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Considerations regarding the Interception and Recording of Conversations or Communications Performed under Law no. 535/2004 on Preventing and Combating Terrorism

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Abstract: This paper analyzes the situations and conditions in which the provisions of Law no. 535/2004 are applicable for intercepting and recording of communications. It also analyzes the compatibility of provisions from special laws with those of the Criminal Procedure Code and the relevant jurisprudence of the European Court regarding: conditions for authorizing, the person empowered to issue the authorization, as special normative documents still refers to prosecutors, the maximum period for interception, defining clear categories of offenses and persons likely to be subject of interceptions, conditions, procedures and institutions - categories of experts responsible for verifying the authenticity of the recordings.

Keywords: records; wiretaps; fighting terrorism; warrants; authorization

1. Introduction

Enacting of Law no. 535/2004 on preventing and combating terrorism has allowed the detailed regulation of the legal framework necessary to carry out the collection and gathering of information and responded the need of amending and supplementing the Criminal Procedure Code.(Petre, Grigoras, 2010).

In accordance with the provisions of article 20 of Law no. 535/2004 on preventing and combating terrorism, state agencies with responsibilities in national security may propose the prosecutor to apply for the authorization of interception and recording of communications, where there is a reasonable suspicion of the existence of threats to the national security of Romania, provided by article 3 of Law no. 51/1991, or any act of terrorism (Coca, 2006).

2. Problem Statement

When analyzing the provisions of article 20 of the Law on preventing and combating terrorism comparative with those of article 53 paragraph 2 of the Constitution we note that the special investigation techniques in national security can be authorized only if the following conditions are met: an offence that constitutes a threat to national security is committed, including any act of terrorism as stipulated by Law no. 535/2004, the interference is necessary in a democratic society and proportionate with the authorized purpose (Udroiu, Predescu, 2008).

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Although most of the offences that constitute threats as provided by article 3 of Law no. 51/1991 are also crimes and the procedure in matters of national security has some similarities with the Criminal Procedure Code, it has generated controversies both in literature and in jurisprudence.

It was noted (Ciuncan, 2001) that the procedure in matters of national security was complemented with the procedural proceedings prior to the enacting of Law no. 535/2004, from the provisions of former article 13 paragraph 1 of Law no. 51/1991, which stated that the circumstances referred to in article 3 of the same law are the legal framework for requesting the prosecutor, where justified and subject to the Criminal Procedure Code, to issue the authorization to conduct acts of information gathering.

Thus, is considered (Volonciu, Barbu, 2007) that the approach according to which the provisions of special laws are applicable only when performing specific intelligence activities, and those of the procedural code only when the interceptions are authorized for criminal prosecution, is unsustainable and possible only if, on the one hand, special regulations would include specific safeguards for the intrusion by intelligence services in the privacy of a person, and, on the other hand, if the intercepted materials thus obtained would not be admissible as evidence in subsequent court proceedings, the latter being possible only if they are conducted under the Criminal Procedure Code. Invoking national security reasons for authorizing the interception according to other procedures than those provided by the Code and the subsequent use of wiretaps as evidence in proceedings concerning other crimes, in our opinion, renders useless the procedural provisions in this matter as are stated by the Code.

However, another author (Julean, 2010) considers that the reference of Law. 535/2004 to threats to national security and express reference to the provisions of Law no. 51/1991, leads to the conclusion that the law, though regulating the prevention and combating of terrorism, is currently the legal basis for the authorization of intelligence services to conduct restrictive measures of fundamental rights and freedoms, including interceptions, in all cases that constitutes threats to national security, and not only for the situation regarding acts of terrorism.

In fact, that is the case even in the practice of the Supreme Court of Justice, and in a recent case (Supreme Court of Justice, file no. 4489/1/2010), the defense claimed that the interception and recording of defendant`s telephone conversations and environmental discussions as showed in the indictment was not carried under the provisions of article 91^1 and seq. of the Criminal Procedure Code (based on a warrant), and procedures of special investigative techniques covered in national security matters were used exclusively (based on warrants issued under article 20-21 of Law no. 535/2004, in conjunction with article 3 of Law no. 51/1991), concluding that, according to prosecution`s case "...cogent and useful information about preparing and committing acts of corruption ... and that under provision of article 91^2 paragraph 5 of the Criminal Procedure Code, were used as evidence."

The multitude of regulations in this area, plus consecutive and uncorrelated changes in the legislative framework renders the internal rules not consistent, inaccessible and unpredictable. The lack of a clear regulatory framework in this area has generated various interpretations in doctrine and practice. Thus, it is considered (Julean, 2010) that the legal provisions are applicable when performing specific intelligence activities and those of the Code when interceptions are authorized for criminal instruction, but, on the other hand, special laws regulations do not contain adequate and specific safeguards for the protection of privacy, and in most cases, intercepts thus obtained are retained as evidence in subsequent court proceedings, the latter being possible only if conducted according with the Criminal Procedure Code.

The doctrine expressed yet another opinion (Coca, 2006), we do not share, according to which with the enacting of Law. 535/2004, article 13-15 of Law no. 51/1991 were repealed tacitly and the interception and recording of communications, and other types of activities referred to in article 3 of Law no. 51/1991 shall follow the procedure stated in Law no. 535/2004.

The above mentioned opinion, is sustained by other authors (Udroiu, Slavoiu, Predescu, 2009), arguing that the provisions of article 13 of Law no. 51/1991 have been implicitly repealed and replaced by those of article 21 of Law no. 535/2004, which makes no reference to the rules of criminal procedure, so it must be rejected the interpretation that the procedure in matters of national security would be a special provision in relation to criminal proceedings that would be the general framework. An argument in support of this view is article 53 of the Constitution, where the constituent legislator intended to distinguish between matters of national security from criminal procedure, consecrating them alternately without establishing between the two a special-general difference. It is considered, therefore, that whenever the provisions of article 21-22 of Law no. 535/2004 are incomplete, they cannot be completed with the provisions of Criminal Procedure Code, nor may resort to analogy. However, it is argued that although there is no express provision, the above provisions actually regulates two procedures for authorizing special investigative techniques in relation to national security, one stated in article 21, for specific situations where national security threat exists, but it is not imminent and that provided by article 22, which applies only in the event of imminent danger to national security. Special procedure contained in article 22 shall apply with priority and is supplemented by the general rules provided by article 21.

As it comes for the authorization of the investigative process, it shall be signed by the head of the intelligence agency, by its legal substitute or by the persons delegated for this task and shall be submitted to the Attorney General`s Office, and must include data or clues which show the existence of the threat to national security, for whose discovery, prevent or counteract it is mandatory the issuance of an authorization. A present threat is the legal basis for the authorization of investigative techniques, the intelligence officer being required to state the alleged facts and suspects and to indicate the reasons why these acts fall into one of the tenets of article 3 of Law no. 51/1991. Thus, the applying agency must demonstrate the proportionality of the information gathering operations with the intended purpose.

The application for the authorization of interception and recording of communications, according to Law no. 535/2004, shall be submitted to the Attorney General`s Office. If the request is assessed as unjustified, it will be rejected by a motivated resolution, which shall be communicated immediately to the applying agency. If within 24 hours of its registration, it is considered that the proposal is justified and the conditions provided by law are met, the Attorney General shall request in writing to the President of the Supreme Court of Justice to authorize the indicated activities, the term of 24 hours being one of recommendation, while not provided any penalty for its non-compliance.

The application will be taken into consideration in council chambers by judges specially appointed by the President of the Supreme Court of Justice, who can accept or decline the issue by final motivated judgment.

In the event of a imminent danger that requires its urgent suppression, law enforcement with responsibility in matters of national security can initiate and conduct special investigative techniques based on a simple internal decisions without court approval, followed by an application made as soon as possible, “but not later than 48 hours.” Another 24 hours are added to this term, for the prosecutor to examine the application, so the judge will be notified within a maximum of 72 hours from the initiation of proceedings, during this period operative officers acting without any authorization. Since

the legislator did not expressly stated a term in which the judge, notified after 3 days (72 hours), can confirm measures already enforced - after unlawful restriction of the fundamental rights of suspects – is stated in the doctrine (Udroiu, Slavoiu, Predescu, 2009) that until the actual authorization is issued, the period of unlawful interception could be increased indefinitely.

Under the provisions of article 21 paragraph 9 of Law no. 535/2004, the warrant issued by a judge will include: types of communications that can be intercepted, the categories of information, documents or objects that can be obtained, if known, the identity of the person whose communications are to be intercepted or the person who possesses important data, information or objects, a general description of the place where the warrant is to be executed, the authorized agency and the authorized period.

It should be noted that if the authorization is issued, the validity of the warrant cannot be longer than 6 months, with possibility of extension, when necessary, each extension for a maximum of 3 months, given the condition that the interception will be discontinued when the grounds justifying its issuance are no longer applicable.

By lex ferenda we consider that is absolutely necessary to regulate a maximum period for the authorization to be issued and to expressly state the obligation to declare, both in the application and in the authorization itself, the circumstances justifying the extension of the authorized period.

The law, in its actual form, does not grant sufficient guarantees about the predictability of the law when it comes to the possibility of extending the authorized period for justified reasons.

Compared to the authorization procedure of special investigative techniques in matters of national security, we think that an application for a warrant with the sole purpose of assessing a threat is unfair and unfounded, given that the threats to national security as provided by article 3 of Law no. 51/1991 are present actions or inactions and not imminent ones. Therefore, in practice, warrants authorizing the use of special investigative techniques are issued with ease, especially for the "prevention of an alleged danger" even if the concept of national security threat includes only already committed offences as stated in article 3 of Law no. 51/1991. In our opinion, provisions of article 9 and article 10 of Law no. 14/1992, under which it is possible to authorize the use of special investigative techniques in order to establish the imminence of the threat, should be amended, because we consider that they are illegal given that it cannot exist an interference with the fundamental rights of individuals for the sole purpose of preventing an alleged threat. Note that the law uses the notion of "communication" for both conversations or communications by telephone or other electronic means, as well as those incurred in the environment or by mail. On these issues, it is considered (Udroiu, Predescu, 2008) that in this manner the legislator removed the possibility of intelligence agencies to apply for judicial authorization of video surveillance. According to expert opinions (Mateut, 1997; Cristescu, 2001), capturing images in matters of national security is a forerunner criminal act when being carried out with the authorization requested by the law and its sole purpose is information gathering and identifying perpetrators and if it occurs subsequent to prosecution, it constitutes a method of obtaining evidence. We agree with the opinions outlined above, considering that video surveillance is not possible without judicial authorization, regardless of the moment or the period of this proceeding. However, the doctrine (Ciuncan, 2002) reveals contradictory points of view, considering that the non-judicial informative video recording is beyond the magistrate reach and as such, in matters of national security, it can be performed without requiring the authorization of a judge.

It should be noted that besides the interception and recording of communications, the provisions of article 20 of Law no. 535/2004 allow the authorization of complementary measures, namely the installation, maintenance and removal of devices necessary to record environmental communications.

Where discussions take place in public areas, the prosecutor must apply for both the authorization to intercept communications and to installation of devices, and according to article 916, paragraph 2 of the Criminal Procedure Code; these recordings may be used as evidence in criminal proceedings (Udroiu, Predescu, 2008). With regard to the procedure outlined in practice, in criminal trial records, warrants issued pursuant to Law no. 535/2004 are not available, motivated by the argument that these documents are considered “classified state secrets”, not accessible for court hearing nor for the defendant, in contradiction with the safeguards of the rights of proper defense. Basically, once declassified, information obtained through special investigative procedures, while preparing “transcript notes” and their transformation by the prosecutor in “preliminary (forerunner) acts”, authorizing warrant ceases to be secret as information obtained under its effect becomes public. The aim of these technical supervision measures is to gather information, the interference with privacy being justified by the need to protect national security (Article 53 of the Constitution). Thus, this measure differs in terms of the legitimate aim pursued by the interference with the fundamental rights guaranteed by the Constitution and the European Convention, than those provided by article 91^1 of the Criminal Procedure Code, pursuing “the conduct of a criminal investigation” as well as those stipulated by article 493^4, namely “defending public order”(Udroiu, Predescu, 2008).

3. Conclusions

These special investigative techniques are particularly methods for information gathering, what distinguishes them being that the specific activities in matters of national security are not criminal proceedings, but these are the only components of intelligence competencies in order to protect national security, while only special investigation techniques in relation to criminal procedure code are considered evidentiary procedures. Given the above, we believe that would be appropriate to corroborate the provisions of special laws with those of the Criminal Procedure Code and with the relevant jurisprudence of the European Court regarding conditions permit, the magistrate empowered to give authorization, special laws still referring to prosecutors, maximum period of authorization, clearly defining the categories of offenses and persons likely to be subject of interceptions, conditions, procedures and institutions - categories of experts responsible for verifying the authenticity of the recordings.

By lex ferenda we appreciate that is mandatory the express regulation of the judge`s obligations to oversee the conduct of authorized agencies and the possibility of removing the evidence obtained unlawful, in non-compliance with the conditions set by the Convention and the European Court, meaning that the interference should be necessary in a democratic society and proportionate with the authorized purpose.

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