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Aspects of Comparative Law regarding the Interceptions and Audio or Video Recordings

Sandra Gradinaru

"Al. I. Cuza" University of Iasi, Faculty of Economics Bussines Administration,
sandra.gradinaru@yahoo.com

Abstract: The area of law-breakings for which can be disposed the interception and registration of the phone calls can be pretty wide. Therefore, in the case in which solid clues exist that one person would have committed, as an Originator or Participant, law-breakings against the safety of the State, of high treason, or directed towards one land that jeopardize the international safety or the defense capacity of the country, these measures can be authorized. The present piece of work suggests a comparative analysis between national regulations and the international ones, in the material submitted to study, in the conditions in which we can notice, at the European Union level, a consolidation of the cooperation in the penal jurisdiction.

Keywords: interception; audio-video recordings; human rights

The interceptions and audio/video recordings are means of prove both in national regulations and in the legislation of other states, obeying special procedures.

In article 8 of the European Convention of the Human Rights[1], having the title "The right to respect private and family life" it is specified that: "any person has the right to respect their private and family life, their home and correspondence." That is why it is not admitted the interference of a public authority in exerting this right but as long as this interference is specified by the law and if it represents a measure that is necessary for the public safety, national security, economic welfare of the country, the defence of order and the prevention of penal acts, as well as the protection of health or others' rights and liberties.

As for the phone interceptions, the Court states that, even though paragraph 1 of article 8 does not mention the phone conversations, they are implied, being comprised in the notions of "private life" and "correspondence" taken into account by the text. (Barsan, 2005, pp. 591 and following)

A compared analysis between the specifications regarding the problem discussed presents special importance, in the conditions where it is noticed, at the level of the European Union, a consolidation in the penal field, significant contributions in this respect being the principle of mutual recognition of the law decisions, the European mandate of arrest and the frame regarding the intensification of the

[1] Ratified by our country by Law no. 30/1994 regarding the ratification of the Convention for the defence of human rights and fundamental liberties and the additional protocols to this convention, published in the Official Monitor, Part I no. 135 from 31.05.1994

cooperation in the field of combating terrorism and trans-border organized criminality[1].

Thus, from the perspective of these considerations, we will present in detail below, as an exemplification, the legal specifications in the legislation of some countries, regarding the interception of communication.

In the German system, listening to the conversations is allowed as long as there are enough clues to suppose that a person committed personally or as an accomplice, a serious crime (murder, genocide, rape, drug smuggling, organized crime, etc.). Also, in order to dispose of this measure, it is necessary that the supposition should be founded, a simple presumption being insufficient, and thus the investigations cannot be realized, aspect that supports the subsidiary character of the interceptions.

According to the German legislation, it can be dispose to intercept and record the phone conversations if the suspected person committed a crime against peace, crimes of high betrayal, or crimes endangering the safety of the democratic state, or against a land and endangering the international security, or if it was committed a crime against the capacity of defence of the state. At the same time, in the German law it is disposed this measure also if some person committed a crimes against the public order or has committed some deed to instigate or be an accomplice to escape, or instigation to rebel, done by a person without military quality, according to the article 16, article 19 reported to article 1, paragraph 3 from the Penal Law of the military staff.

At the same time, the Code of German penal procedure also specifies the fact that ordering the interceptions must be done by the instruction judge or, in case of emergency, the prosecutor, whose decision must be confirmed by the judge within 3 days. The mandate to authorize the phone listening confers, at the same time, the right to record the communications on magnetic tape. During the audition, the court can opt for playing the tape or reading the transcription of the conversations. (Delmas-Marty, 1995, p. 98)

At the same time, the Code of German penal procedure also specifies the fact that ordering the interceptions must be done by the judge of instruction or, in case of emergency, the prosecutor, whose decision must be confirmed by the judge within 3 days, otherwise the order will be null. The order must be written and must contain the name and address of the person who will be intercepted. Actually, it must mention the type, volume and duration of the measure, which can be of maximum 3 months. This duration can be extended though, until three months at the most, if there are accomplished consequently the specifications of article 100a of the Penal Code. The mandate of authorisation of the phone interception confers at the same time, the right to record the communications on magnetic tape. During the audition, the Court can opt for playing the tape or reading the transcriptions of the conversations. The interceptions and recordings on magnetic tape or any other type of support are done if there are founded clues regarding the preparation or committing a crime, for which the penal tracking is done ex officio, and the interceptions and recording are imposed in order to find out the truth. The interception and the recording are done with the grounded authorisation of the court, in the cases and conditions mentioned by the law, upon the prosecutor's request.

In the English system, the interceptions and phone recording are regulated by *Communication Act*, 1985. They cannot be done without a mandate given by the Home Secretary (*Home Secretary*), valid for 6 months, with possibility of renewal.

[1] Prof. PhD K. Himberg, The Crime Laboratory of the National Bureau of Investigations, Finland, "Presentation of the main scientific progress made in proof in criminal cases," 2008.

The investigations are done by the police organs that, by means of authorisation issued by the Home Secretary, can proceed to listening to the phone conversation in some cases especially mentioned: if the national security or the economic one of the country is in danger, or to prevent committing a crime sanctioned with prison for more than 3 years, or involving the use of violence, endangering an important financial interest, or is done by a large number of persons following the same purpose.

The judge does not have any power of control over the interceptions, they not being under their motivated authorization. The person who discovers that they are listened to can exert the attack of appeal in front of a special court, formed by lawyers appointed by the government. The court thus informed has the obligation to verify if it was respected the legal conditions of being intercepted. (Delmas-Marty, 1995, p. 152)

In the cause Malone vs. Great Britain[1], the Court noticed that the phone interceptions are not subordinated to a mandate of the Ministry of Home Affairs and underlines the contradictions contained in the jurisprudence and government interpretation. In this case, the court noticed the lack of foreseeable character and, thus, the violation of article 8, since the "English right regarding the interception of the communication is quite obscure and the subject of divergent analyses [...] and does not indicate clear enough the extension and modalities of exercise of the discretionary power of the authorities in this field."

In the Belgian system, before 1994, there was no special law to regulate the interception of phone conversations, so that the judge of instruction was not authorized to order the interception.

Beginning with the Law from 30 June 1994, the judge of instruction is allowed, for certain serious crimes, already consumed and limitedly mentioned, to authorize the listening to and recording of private conversations, and be informed about it. Also, regarding the period of time for this measure, the Code of Belgian procedure specifies the fact that the authorization can be given for a period of maximum one month, and it can be extended for one more month at a time, for six months maximum[2].

In France, on 10 July 1991 was adopted Law no. 91-646 related to the secret of the correspondence, regulating the interception of the phone conversations, conferring a legal existence to the Inter-ministry Group of Control (I.G.C.) and interceptions. (Cristescu, 2002, p. 14)

The law mentioned above authorizes two categories of interceptions, judiciary and administrative interceptions, respectively. Thus, the *judiciary interceptions* are, after the apparition of the mentioned law, specified and regulated beginning with article 100 and until article 107 in the Code of penal procedure. This category of interceptions is ordered by the judge of instruction in the frame of a criminal or correctional business, when the necessity of gathering information is urgent and the punishment of prison specified by the law for that deed is equal to or more than 2 years. The activity is done under the authority and control of the instruction judge who ordered it.

The decision of the instruction judge, settled for an initial duration of maximum 4 months, can be extended by repeating the whole procedure, with the same conditions of form and duration in time and must comprise all the elements to identify the relations to intercept, the crime motivating the decision to intercept and the duration of the activity.

The judge of instruction or the officer of judiciary police can ask the agents qualified in the field, to proceed to the installation of the device to intercept the phone conversations. They must write down a report for each operation to listen to and record, where it is mentioned the date and hour of beginning

[1] CEDO, 2 August 1984, no. 8691/1979, Malone vs. Great Britain.
[2] Ibidem, p. 200.

and end of the operation.

The information obtained, but only the "documents of information useful in finding out the truth" are transcribed in a report, and the communication in foreign languages are transcribed in French with the assistance of an authorized interpreter.

The supports to store the recordings are kept sealed. They are destroyed upon the Prosecutor Office's request, at the expiry of the duration of the public action started by the judiciary organs, an occasion to write a report of destruction.

As for the interception of the phone conversations of the persons having the profession of a lawyer, judiciary assistant or parliamentary, it cannot be done unless the instruction judge informs the Council of the Bar association where the lawyer belongs, the president of the National Assembly or the Senate, respectively.

The administrative interceptions are the phone security interceptions, authorized with extraordinary title by the Prime Minister, having as an object the research of some information of special nature, namely that regarding: "the national safety, the security of the scientific and economic potential of the country, the prevention of terrorism, criminality or organized crime, the prevention of restoration or maintenance of extremist groups." (Delmas-Marty, 1995)

At the same time, in the French legislation it is specified, in article 100-6 of the Code of penal procedure, that the recordings are destroyed, by the prosecutor's diligence, at the expiry term of prescription of the public action. In this case, the instruction judge has the monopoly in the procedure of the interceptions. No legal disposition authorizes the judiciary police to proceed to intercept in the frame of a preliminary investigation. It is noted the fact that the specification mentioned is judicious, since the solutions not to start the penal tracking are not temporary, but also not final.[1]

In the Italian system, in order to impose an interception and recording of somebody's conversations, a representative of the Public Ministry must formulate a request to a judge for preliminary investigations, when it is considered that the interceptions are compulsory for the investigation. They will be authorized in case of crimes that are punished with prison for more than 5 years, crimes related to smuggling or drug smuggling or gun smuggling, or when the phone is used to commit a crime (such as a threat on the phone).

The permit – to intercept conversations – can be obtained only for 15 days, yet it can be renewed.

The results of the interceptions are transcribed in special regime, they can be made available for the accused' council for the defence. In case of emergency, the Public Ministry can give up the judge's authorisation for maximum 24 hours. In this situation, after the expiry of the term indicated, it is required to validate the operation by the instruction judge within 24 hours, otherwise the interceptions cannot be continued, and their results cannot be used.[2]

The persons responsible for the fight against mafia or anti-terrorism, benefits from special power to organize interceptions, avoiding this process. (Diaconescu, 2000, p. 28).

In the Spanish system, the intercepting of conversations is done according to the Law of penal procedure, having the name of "Ley de enjuiciamento criminal." According to this law, the judge is the one who can authorize to retain the private, postal and telegraphic correspondence of the investigated person, as well as to open and check it, if there are clues that by these measures could be

[1] Means of prove obtained illegally, Magazine of commercial penal law, www.mateut-budusan.ro
[2] Ibidem, p.

proved some deed or important circumstances for that investigation.

Consequently, in the case Venezuela Contreras vs. Spain[1], regarding the interception of a phone line in the frame of some penal investigation, the Court considered that the Spanish constitutional dispositions in the sense that "the secret of the communication and, particularly, the post, telegraphic and phone communication, is guaranteed, except for when there is a judiciary disposition," do not accomplish the condition of foreseeable character. Even though it accepted partially the support of the Government that the judge followed to observe the legal conditions (indicating in the Ordinance of that person, the crimes they were guilty of, the controlled phone line, the duration of interception, etc.), the Court drew the conclusion that the constitutional dispositions and those in the code of penal procedure were not clear enough in the moment of producing the events, and did not specify the extent and the modalities to exert the power to appreciate of the authorities in the field of interceptions.

The measure to intercept can be disposed also by the Ministry of Home Affairs or, in its absence, by the Director for State Safety, but this disposition must be communicated compulsory to a competent judge. The latter, within at most 72 hours, can confirm or revoke this resolution. (Alvarez, 1996)

In the Danish legislation, the secret of the correspondence and communication can be violated only if there are grounded reasons to suspect that the correspondence comes or is for a person suspected for some deeds of penal nature. Breaking this fundamental right is presumed to be of essential importance for the development of the investigation and for it to have as an object a crime committed with intention and that is punished with prison for at least six years.

The interception of the conversations can be authorized thus, if there are fulfilled the conditions mentioned above. The code of Danish penal procedure, in article 782 paragraph 1, stipulates the necessity that the measure of interception should be proportional with the importance of the case.

The measures to intercept and register, according to the Danish legislation, are disposed only by judge order. This must contain, according to the Danish Code, the phone number, addresses and circumstances specific to the case, and the duration of applying the measure must not be more than 4 weeks.

In form of judge order, this duration of interception can be extended with 4 more weeks, every time when it is necessary. As in the case of the other legislations, in case of emergency, the measure can be taken by another judiciary organ. In this case, the measure can be disposed by the police, with the obligation that within 24 hours to inform the competent instance, and the latter will decide to maintain or cancel the measure, and in case it considers it necessary, it will inform the Ministry of Justice.

Actually, in the Anglo-Saxon legislation, due to the common law, the penal procedure has a form a lot different from the one in the law on the continent. Thus, ***in the United States of America***, the means of proof are regulated by the law called *Rules of evidence*. By issuing this law, it results the fact that for the first time in the history of the United States there are laws of uniform rules regarding the proof admissibility in the procedure of the federal courts. The legislation of the USA has a series of specifications to limit the sphere of obtaining proofs, such as the rule called *exclusionary rule* with application in the incipient stage of the penal investigations, and specifying that a proof, even though it could be useful to solve some case, will not be used in court unless it was obtained observing the legal procedure. (Sava, 2002, p. 55) Another rule is that called the *fruit of the poisonous tree* specifying that, if a proof legally obtained is related to another proof that was illegally obtained, then the proof legally obtained will not be used in the trial. (Sava, 2002, p. 56)

[1] Court EDO, 30 July 1998, no. 27671/1995, Venezuela Contreras vs. Spain RJD 1998-V no. 83.

The federal rules regarding the proofs (Federal Rules of Evidence) that are incidents in the American penal trial settle that there are admitted the relevant proofs. This type of proofs means the "*proof that has any tendency to make the existence of any fact that determined the penal cause more or less probable than it would be without that proof*". (Mueller & Kirk, 1994, p. 7; Lilly, 1987, p. 5)

Even though the proof is relevant, it is possible not to be taken into consideration, if its proof value leads to causing an unfair prejudice, if confusion appears among the objects of the proof or if it is confusing for the jury.

In the Swiss legislation, it is mentioned expressly the destruction of the information that is not necessary in a cause, as indicated also CEDO.[1] Thus, it was noticed that the Swiss law is not clear enough, if it supposes the possibility to preserve information. It was appreciated that there is a violation of article 9 in the Convention, both settling a file of information by the Public Ministry, and the preservation of files represent an interference in the private life, not specified by the Swiss law.[2]

Some authors appreciated, in virtue of rallying at the dispositions of the legislations of the European states, the fact that it is imposed to modify the article 91[1] in the current Code of penal procedure, in the sense of eliminating any doubt regarding the violation of the persons' fundamental rights and liberties. In conclusion, any interception must be done only with the motivated authorization of some judge, the court informing all the persons whose conversations have been intercepted.

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[1] CEDO, cause Hermann Amann vs. Switzerland, 2000.
[2] Means of proof obtained illegally, Magazine of commercial penal right, www.mateut-budusan.ro.