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**Considerations Regarding the Expertise of Optical Media that Contain the
Results of technical Surveillance in Criminal Cases**

Andrei Apostol¹

Abstract: In order for the data that results from the technical surveillance to form a veritable means of proof, it is mandatory that such informations are not to be altered in any way and that the original support in which the data was printed to be kept secure. In the context of a society in which technological advancements are increasing at a rapid rate, there exists a real risk of altering such evidence. As such, it is in the prosecution's duty to secure the data resulting from technical surveillance. If there is doubt regarding the authenticity of such recordings, the only method to verify the reality of the data resulting from technical surveillances is a criminalistic expertise. Such an expertise can be performed in the course of a judicial inquiry so that the court can verify if the technical surveillance data has not been altered or manipulated in such a way that the actions of the defendants may gain criminal connotations. The jurisprudence is not unanimous in this regard, but if an opposite hypothesis is to be acknowledged, it would lead to absurd situations. Rejecting an expertise proposed in order to demonstrate the authenticity or the forgery of the data obtained through technical surveillance means convicting a person on the basis of unverified proof, while the European Court of Human Rights claims an express a posteriori verification regarding all evidence materials.

Keywords: expertise; technical surveillance; interceptions; altering of proof

Related to the type of conversation or communication that is the subject of interference by the competent authorities, technical surveillances can be classified into two categories: interception of conversations carried directly, (this category referring to the interception of a human-to-human exchange with no technical means) and the interception of postal mail, phone, fax, telex, e-mails, telegrams etc (Udroiu, Slăvoiu, & Predescu, 2009, pp. 22-23).

According to article no. 138 paragraph 1, section d) of the Romanian Criminal Procedure Code, in order to establish the factual situation, or for the identification of the culprits, the criminal investigation body can resort to localization and tracking through technical means.

The liberty of the criminal investigation body in evidence-taking must meet a balance between the need to protect the citizen's right to intimacy and the fundamental principles of a criminal trial, the context of which the right to a fair trial is of primordial importance (Grădinaru, 2018, p. 7).

In case-laws, the search warrants are issued with ease, especially in order to "prevent an imminent danger", even if the concept of an attack on national security covers only deeds that are already committed, as provided by article no. 3 of Law 51/1991 regarding the national security of Romania (Grădinaru, 2013, p. 71).

¹ Lawyer, Iasi Bar, Romania, Address: 2 Sf. Lazar Str., Iasi, Romania, Corresponding author: apostol.andrei93@yahoo.com.

The recordings obtained under the conditions laid down by the Romanian Criminal Procedure code, constitute pieces of evidence regarding the circumstances of conducting the technical surveillances (Gârbuleț & Grădinaru, 2012, p. 94).

According to the relevant published literature (Tudoran, 2012, p. 226), “nothing prevents the parties or the criminal investigation body to ask, respectively to order such probative proceedings in the virtue of article no. 100 of the Romanian Criminal Procedure Code”.

Relevant in this regard is the case *Rotaru vs Romania*¹, under the conclusion that the recordings containing informations from the private life of an individual conducted by a public authority, the use of this recording as proof and the denial of the right to contest this proof is an infringement towards the right to a private life, guaranteed by article no. 8 paragraph 1 of the Convention.

Obviously, during the judicial inquiry, an expert’s report can be requested so that the Court can verify if the information obtained through technical surveillances have not been altered, or manipulated in such a way that the culprit’s deeds may gain penal connotations (Grădinaru, 2014, p. 151).

Accepting a contrary hypothesis would lead to absurd situations in case laws. For instance, in the context in which in the first instance an expert’s report was requested based on article 916 of the Romanian Criminal Procedure Code, a request that was rejected by the Court, in the appeal the parties would not be able to reiterate this request, as there is no express provision in this regard.

Such a hypothesis is not sustainable as it would mean convicting citizens on the basis of unverified proof, under the circumstances in which the European Court of Human Rights claims the necessity of an a posteriori judicial control regarding all means of proof.

Any authorized person that conducts technical surveillance activities has the option of ensuring the digital signing of the data obtained from technical surveillance activities, using a digital signature based on a qualified certificate, issued by a certification service supplier.

In this situation, according to the relevant published literature (Gârbuleț & Grădinaru, 2012, p. 119), provided that the parties raise objections regarding the method of applying a digital signature and the validity of the data obtained through technical surveillance or regarding the authorized certificates, in accordance to article no. 8 from Law no. 455/2001 on the digital signature, it is necessary that the Court verifies the legality of this evidence.

It is also necessary for the fair settlement of the cause, to verify through a legal expertise if these filed interceptions have not been conducted through collages, video montage or croppings and that they are not just summaries of conversations that can sustain the public attorney’s accusations (Grădinaru, 2017, p. 201).

Even if Law no. 255/2013 regarding the application of the Romanian Criminal Procedure Code does not cover any transitory provision in this matter, under article no. 100 and 172 from the Romanian Criminal Procedure code, the European Court of Human Rights case law and article no. 3 from Government Decision no. 368/1998 regarding the establishment of the National Criminalistic Expertise Institute, an expertise can be requested in order to establish the authenticity of the data obtained through the surveillance measures.

In this regard, the case law² reveals that Courts allow technical and criminal judicial expertise regarding the authenticity of the recordings and interceptions of phone calls. A technical expertise of the audio-

¹ ECHR, case *Rotaru vs. Romania*, Decision from 29th March 2000.

² Romanian High Court of Justice, Criminal Division, Decision from 16th February 2011, case no. 4489/1/2010.

video recordings was requested based on the confrontation of the recordings with the transcripts conducted by investigators and kept on the case-files that have determined errors consisting in crossings of the speaker's lines, the adding or elimination of lines or figures of speech with the obvious purpose of sustaining the evidence presented by the accusation. It has also been requested to bring before the Court, fragments of the conversations stocked on the investigator's hard drive, but that have been avoided by the criminal investigation bodies, and have not been transcribed, being labelled as "unintelligible" or "discussion without operational interest".

Moreover, the possibility of conducting such an expertise is also provided by article no. 3 from Government Decision no. 368/1998 on the establishment of the National Criminalistic Expertise Institute, modified through Government Decision no. 458 from 15 april 2009 and the Ministry of Justice Order no. 441/C/1999 that allows the expertise of voice and speech in order to analyze the authenticity of the audio and audio-video recordings, namely if the recordings contain signs of altering.

The audio recording expertise is conducted by bringing the magnetic support that contains the audio recording to a voice analyst expert in order for him to determine if the recording is authentic or a simple copy or it is forged. In the published literature (Grădinaru, 2010, p. 96) it is thought that in the absence of such an expertise, the recording stocked on optical storage media can not be accepted as evidence.

Taking into account that the National Criminalistic Expertise Institute is a public institution, a legal entity placed under the orders of the Department of Justice, the published literature believes that this institution does not offer sufficient guarantees regarding its impartiality, considering the European's Court of Human Rights recommendation, which, in the case *Prepelita vs Moldova*¹ concluded that through the Republican Institute for Judiciary and Criminalistic Expertise within the Department of Justice from Chisinau, the state is a party to these proceedings and has declared the applicant's claims admissible.

We believe that in a criminal trial it is not allowed that the judicial bodies to administer evidence on one hand, and on the other to verify such evidence, provided that the investigated citizens do not benefit from the principle of equality of arms in this way. The expertise of such evidence must be conducted by independent experts.

We would refer to the conclusions of an expert's report² conducted by the Inter-county Criminal Expertise from Iasi from case no. 236/45/2007, in which the expert notices that "the recordings are not authentic", although "this does not mean that the recordings are not exact copies (duplicates) of the original recordings or that the data transfer has not been conducted carefully".

In addition to the guarantee of verifying these means of proof by an independent authority, in published literature (Alămoreanu, 2004, p. 16) it is thought that the introduction of Government Ordinance no. 75/2000 on the activity of criminal expertise that gave the parties the option to hire a consulting expert along with the official expert in order to stand for their interests in the expertise phase is a step forward in the legislative evolution, even if the way the involvement of consulting experts in the making of the expertise was enacted is somewhat restricted, instating a system of supervised expertise rather than a contradictory expertise (Grădinaru, 2019, p. 6).

In the voice and speech criminalistic expertise made by the National Criminalistic Expertise Institute there are stated a few objectives.

¹ ECHR, case *Prepelita vs Moldova*, Decision from 23rd September 2008, www.justice.md.

² Criminalistic expert report nr. 194/18.11.2011, conducted by the Inter-county Criminal Expertise from Iasi from case no. 236/45/2007 of the Iași Court of appeal.

The first objective consists in the verification of the audio and audio/video tapes authenticity. This expertise is conducted only on original recordings. In this type of expertise, they verify if the recordings were conducted simultaneously with the acoustic or video events that they contain, with the technical equipment and the method indicated by the party that produced the evidence. In the absence of the technical equipment that was used in obtaining the recordings, there could be situations where the expertise cannot be conducted.

Another objective is to identify the individuals by voice and speech. The expertise of voice and speech is conducted only on the authentic recordings. The examination consists in the comparison of a voice from the recording to a voice of the suspect recorded in a similar environment (same technical equipment, same means of communication).

Furthermore, through the criminal expertise, a better quality of the recordings can be obtained, with the purpose of adding to the intelligibility of the recordings by limiting or eliminating some type of noises (Grădinaru, 2014, p. 155).

The following objectives: the identification of technical methods (optical media and equipments) and whether the content of the intercepted conversations is faithfully rendered cannot be determined through a criminalistic expertise, as such, these objectives cannot be solved by the National Criminalistic Expertise Institute.

As follows, in the context of which the party has presented the recordings cannot indicate the equipment that was used to record the conversations, the expert might not be able to determine the authenticity of the recordings.

In order to reach the objective of identifying the individuals by voice and speech it is necessary to put at the expert's disposal the original recordings as well as voice and speech samples from the person that is the subject of the expertise.

Regarding the method used and its margin of error, the method used in the expertise cannot be established before the examining the recordings from an criminalistic voice and speech expert's point of view. The methods used in conducting the expertise and their limits are noted in the expert's report, the choice of method being conditioned by the materials that are to be expertised and other aspects (Grădinaru, 2014, p. 156).

Conclusions

In the context in which technical surveillances are undoubtedly an interference in the private life of an individual, the European Court of Human Rights punishes such an action when it does not abide to the principles of legality, proportionality and legitimacy. In this regard, the informations obtained through these means are to be kept undisclosed in order to protect the private life of an individual. Only a small part of these informations are brought to the public knowledge and used in a criminal trial, through the certification method provided by article no. 143 of the criminal procedure code (Dâmbu, 2007, p. 117).

The rules covered by article no. 143 and the following of the Romanian Criminal Procedure Code, that concern the use of the interceptions and conversation recordings in a criminal trial, with the purpose of proving the facts that are the object of the trial are of the nature to guarantee their credibility with the goal of finding the truth. Overthrowing the presumption of authenticity created by the means of certifying provided by article no. 143 of the Romanian Criminal Procedure Code, materialises in a

verification conducted a posteriori, provided by article no. 172 of the Romanian Criminal Procedure Code.

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