

Observations on the Judicial Expertise of Devices that Contain the Results of the Technical Surveillance Activity

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Abstract: The present paper aims to analyze the judicial expertise of devices that contain the results of the technical surveillance activity from a procedural point of view. The constant evolution of technical methods to obtain evidences in criminal trials led to the development of new types of expertise in various fields. One of these is the expertise of any device or optical support on which recordings of intercepted conversations are stored. Statistical data from the courts shows that technical surveillance is very common in Romania, being used as proof for various crimes from white collar crimes such as abuse of office or bribery to violent crimes or drug trafficking. Yet, being electronic the recordings can be forged, fragmented, collated aspect that can lead to unlawful trials or abuses from judicial bodies. In order to prevent that, the doctrine and the jurisprudence stated that the court may order technical expertise of the recordings to verify their the authenticity and continuity. If it is found, after examination, the lack of authenticity of the records or interfering mixes in the text or removal of passages of conversation, they cannot be retained in the case and cannot be used as evidence. Furthermore, judicial expertise of devices that contain the results of the technical surveillance activity can prove to be of real value in different kinds of criminal trials, from corruption cases, to murder trials, drug trafficking, human trafficking, etc. The academic and practical interest of the present study lies in the fact that it addresses both law theorists and practitioners in the field as it analyzes how judicial bodies can use the judicial expertise in the criminal trial and how to corroborate such a report with the other evidences administered by classic methods.

Keywords: judicial expertise; probative value; criminal trial; technical surveillance

The need for verification of evidence by the court is a demanding one that derives from respect for the principle of equality of arms and the right to defense and is presented in the form of a posteriori guarantee.

Even if the probative procedures representing the technical surveillance measures are subject to strict conditions from the point of view of the provisions regarding the certification, the very strict observance of the steps provided by the law does not remove the possibility of altering the data resulted from the technical supervision by truncation or assembly.

We appreciate that the provisions of art. 142¹ C.pr.pen. presents in this perspective more guarantees than previous regulation, by making it possible to ensure the electronic signing of data from technical surveillance.

To this end, any authorized person carrying out technical surveillance activities has the possibility to ensure the electronic signing of the data resulting from the technical surveillance activities using an extended electronic signature based on a qualified certificate issued by an accredited certification service provider.

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At the same time any authorized person transmitting or receiving such data may also sign the transmitted data or verify its integrity by following the same procedure.

In addition to this electronic signature warranty in article 142¹ par. 4 the legislator provided that every person who certifies the data under electronic signature is responsible under the law for the security and integrity of such data.

Although it operates with innovative notions, the legislator does not explain in concrete terms how these procedures are to be carried out, in which case the role of doctrine and jurisprudence will have to clarify these aspects.

Therefore, some appreciations are needed regarding these conceptual notions. In this respect, we emphasize that a Community framework for electronic signatures was established by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999, this normative act being transposed into national law by Law no. 455/2001 regarding the electronic signature, respectively the norms for its application, regulated by H.G. no. 1259/2001.

In the absence of any specific clarification in the Code of Criminal Procedure regarding the way in which it should be done in concrete terms, we consider that the provisions of the aforementioned law constitute the general normative framework, defining the concepts of electronic signature, qualified certificate, certification.

Therefore, according to art. 4 of this legal act, an electronic signature represents the data in electronic form, which is attached or logically associated with other data in electronic form and which serves as an identification method.

In relation to electronic signature, the extended one, notion used by the provisions of article 142¹ C.pr.pen., must meet cumulatively certain conditions: it is uniquely bound by the signatory, ensures identification of the signatory, is created by means exclusively controlled by the signatory, is linked to the data in electronic form, to which it refers so that any subsequent modification is identifiable.

Article 4 of Law 455/2001, at point 11, also defines the notion of certificate as a collection of data in electronic form attesting the link between the verification data of the electronic signature and a person, confirming the identity of that person.

Thus, a qualified certificate is a certificate that meets certain conditions, namely, it contains the identification data of the certification service provider, the name of the signatory and other specific attributes of the signatory, if relevant, depending on the purpose for which the qualified certificate is issued; signature verification data, which corresponds to signature creation data under the sole control of the signatory, indication of the start and end of the period of validity of the qualified certificate, qualified certificate identification code, extended electronic signature of the certification service provider issuing the qualified certificate, where applicable, the limits of use of the qualified certificate or the value limits of the operations for which it may be used.

The Certification Service Provider represents any person, whether Romanian or foreign, who issues simple or qualified certificates or provides other services related to electronic signature.

We consider that the verification of the conditions on the application of the extended electronic signature are matters that need to be verified by the court, ex officio, during the preliminary chamber procedure. In this respect, together with the copy of the support containing the result of the technical surveillance activities, it is also necessary to attach to the case file copies of the qualified certificates, since they can

be suspended or revoked, respectively the legal requirements regarding the application electronic signature are not met.

If the case parties invoke exceptions as to how to apply the electronic signature and the validity of the data resulting from the technical supervision or of the qualified certificates, we consider that according to art. 8 of the Law no. 455/2001, which stipulates that “in case one of the parties does not recognize the document or the signature, the court will always order the verification to be done by specialized technical expertise”, during the procedure provided by art. 342 et seq. C. pr. pen. the court would have to verify the lawfulness of this evidence.

For this purpose, as provided for in paragraph 2 of art. 8 of the Law no. 455/2001, the expert or specialist is obliged to apply for qualified certificates and any other documents required by law to identify the author of the document, the signer or the certificate holder.

Or, we find that we are in the presence of a legal incoherence, in the context of the incompatibility between the text of art. 172 C. pr. pen. on the performance of the expertise and those of art. 342 et seq., Which provides that the preliminary chamber procedure is a written one, carried out in a fast-track manner, the text expressly stipulating that the parties may lodge claims and exceptions as to the lawfulness of the taking of evidence and they had no possibility to request the administration of new evidence.

Nowadays, the Constitutional Court of Romania, by Decision no. 802/2017 stated that there is the possibility to administer evidence in order to prove the lawfulness of criminal prosecution, but in practice such an expertise has not been admitted so far.

Given that the purpose of the preliminary chamber procedure is to verify the lawfulness of the evidence administration procedure, in the context in which it is necessary to carry out such an expertise in order to achieve this objective, if the expert examination is rejected, the judge cannot pronounce a solution for the exclusion of unlawful evidence administered.

The aspects stipulated in art. 8 of the Law no. 455/2001, regarding the possibility of carrying out an forensic report, reinforces our view that although the Criminal Procedure Code no longer provides for an examination of the technical means of surveillance, despite the guarantees established by the introduction of the electronic signature, the risk of data corruption cannot be eliminated.

Furthermore, it should be taken into account that certain computer attacks may result in the stealing of data that generates the electronic signature, and there is no absolute guarantee as to the integrity of a qualified certificate.

The certification therefore has a triple dimension, the legislator operating in this sense with three notions: “Extended electronic signature based on a qualified certificate issued by an accredited certification service provider”, “Certified copy of the support containing the result of the technical surveillance activities” “certified statement of authenticity by the prosecutor”.

The previous criminal law did not define the notion of certification of audio or video recordings, relying on doctrine and jurisprudence on the role of formulating certain notional explanations.

Thus, in relation to the provisions of art. 91³ of the previous Criminal procedure code, certification means an act of confirmation, to strengthen the accuracy of those established by a document. The notion comes from the Latin “certificare”, meaning to prove the validity of a thing. From a legal point of view, the notion shows that all the requirements of the law for the validity of the legal act are observed.

Although the legislator did not define the notion of certification, it involved the following stages: the selection by the prosecutor of the intercepted conversations or communications relating to the deed that are the object of the research or the localization and identification of the participants; the selected conversations or communications are fully transcribed in the minutes by the prosecutor or the judicial police officer delegated by him; the report is certified for authenticity by the prosecutor conducting or supervising the prosecution; the minutes shall be accompanied, in a sealed envelope, by a copy of the medium containing the recording of the call (Julean, 2010).

In national jurisprudence (Decision no 141, 2009) it was stated that “besides initiating the procedure and controlling the persons called by the law to intercept the conversations (Articles 91¹ and 91² of the previous Criminal Procedure Code), the prosecutor is obliged to give a legality warranty, this legal operation being done by the certification of the recordings, according to Article 91³ of the Code of Criminal Procedure. Therefore, certification is not a mere formality but an essential condition for guaranteeing the authenticity and compliance of the transcripts of the records, knowing that such evidence is only allowed when complying with the requirements of Article 8 (2) ECHR”.

We notice a regression of the norms in force, by repeatedly using the concept of “certified copies of the original support” and by the fact that at art. 143 par. 2 of the Criminal Procedure Code it is mandatory for the original or the certified copy to be kept at the headquarters of the prosecutor's office, without specifying what happens to the original, if such a copy is made.

In the absence of the original, we consider that the media containing the data resulting from the technical surveillance activity cannot be tested in order to comply with the requirements of the European Court's jurisprudence, which calls for such an “a posteriori” guarantee.

We note the lack from the current Criminal Procedure Code of the former art. 91⁶, which, as amended by Law no. 202/2010 gave the parties, the prosecutor or the court, ex officio, the possibility to expertise not only technically audio or video recordings, but also psychologically for the purpose of analyzing gestures, mimics, the tone of the voice, the rhythm of the discussion, the position of the parties involved.

Modification of the law norm provided for in Art. 91⁶ par. 1 of the previous Criminal Procedure Code by Law no. No 202/2010, in that the legislator left open the way for performing any type of expertise, not just the technical one, was a novelty in the verification of this evidence, so that apart from a forensic technical expertise, the recordings of the conversations between the investigated subjects could be analyzed psychologically, from the perspective of language, mimics, gestures, in the situation of video recordings.

We appreciate the usefulness of such an analysis, given the fact that in practice there are situations in which the recorded discussion leaves room for interpretation, and in relation to the offenses for which it is possible to make this evidence, they presuppose their committing with a direct intent, as a form of the subjective side, conditions in which the opinion of some communication experts interpreting the used, mimic, gestural attitude, in the situation in which the explicit statements do not result with certainty, the committing of any act, is imposed for the elimination of the ambiguity.

According to the current legislation, such evidence may be requested on the basis of Art. 172 par. 7 of the Criminal Procedure Code, which states that “in the strictly specialized fields, if certain specific knowledge or other such knowledge is necessary for the understanding of the evidence, the court or the criminal investigation body may request specialists working within or outside judicial bodies. The provisions relating to the hearing of the witness are applicable accordingly”.

The fact that the legislator did not take over the provisions of art. 91⁶ of the previous Criminal Procedure Code we consider it to be a legislative incoherency, having regard to the institution of the Preliminary Chamber, which the legislature provided for it to verify, after the indictment, the jurisdiction and lawfulness of the court's referral, as well as the lawfulness of the administration of evidence and the execution of acts by criminal prosecution bodies.

Thus, when it is found that the minutes in which the results of the technical surveillance activity are transcribed are based on material evidence (technical storage device such as CD/DVD, USB or hard drive) that has been altered, the parties have the right to request the court to verify this aspect on the basis of art. 100 of the Criminal Procedure Code regarding the administration of evidence and the following, art. 172 et seq., as well as based on the jurisprudence of the European Court.

It is appreciated in the literature (Tudoran, 2012) that nothing prevents the parties or judicial bodies from requesting, or having such a probative procedure, by virtue of article 100 of the Criminal Procedure Code.

Relevant in this respect is the Rotaru case against Romania, on the grounds that both the recording by a public authority of data on an individual's private life and their use and the refusal to allow them to be challenged constitute a violation of the right to respect for private life, guaranteed by art. 8 par. 1 of the Convention.

This regulation is a back-up guarantee for making interceptions and transcribing them, in the context of the expertise being carried out by an independent and impartial authority. Thus, the European Court of Human Rights has sanctioned the lack of independence of the authority that could have verified the reality and reliability of the registrations (Hugh Jordan v. The United Kingdom, McKerr v. The United Kingdom, Ogur v. Turkey).

Moreover, the possibility of carrying out such an expertise is also provided in Art. 3 of H.G. no. 368/1998 regarding the establishment of the National Institute of Criminal Expertise, modified by the Government Decision no. 458 of 15 April 2009 and the Order of the Minister of Justice no. 441 / C / 1999, which allows voice and speech expertise to analyze the authenticity of audio and video recordings, and whether the recordings may contain any alteration.

Considering that the National Institute of Forensic Expertise (hereinafter INEC) is a public institution with legal personality under the Ministry of Justice, we consider that this institution does not provide sufficient guarantees regarding its impartiality, also in view of the European Court's recommendation, in Prepelita v. Moldova, found that through the Republican Institute for Judicial and Criminal Expertise in the Ministry of Justice in Chisinau, the State is a party to the proceedings and declared the claim of the applicant as admissible.

We appreciate that it is not acceptable for the judicial bodies on the one hand to administer evidence and, on the other hand, to verify them, since the persons under investigation do not benefit from the principle of equality of arms, requiring the analysis of the evidence by the independent experts.

We refer, to strengthen our opinion, to the conclusions of an expert report (LIEC, 2011) conducted by L.I.E.C. in file no. 236/45/2007, where the expert finds that "the records are not authentic", but because of the lack of independence they still hold "without this meaning that these records are not duplicate copies of the original records or that the transfer was not carefully done".

In this sense, we propose as *lex ferenda*, that the National Institute of Forensic Expertise, a non-partisan authority, should be an autonomous authority or under the subordination of Parliament in order to present more guarantees of impartiality.

Besides the guarantee of verification of this evidence, by an independent authority, it is appreciated in the literature (Alamoreanu, 2004) that the introduction of provisions in the Government Ordinance no. 75/2000 which offers the parties the possibility to have a consultant expert alongside the official expert to represent them at the stage of carrying out the expertise is a step forward in the legislative evolution, although the way in which the participation of the consultants experts in the expertise is regulated is somewhat restricted, rather setting up a supervised system of expertise instead of a contradictory expertise.

We also notice that national legislation, through H.G. no. 368/1998, supplemented and modified by H.G. 458 /15.04.2009, Order of M.J. no. 441/C/02.03.1999, Regulations for the organization and operation of INEC, as well as O.G. no. 75/2000 regarding the authorization of forensic experts, stipulate that it is forbidden in cases where I.N.E.C. and the County Laboratory of Forensic Expertise (also known as L.I.E.C.) were invested with forensic expertise, the files/materials submitted by the judiciary body were made available to the forensic expert consultant appointed by the judicial body at the request of the parties. At the same time, if the judiciary ordered that some of the activities necessary for the forensic expertise to be carried out by the official forensic expert, the authorized forensic expert shall be notified in writing only at the disposal of the judicial body of the date, time and place where the forensic expert will perform activities (Decision no 3, 2011).

Relevant to this is the case-law of the Strasbourg Court, which held that “it is the judge’s discretion to decide on the competence of an expert witness appointed by the party”, noting that the expert party was only allowed to express opinions on the conclusions of the report drawn by the appointed experts to perform the audio expertise and was not allowed to participate directly in the performance of the expertise. (Mirilashvili v. Russia)

Thus, at present, in relation to INEC practice, the right of the parties to have a consultant expert is more theoretical, since it is not allowed to actually involve him in the realization of the expert report, which should be remedied by the provisions of the current Code of Criminal Procedure.

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