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Verification of Data Resulting from Technical Surveillance by the Court

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Abstract: The present analysis aims to highlight the different methods of verification of the data obtained by judicial bodies through technical surveillance methods provided by the Criminal Procedure Code. Although the current legislative framework as interpreted by the Constitutional Court of Romania provides specific guarantees in order to prevent using forged evidences in the criminal trial, we believe that the court, after the indictment, needs to verify on its own the authenticity of such means of evidence. Therefore, the doctrine and the recent jurisprudence of national courts stated in this context the need for an independent expertise that can analyze the data obtained through technical surveillance in order to be used as evidence in a criminal trial. Also, the present context of the Romania legislative reform and the context in which several cooperation protocol between criminal investigation bodies and Romanian Intelligence Service were declassified, led to a stringent need for such an expertise. We tend to believe that without an independent expert that can assess whether the recordings are authentic or not, the court cannot in good faith decide to convict a person. Present paper is of interest to any law practitioner as it tries to highlight in a concise manner both the framework for such an expertise and the means to obtain it.

Keywords: technical surveillance; expertise; criminal trial

In the doctrine, (Gradinaru & Girbulet, 2012) several problems were raised regarding the legal conformity of these legal provisions with the European Convention. The European court considered that the national legal guaranties are to include the necessity of communicating all of the unaltered recordings (Kruslin v. France, Huvig v. France, Valenzuela Contreras v. Spain). There needs to be a legal substance regarding the unaltered and complete keepings of these recordings, so that the judge may examine them (Prado Bugallo vs Spain, Dumitru Popescu vs Romania).

According to par. 2 of art. 143 copies of the minutes shall be sent to the court, together with the copy of the support containing the technical surveillance activities, after hearing the case.

From this perspective, we believe that, in order to establish the truth and for a correct assessment of the evidence, it is very important for the support to contain the conversations entirely, not only fragmentarily, as is often the case in practice.

Moreover, the recording of communications on various media, as well as keeping them in conditions imposed by the Code of Criminal Procedure was regulated to ensure the possibility to be heard or viewed later, but, also, in order to be able to provide, if necessary, checking the correspondence between the content of the recordings and of the minutes (reports) (Gradinaru, 2012).

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We believe that an explicit legal regulation is required (especially in the court's internal procedure, but also regarding the prosecution's internal procedure), in order to correctly apply article 91^3 paragraph 3 of the previous Criminal Procedure Code: "After indictment, the copy of the records containing all the technical surveillance activities are kept in the court's registry, in a sealed envelope, at the judge's exclusive disposal". This legal change is also required in order to prevent information leaks and to assure that all the parties involved can access the case files, and that the special legislation regarding classified information is enforced.

The data resulting from the technical surveillance measures can also be used in another criminal case, if they contain conclusive data or information regarding the preparation or committing of another offense as provided by art. 139 par. 2 of the Criminal Procedure Code. It is appreciated (Dambu, 2007) that "this derogatory regulation is in line with European standards in the field of human rights protection, as it is only allowed in the preparation or commission of criminal offenses."

Moreover, in the doctrine (Mateut,) the opinion was expressed that "allowing the use of the intercepted conversation by overcoming the initial authorization may lead to discussions from the point of view of complying with the requirements of the European court", especially if the illegally obtained evidence obtained through prohibited means, unauthorized, unwritten, unchecked, uncertified, unverified, unsorted, not counter-signed, countersigned by unauthorized people, translated with the use of an unauthorized translator, unsealed, declared non relevant, obtained provisionally and left unchecked etc., cannot be used in criminal proceedings.

To this extent we believe that a first verification is to be done by the court, when the judge authorizes the technical surveillance warrant. There needs to be a correlation between the police reports and the digital recordings. Another reason to contest the recordings is the absence of the electronic signature.

We consider that the court invested with the case settlement requires visual viewing of audio-video recordings or listening to audio recordings, as they perceive the evidence directly, judges have a greater capacity to learn the truth than if they perceive them from the documents where they have been transcribed (Gradinaru & Girbulet, 2012).

A condition for which records can be challenged is the lack of electronic signature. Thus, the Chairman of the Information and Communication Technology from the Chamber of Deputies appreciated the fact that, if the telephone records have no electronic signature, if used as evidence in proceedings, may be appealed. Thus, the file can be edited so that with the voice that carried the conversation, with the words spoken by one who carried the conversation can be constructed other phrases. This can be avoided by the approval of devices that are used for recordings (Gradinaru, 2012).

In this context, we consider that it would be necessary to introduce a text of law providing for the obligation of the court, provided that the file contains such evidence, to dispose of their hearing and/or their appearance ex officio in the presence of the parties, prior to their hearing, in order to be able to clarify relevant aspects of the criminal matter at the hearing, provided that they are not disputed by the parties. Thus, when challenged by the parties, we consider that hearing or viewing them is only necessary after authentication has been established.

We notice that at the present time, the supreme court's practice regarding the viewing of the recordings is that the culprits, assisted by their attorneys, will view the recordings separately from the court. (Decision number 236/45/2007)

Disregarding the administrative difficulties due to the lack the technical support specialist's time and the space required for this activity, the goal for viewing these recordings is not reached. The parties

involved, when viewing these recordings, will find themselves in the impossibility of identifying the bearings that lead to the truth.

Since the recordings are kept in the prosecutor's office, during the prosecution, as well as the court phase, and at the legally invested panel's disposal, at its request (Crisu, 2007), the juridical literature (Gradinaru, 2018) claims that the court needs to have direct access to the original support of the recorded conversation. We also believe that the court needs to have direct access to the original technical support, in the context that present day technology allows with ease the forging of tape recordings. In the eventuality that such an suspicion arises, the prosecutor, or the parties may ask for or the judge may order a technical expertise of the recordings in order to verify their authenticity and continuity.

There have been countless cases in the judicial practice (Dolenciu & David v. D.N.A., Bolocan v. D.N.A.) when D.N.A. refused to provide the parties, the court or the experts, the original support of the interceptions and recordings, issues which were believed as hiding the possession of these interception, recording and processing equipments.

Even if the institution of certifying recordings was implemented with the purpose of attesting the authenticity of draft reports regarding the conversations and communications, in order to remove all possibilities of altering or counterfeiting these recordings, there are still cases in which doubt persists regarding the authenticity and reliability of such a recording.

The necessity of verifying the means of evidence by the court through the technical expertise is a requirement that derives from the principle of equality of arms and the right to defense that presents itself under the form of an a posteriori guarantee.

In this regard, alongside the support copy that contains the result of the technical surveillance, it is necessary to attach the copies of the qualified certificates to the case files, given the fact that these certificates can be suspended or revoked, namely the legal requirements regarding the use of the electronically signature are not met.

We also bear in mind the fact that S.R.I., an authority that has the competence to put into practice the warrants concerning the technical surveillance, are to put at the criminal investigative body either the original support, or certified copy of this support. Thus, the hypothetical possibility persists that before the appliance of the electronic signature, the data obtained could be modified.

Thus, if the parties make exceptions regarding the way of applying the electronic signature and the validity of the data resulting from the technical supervision or the qualified certificates, we consider that according to art. 8 of the Law no. 455/2001 stipulating that "if one of the parties does not recognize the document or the signature, the court will always order that the verification shall be carried out through specialized technical expertise", according to the procedure provided by art. 342 et seq. The court would have to verify the legality 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 of the Criminal procedure code on the performance of the expertise and those of art. 342 et seq., Which stipulate that the preliminary chamber procedure is a written one, carried out in a fast-track manner, the text expressly stipulating that the parties may formulate requests and exceptions as to the lawfulness of the taking of evidence and not provides for the possibility of new evidence (Gradinaru, 2018).

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 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 (Gradinaru, 2013).

Taking into account that the procedure for carrying out the expertise involves contradictory debate on the relevance, concluding and usefulness of this evidence, and the carrying out of an expertise presupposes the right of the parties to propose the recommended experts, as well as the provisions of art. 179 of the Criminal Procedure Code concerning the hearing of the expert, I consider that, in the absence of a provision expressly providing for the possibility of new evidence in order to establish the lawfulness of the evidence administered during the criminal proceedings, such a request is inadmissible at this procedural stage.

However, since the purpose of the preliminary chamber procedure is to verify the lawfulness of the taking of evidence, in the context in which it is necessary to carry out such an examination, the reasoning of that institution is not justified, since the judge cannot, for example, decide the exclusion of illegally administered evidence.

In this context, we propose completing the text of the law, respectively art. 345 of the Criminal Procedure Code with a new paragraph, providing for the possibility of new evidence, in order to analyze the legality of the evidence in the criminal prosecution phase.

The Constitutional Court of Romania, by Decision no. 802/2017 stated that there is the possibility to administer any evidence in the preliminary chamber procedure in order to prove the lawfulness of criminal prosecution. This decision is not enough since there are courts that deny this right to the defendant if the possibility to administer new evidences is not expressly regulated by the law itself.

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 (Gradinaru, 2013).

The aspects stipulated in art. 8 of the Law no. 455/2001, regarding the possibility of carrying out an expert opinion, reinforces our view that although the Criminal Procedure Code no longer provides for an examination of the technical means of supervision, 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 cyber attacks may result in leaking the data linked to the electronic signature, and there is no absolute guarantee as to the integrity of a qualified certificate.

In conclusion, we believe that in the absence of the original storage media, the media that contain the data from the technical surveillance activity cannot be tested in order to meet the requirements of the European Court's practice, which requires such an "a posteriori" guarantee.

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