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**Aspects in Connection to the Interception and the Recording of Talks or
Conversations Performed as per Law 51/1991 Regarding the National
Security of the Romanian Country**

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Abstract: This study is aimed at analyzing the cases and conditions in which the interception of conversations is actually authorized, as per Law no. 51/1991. At the same time the manner in which the provisions of the Code of Criminal Procedure interfere with this Law and with Law no. 535/2004 is presented on legal grounds with regards to issuing the mandate. This analysis studies the aspects of compatibility between the provisions of the present Law and the Convention for Human Rights and Fundamental Freedoms, i.e. the jurisprudence of the European Court of Human Rights.

Keywords: recording; intercepting; national security; mandate

1. Introduction

As per art. 13 from the Law no. 51/1991 regarding the national security, one can claim to the prosecutor only in justified cases, as per the provisions of the Code of Criminal Procedure, the authorization of writing official papers with the end result of gathering information consisting of , among others, the interception of conversations (Coca, 2006). The authorization act is issued at the request of the bodies which have attributions in the field of national security, by the prosecutor hereby named by the Prosecutor General of Romania. The duration of the mandate cannot overpass 6 months. In the specialized literature (Julean, 2010; Volonciu & Barbu, 2007) it is stated that the procedure as per Law 51/1991 was approved by the Law no. 281/2003 with regards to the modification and addition to the Criminal Procedure Code and to some other specialized rules, this being a text which proved itself to be not sufficiently strong and clear though, but which nevertheless states that “*no matter how many times other rules stipulate provisions with regards to intercepting and recording conversations, the provisions of art. 1 are applied accordingly*”.

2. Problem Statement

Another author (Coca, 2006) raised the problem if the requested and issued mandate as per Law no. 51/1991 will follow the procedure according to Law no. 281/2003, with the subsequent modifications and additions, or it will remain an extra-procedural one aiming at defending the national security, thus not needing the authorization given by the President of the Court who would bear the competence to judge the named cause. In this matter it is concluded that the public authorities with competence in the field of national security have to respect the juridical regime provided by art. 911-915, Code of

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Criminal Procedure, otherwise facing the danger that the means of probation obtained illegally not be used in the criminal procedure.

It was estimated that (Petre & Grigoras, 2010) the provisions of art. 13 of Law no. 51/1991 which use two notions namely “the authorizing of documents” and “mandate” as well as those of the criminal procedure code which only brings into discussion the term of “authorization” cannot justify the interpretation that for this “mandate” one has to keep in mind the prosecutor’s competency. Thus, the two notions used by the above named Law are used with regards to a single attribution, namely that of “authorizing the issue of legal documents”, which is in fact a legal procedure, and the means by which the “authorization” is applied is the “mandate” which represents the procedural act. Furthermore, the “authorization” from Law no. 51/1991 has a broader content, not limited to the interception and recording of communications, but also bringing forward other aspects regarding some other juridical terms like “inquisition” and “retaining and delivering the conversations and objects”. On the other hand it is also brought into discussion that (Volonciu & Barbu, 2007) Law no. 535/2004, an additional and special Law states in art. 10 paragraph 1 that the “*threatening of the national security of Romania, including the terrorist acts as per the present law are the legal grounds for the authorization of interceptions according to the procedure of this current Law*”, which leads to the interpretation that this Law is the legal ground for the restrictive measures with regards to the rights and freedoms performed by the Intelligence Services, including those for interceptions, in all cases which represent threats towards the national security, not only for those that represent terrorists acts.

Although in the specialized literature there these aspects have been highlighted, in practice these measures for surveillance in case of potential threats towards national security seem to be provisioned also by the Prosecutor as per the procedure provided by art. 13 from Law no. 51/1991, procedure which was not accepted until present times (Mateut). Thus as per the application literature of Law no. 51/1991 with regards to the national security of Romania, in the specialized literature (Coca, 2006) it was stated that the provisions of art. 13 from the special Law continue to be valid even after the entering into force of Law no. 281/2003, fact which was supported by the provisions of art X from Law no. 281/2003, according to which “*Every time some other laws claim provisions with regards to the Prosecutor’s requirements (...) the provisions of art. 1 of the present Law are applied accordingly*”, i.e. the Criminal Procedure Code rules, which state that the authorization be given only by judges. We support the above mentioned idea, under the conditions in which in what regards the rules and regulations with respect to interceptions included in the Criminal Procedure Code, the European Court of Human Rights found that these rules and regulations are not applied under the conditions in which security measures are taken for the cases of presumed attempts to violate the national security, these measures seeming to still be required by the Court as per art. 13 of Law no. 51/1991, which wasn’t approved until present times. In arguing with this opinion, the European Court referred to the decision of the Constitutional Court (Decision no. 766/2006), by means of which the constitutional judged inferred the special character of Law no. 51/1991 for justifying its application to the upcoming criminal acts, performed after the entering into force of the new procedure stated in the Criminal Procedure Code (Volonciu & Barbu, 2007). As per the opinion of a judge of the European Court (the opinion of judge Pettiti in the case *Malone vs. The United Kingdom*), the distinction between the administrative interceptions and the interceptions required by the judiciary bodies must be clearly provided by the national regulation, in order to respect art. 8 of the European Convention, thus favoring the application of the lawfulness of some interceptions in a juridical framework rather than the existence of a juridical void which permeates the arbitrary. We notice that in order to issue the mandate which authorizes the interception of communications one must fulfill in whole the following conditions: to gather data or clues for the existence of one of the situations provided by art. 3 of Law

no. 51/1991, which to consist threats towards the national security; the case for which one requires the authorization of the interception of conversations be justified, i.e. to result in the need to use this procedure; to respect the provisions of the Criminal Investigation Code. The European Convention of Human Rights uses the phrase "public order"¹ as being the accepted cause for limiting the performance of human rights-freedoms, in close connection to the national security and public safety².

There are some exceptions when emergency actions are required, but the specialized state bodies can perform these acts without the claimed authorization, afterwards requesting the authorization. In practice, there were situations in which the person suspected to have performed one of the criminal acts as per art. 3 Law no. 51/1991 was surveyed for an unlimited period of time, by means of the effected mandate in order to "*prevent and counter the threats towards national security*". During all this time only some pieces of information were obtained with regards to corruption deeds, signaled to the official bodies which "were notified ex officio" and issued a temporary decree for interceptions, thus moving towards the procedure regarding the authorization of the same investigation techniques used in the criminal case. To be more exact, there is no limit as to the period of time in which the intromission of authorities in one's private life be legal, but the special techniques of investigation can start once the mandate for preventing the danger of disturbing national security and can cease only after a long period of time, with the expiration of the 120 days provided by the criminal investigation law. The recommendation no. 1402 of the Council of Europe Parliamentary Assembly with regards to the internal security services for member states of the European Council claim that the operative acts of these services which involve the limitation of exerting some rights or freedoms of a person must be submitted to a prior authorization on behalf of the judicial bodies. This hasn't done anything else but highlight the importance and usefulness of the informative structures of the information and security systems, and also the need that their activity is subsumed to respecting the fundamental rights and freedoms. The analysis of Law no. 51/1991 with regards to national security as per provisions of art. 8 from the European Convention was debated upon by juridical practice and by The European Court of Human Rights. In the Decision no. 766/2006 (The Constitutional Court, 2007) by means of which the exception of non-constitutionality was rejected by the Constitutional Court as per art. 10, 11, 13 and 15 from Law no. 51/1991, the Government requested the admission of this exception showing that the "validity of the mandate is very long (6 months) and can be prolonged for an undetermined period of time in special cases, yet not claiming under what conditions the persons subjected to interception be notified. At the same time, the law doesn't include the provisions according to which the recordings are certified, the way in which they are written in the recording of proceedings, or the way in which the recordings containing actual elements for defending the national security be separated from those recordings which don't have this characteristic".

In this context, the passiveness of the Romanian Government is not to be understood until present times, as it didn't learn to use the prerogative regulated by law no. 74 paragraph 1 from the Romanian Constitution with regards to pursuing an legal initiative with the end purpose of modifying or eliminating the provisions of Law no. 51/1991 which are considered unconventional. As a matter of fact the Court of Appeal of Bucharest to which this exception was presented, assessed (The Court of Appeal of Bucharest, 2007) that after pronouncing the decision of the Constitutional Court the Law no. 51/1991 cannot be qualified as "predictable law" as per art. 8 paragraph 2 from the European Convention. For this reason the Court stated that "*the recording of phone conversations between the accused and third parties, as per law 51/1991 are means of probation obtained illegally and must be*

¹ See art. 9 paragraph 2, art. 10 paragraph 2, art. 11 paragraph 2 from the Convention and art.2 of Protocol 4 from the Convention.

² See art. 8 alin. 2 of the Convention.

precluded under the conditions in which the file case doesn't have the authorization and mandate for the recording". The Court of Appeal of Bucharest maintained in another cause (The Court of Appeal of Bucharest, 2009) the sentence of the Bucharest Court by which the Romanian Intelligence Service was forced to pay to the accuser moral penalties, determined by the fact that the phone conversations were recorded illegally for a long period of time, causing a moral prejudice. The Court's motivation was as follows: *"In what concerns the material acts of intercepting the phone calls of the accuser, the Court retained that to the response at the interrogation, the accused showed that this interception started in 2003, the mandate being successively prolonged for another year and three months. In order to verify the existence of the authorization for interceptions, the accused claimed that the mandate whose request is inferred isn't issued by the Romanian Intelligence Service, but by The Public Prosecutor's Office attached to the High Court of Cassation and Justice, so that it cannot be submitted to the file as per Law no. 182/2002¹. As follows, the circumstance of the interception of phone conversations in 2003-2004 was admitted by the accused, who inferred the mandate issued by The Public Prosecutor's Office attached to the High Court of Cassation and Justice and prolonged successively as well as the provisions of Law no.51/1991 with regards to the national security of Romania".* The Court retained the provisions of art. 20 of the Constitution of Romania, on the basis of which the jurisprudence of the European Court has a direct application on the internal legislation, and thus considered that the defense of the accused couldn't be retained due to the illicit character of its deed. With regards to Law no. 51/1991, the European Court of Human rights retained in the Dumitru Popescu vs. Romania case (The European Court of Human Rights, 2007) this legislative act doesn't meet the needs of predictability herein discussed, because it doesn't consist a guarantee of preventing the arbitrary and rightful abuse. In this respect, it was noted that the interception of conversations be done on the basis of this regulation, with the authorization of the prosecutor which doesn't fulfill the request of independence towards the executive, whereas, in the procedure regulated by law there is no control a priori of the authorization issued by the prosecutor by means of an independent authority, furthermore because the persons that are subjected to an interception aren't informed at all in the field of special legislation.

Moreover, it was noted that there is no a posteriori control of the validity of the interception of phone conversations by an independent and impartial authority, since the possibility regulated by art. 16 of Law no. 51/1991 of notifying the defense and public order commissions from within the Parliament (this control being appreciated as purely theoretical) doesn't supply the total absence of control over interception. Consequently, the European Court of Human Rights maintained that the mentioned Law doesn't bear a minimum degree of protection against the arbitrary, violating the art. 8 of the Convention. Relevant in this respect is the Rotaru vs. Romania case (The European Court of Human Rights, 2000), considering that both the recording performed by a public authority of data regarding the private life of an individual, and the use of this data and the refusal to call in question the data gathered, is a violation of the right to private life, guaranteed by art. 8 paragraph 1 from the Convention. And this is valid under the conditions in which, as per art. 8 from Law no.14/1992² information regarding the national security can be gathered and no internal regulation will provide limits that have to be respected in performing this matter of facts. Thus, the internal regulation doesn't define the type of information that can be recorded, the persons subjected to the surveillance procedures like gathering and archiving data, nor does it state the circumstances in which these

¹ Law no. 182/2002 with regards to the protection of the information, published in Monitorul Oficial part 1, no. 248 of the 12th of April 2001.

² Law no. 14/1992 regarding the organization and functioning of the Romanian Intelligence Service, published in Monitorul Oficial part 1 of no. 33, 3rd March 1992.

measures will be taken, or the procedure that has to be followed. In addition, the law does not trace limits with regards to the age of the information contained or its duration. But in order to be compatible with the demands of art. 8, a secret surveillance system must contain warranties established by law and applicable only when the activity of the authorized bodies is controlled, assuming that any interference of the executive in performing the rights of a person will be submitted to an efficient control, assured by the judiciary empowerment – at least and in the last resort, thus offering the broadest guarantees of independence, impartiality and procedure. In this respect, the Court retained that the Romanian system of gathering and archiving information doesn't supply this type of guarantees, because Law no. 14/1992 doesn't provide any control procedure during the application of this measure taken or after its application stopped. In art. 8 from Law no. 14/1992 it is claimed that the Romanian Intelligence Service is authorized to hold and use the appropriate means in order to attain the verification, archiving and arranging of the information with regards to the national security. In what concerns the technical means by which one can perform interceptions of conversations, Law no. 51/1991 doesn't enumerate or enunciate them, but only states that "they mustn't in any way violate the citizens' rights and freedoms, private lives, honor and reputations, or to subject them to illegal obligations.

3. Conclusions

Under these mentioned conditions, we estimate that it is necessary to modify the provisions of art. 13-15 from Law no. 51/1991 in what concerns the national security of Romania, in order to compel to the provisions of the Code of Criminal Procedure, of the Convention for Defending Human Rights and Freedoms, and of the European Court's jurisprudence, which means that the above named provisions be removed, as being non-conventional: they allow a prosecutor and a judge to authorize the interception of communication at the request of the intelligence services; they refer to the higher validity of the mandate discussed, i.e. of the authorization of conversation interception, under the conditions in which the Criminal Procedure Code establishes a duration of 30 days and not 6 months as the Law no. 51/1991 claims, as well as a maximum period of interception procedures of 120 days, and not sine die, as per art. 13 paragraph 5 from Law no. 51/1991 which claims that "only in entitled cases the prosecutor general can extend on demand the duration of the mandate, without over passing 3 months", and without establishing a maximum period of time. At the same time, we notice the opportunity of a normative and explicit statement, without any ambiguities, of the categories of persons subjected to interceptions on the basis of national security reasons and on the basis of concepts such as "national security", "public order", "balance and stability of social or matters in the country", "maintaining the rightful order" and "maintaining the possibility of exert citizens' rights" as per internal law, which the state can claim as being legitimate aims for justifying the interference of the public authorities in the private life and correspondence between individuals. The intervention of the legislator is mandatory, as the European Court stated in the *Iordachi vs. Moldova* case, with the purpose of ensuring the compatibility of the internal law with regards to the supereminence of the right which means that it is not enough that the internal law be only accessible, but it must also fulfill the request of predictability (*lex certa*), predictability which is expressed by the unequivocal definition of the mentioned concepts.

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