of coins, stamps or other values, forgery of electronic payment instruments, in the case of crimes committed through computer systems or means of electronic communication, against patrimony, of blackmail, rape, illegal deprivation of liberty, tax evasion, in the case of corruption crimes and crimes assimilated to corruption crimes, crimes against the financial interests of the European Union or in the case of other crimes for which the law provides a prison sentence of 5 years or more. Technical supervision can also be ordered if there is evidence that the lawyer commits or is preparing to commit one of these crimes;

- the measure should be proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime. In this case, the judge of rights and liberties must verify the proportionality of the measure, of the evidentiary procedure of the technical supervision, in relation to one of the following alternative criteria: the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime;

- the evidence could not be obtained in any other way or obtaining it would involve special difficulties that would prejudice the investigation or there is a danger for the safety of people

[1] N. Volonciu, A. S. Uzlău (coord.), R. Moroșanu, V. Văduva, D. Atasiei, C. Ghigheci, C. Voicu, G. Tudor, T. V. Gheorghe, C. M. Chiriță (2014), The New Code of Criminal Procedure Commented, Hamangiu Publishing House, Bucharest, p. 311

or valuable goods. In this sense, we mention that the purpose of any activity in the case of evidentiary procedures is the administration of the evidence, bringing it into the procedural framework to be considered in establishing the judicial truth, which, in turn, can serve as a basis for establishing the facts, the guilt or the innocence of the suspect or defendant and finally for determining the punishment.

In order to comply with this condition, it is necessary to verify the appropriateness of the intrusion into a person's private life and the limitation that would be produced by fulfilling the mandate of technical supervision[1].

Some evidentiary procedures in the category of technical surveillance methods can be carried out, and the obtained evidence can be used in a case without the authorization of the judge of rights and freedoms being required. Thus, the recordings made by the parties may constitute means of evidence without having been authorized to make them.

Although they do not require authorization, as is the case with special surveillance methods, they must be subject to admissibility control in order to meet the requirements set forth in Art. 139 para. (3) of the Criminal Procedure Code, namely: registrations must be made by the parties or other persons; the records must concern their own conversations or communications they had with third parties. Thus, the material recorded under these conditions must include one's own conversations or communications, as it is necessary that they do not affect the right to private life. Art. 139 para. (4) of the Criminal Procedure Code provides a category of relationships that cannot be subject to technical supervision, namely the relationships between the lawyer and the person he assists or represents. In this case, the object of the protection offered by the law is the lawyer-client relationship, the law offering protection to professional secrecy. The judge of rights and liberties can order the issuance of a technical supervision mandate if there are data that the lawyer has committed or is preparing to commit a crime among those provided in para. (2) of Art. 139 of the Criminal Procedure Code, either at the request of his client or on his own initiative, but only in compliance with the entire set of this article.

If, during or after the execution of the measure, it turns out that the technical surveillance activities also concerned the relationship between the lawyer and the suspect or the defendant he is defending, the evidence obtained cannot be used in any criminal trial, and it will be destroyed, immediately, by the prosecutor. The legislator provided a double guarantee to protect lawyer-client secrecy. On the one hand, the destruction of the evidence, and, on the other hand, the impossibility of using the evidence obtained through the violation of professional secrecy in any criminal process.

Art. 139 para. (3) the final sentence of the Criminal Procedure Code allows the administration in the criminal process of any other recordings, even if they are made without the authorization of the judge or without being their own recordings or communications,

[1] G. Mateuț (2019), Criminal Procedure. General Part, Universul Juridic Publishing House, Bucharest, p. 677

basically, any recording can be administered as a means of evidence, if it is not prohibited by law. The legality of the conclusion by which the carrying out of these activities was authorized, of the mandate issued on its basis, of the way of executing the authorization, as well as of the resulting records will be verified, as appropriate: in the preliminary chamber procedure, in the complaint procedure against the dismissal solution, under the conditions of Art. 341 para. (7) of the Criminal Procedure Code, in the procedure provided in Art. 139^2 of the Criminal Procedure Code.

Thus, in the complaint procedure against the dismissal solution, under the conditions of Art. 341 para. (7) of the Criminal Procedure Code (settlement of the complaint by the judge of the preliminary chamber, in the cases in which the initiation of the criminal action was ordered), as well as in the procedure provided in Art. 139^2 of the Criminal Procedure Code (regarding the complaint against a specific information gathering activity), if requests and exceptions were made or, as the case may be, the judge of the preliminary chamber raised ex officio exceptions regarding the recordings resulting from the authorized activities, he notifies by conclusion the High Court of Cassation and Justice in order to verify the legality of these activities and submit the case file, together with the formulated requests and exceptions.

After the notification is registered, the file is randomly assigned to a preliminary chamber judge from the High Court of Cassation and Justice and a deadline is set for resolution in the council chamber, with the summoning of the parties and the injured person and with the notification of the prosecutor. The judge who authorized these activities specific to the collection of information will not be able to participate in the resolution of the referral regarding their legality.

The judge of the preliminary chamber from the High Court of Cassation and Justice, taking into account the requests and exceptions made and the conclusions of the prosecutor, as well as of the parties and the injured person, if they are present, rules by conclusion on the legality of the activities from which the recordings resulted, based on the papers and material in the criminal investigation file and any other evidence.

An appeal can be filed against this conclusion by the prosecutor, the parties and the injured person, within 3 days of communication. The appeal is resolved by a panel consisting of 2 preliminary chamber judges from the High Court of Cassation and Justice.

After the final stay, the conclusion is immediately communicated to the preliminary chamber judge who ordered the referral. Finding the illegality of the authorization or the execution of the activities specific to the collection of information from which the recordings resulted, entails the nullity of the act by which the administration of the evidence was ordered or authorized and the exclusion of the evidence, as well as the removal from the case file of the evidence corresponding to the excluded evidence.

According to the provisions of Art. 139^2 of the Criminal Procedure Code, against the conclusion authorizing the carrying out of activities specific to the collection of information,

any person affected by this activity and who did not acquire the capacity of a party during the criminal process, as well as the defendant against whom the waiver was ordered, can file a complaint against the criminal investigation or the dismissal solution, regarding the legality of the conclusion by which the respective activities were authorized, the mandate issued based on it, the way of execution of authorization, as well as the resulting records, within 20 days, calculated according to the provisions of Art. 145[1] para. (3) of the Criminal Procedure Code: from the date of receipt of the written notification, when the written information and, as the case may be, the presentation of the content of the media on which the activities specific to the collection of information are stored take place before the resolution of the case; from the date of receipt of the written information or, as the case may be, from the date of presentation of the contents of the supports on which the activities specific to the collection of information are stored, when they take place after the resolution of the case.

After the termination of the authorized activities, the prosecutor must inform in writing the persons against whom the specific information gathering activities were carried out, regarding these activities that resulted in the recordings used as evidence in the criminal trial. In this sense, the provisions of Art. 145 para. (2) and (3) of the Criminal Procedure Code regarding informing the supervised person and Art. 145[1] para. (2) of the Criminal Procedure Code regarding the complaint against the technical supervision measures are applied accordingly.

This complaint is addressed to the High Court of Cassation and Justice and is resolved by a preliminary chamber judge, the provisions of Art. 145[1] para. (5) and (6) of the Criminal Procedure Code and Art. 139[1] para. (5) of the Criminal Procedure Code applying accordingly. The judge of the preliminary chamber from the High Court of Cassation and Justice will rule on the legality of the activities from which the recordings resulted, by definitive conclusion, in relation to the legal provisions under which they were authorized and on the basis of the works and the material in the file of prosecution and any other means of evidence.

We know that the suspect has rights and obligations, being neither the perpetrator nor the defendant in the case, because, according to the provisions of Art. 305 para. (3) of the Criminal Procedure Code, the suspect is the person against whom, from the evidence, there is a reasonable suspicion that he has committed a crime. Also, until the perpetrator becomes a suspect, will the criminal investigation bodies hear him, and following his hearing, will the statements be recorded in a perpetrator's statement?

No, because the provisions of the Code of Criminal Procedure do not regulate this institution, and then an appeal is made in the practice of criminal investigation bodies to the recording in a witness statement of the data provided by the perpetrator, and then, depending on the evidence administered in the case file, to be able, if necessary, to continue the criminal investigation started in rem, regarding the act against him, who acquires the name of the suspect in question, being obviously about the reported witness to which there is in fact an accusation and which, according to the provisions of Art. 118 para. (4) of the Criminal

Procedure Code the right to appear at hearings accompanied by a lawyer[1]. In other words, in the situation in which the measure of technical supervision is ordered against a person, and he, following the evidence administered by the judicial organs, does not acquire the status of suspect or defendant, then he will be able to file a complaint against the ordered measure of supervision.

We thus find that these provisions have managed to harmonize the surveillance measures with the provisions of Art. 11 of the Criminal Procedure Code regarding the need to respect a person's private life.

4. Conclusions

The provisions regulating the need to respect a person's rights during a criminal trial, in order to avoid serious violations of the person's rights and freedoms during a criminal trial that lead to abuses, ensure a unanimous recognition of the importance of respecting them, as a guarantee of protecting the individual against all arbitral criminal decisions, for the purpose of discovering crimes, identifying and catching criminals, collecting and managing evidence and bringing criminal liability by applying a sanction.

In this context, it is the obligation of the judicial bodies to solve the criminal cases, and, for the proper conduct of the criminal process, to apply the provisions that regulate both the need to respect the dignity and the private life of a person.

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