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General Considerations Regarding the Interceptions and Audio-video Registrations Related to the Judicial Practice and Present Legislation

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Abstract: The present paper tries to analyze the controversy of the admissibility of the interceptions and audio-video registrations in the phase of the precursory documents cannot be admitted. The fact that interceptions and registrations can be disposed even before starting the criminal prosecution, respectively before starting the criminal process or even before committing an offence is to bring severe prejudices to the right of a fair process and the right to a private life in the way in which these are stipulated in the Constitution and in the European Convention of the Human rights.

Keywords: precursory actions; evidences; admissibility; prosecuting charges

Because of the too general name of the precursory documents and lack of specification regarding the content and their limits, in the doctrine and judicial practice contrary opinions were expressed related to the interceptions admissibility and audio-video registrations in the phase of the precursory documents. Our opinion is in the sense in which the interceptions and audio-video recordings are admissible as evidence procedures, respectively evidences, only in the circumstances of starting the prosecuting charges in question, point of view expressed by the Constitutional Court in the summary of the Decision No. 962/2009 and by the New Code of Criminal Procedure.

Thus, it is shown in the decision above mentioned that, undoubtedly, administering these evidences is placed within the first phase of the criminal process, the prosecuting charges could be started, in conformity with the Article 221 & 228 from the Code of Criminal Procedure not only in *personal but also in rem*. At the same time it was shown that the possible inobservance of these stipulations does not constitute a problem of constitutional debate but one of applying the law.

However the opinion of the Court was expressed within a decision of rejecting of one constitutional challenge of art, so that the point of view exposed does not have effects *erga omnes*, context in which the organs of criminal prosecution and the Law Courts are not kept to respect it, and the fact that the law does not condition deliberately this procedure of starting the criminal prosecution (or the fact that the law does not forbid explicitly in front of the precursory documents), does not determine supporting according to which this procedure is allowed.

The stipulations of the Code of Criminal Procedure, stipulate at the Article 91⁴, the coercitiveness that the interceptions or audio-video registering to be realized only when the establishment of the situation in fact or the identification of the causers cannot be realized on the bases of other evidences. This

express provision of the law is of strict interpretation, the legislator establishing that the interceptions and audio-video registering be allowed in the appendant and only if the use of the classical evidence cannot lead to establishing the situation in fact or to identifying the causers. From another perspective, retaining as commissioners in order to do the precursory documents that lay on the basis of initiating the criminal procedure are the Organs of prosecuting charges and other state organs expressly stipulated by the law in the article 224 line 2, article 224¹ C.pr.en, in the conditions in which we could estimate that the interceptions and audio-video registering could be made in this phase, we must observe that the authorization of the judge by which the interception is disposed represents a precursory action and involving the judge in this phase is difficult to sustain.

Therefore, it is tackled if the public prosecutors or the judges are competent in suggesting and reducing the scope of some fundamental rights outside the criminal instruction, in the way in which CEDO defines the prosecuting charges. Although we admit the idea of the rights protection and the fundamental liberties in front of some abusive actions by instituting the fulfillment of the condition of the existence of the authorization given by the judge, we believe that, as far as the initiating of the prosecuting charges was not disposed in one cause, the judge shouldn't get involved, because this intervention can be interpreted as a substitution of this to the official examinations, by developing other activities than those judicial, that take place within a criminal process.

Another argument is that in the case of emergency, when the delay of obtaining the authorization would bring severe prejudices to the activity of prosecuting charges, the public prosecutor that does or watches the prosecuting charges can dispose, by motivated order, the interception of the conversations for a period of no more than 48h. Else the public prosecutor's order is a procedural document of argumentation, of justification by which it is carried out an act or a procedural measure that cannot be disposed with the exception of the criminal process. Even more, the judge is forced to motivate the authorization closing of the interceptions and of the audio-video registrations that, in conformity with 91¹ line C.pr.en, must contain the concise indications and facts that justify the measure, and also the reasons for which the establishment of the situation in fact or the identification or localizing the participants cannot be made by other ways, or the research would be very delayed.

In these conditions, we consider that this cannot motivate the authorization finality but in the hypothesis in which the legislator has foreseen the possibility of the court to ask to the criminal prosecution organs all the data that are on the basis of the authorization solicitation of the interceptions and audio-video registering, not only in favor but also against the person viewed. *Per a contrario*, in the way in which these elements are defining for the active role of the court, that cannot be exerted but within the criminal process, results undoubtedly that in this situation the criminal prosecution must be legally initiated. Another argument in sustaining the inadmissibility of making the interceptions and audio-video registrations in the phase of the precursory acts is that, when the legislator refers to certifying the registrations, in line 2 of the article 91³ C.PR.EN, specifying the fact that 'the assessment record' is certified for its authenticity by the public prosecutor that makes or supervises the criminal prosecution in discussion', that leaves without certification the situation of the precursor documents. Besides, the situation of the interceptions and of the audio-video registrations as part of extra procedural litigation comes in contradiction with the article 98 C.pr.pen, where we will observe that the legislator, expressly, establishes a similar material that is keeping the correspondence only concerning the accused and the defendant. In these conditions we believe that a possible interpretative severance of the law is not justified, because the essence of the measures is identical.

We notice that the legislator had in view, and in the case of the domicile search (article 100 C pr.pen), the condition that this should be disposed after the initiation of the criminal prosecutions a guarantee

against possible abuses regarding the rights and fundamental liberties. Also, if we could interpret the law text in the way it is interpreted in the probation of the Superior Court, we appreciate that the stipulations of the art. 26 and 28 are not respected from the Constitution and the stipulations of the art. 6 and 8 from the European Convention, and as for the Constitutional provisions that weren't respected, it is necessary to be made a distinction between the moment of getting and the moment of using of these probation ways. In this way, the interceptions disposed and realized before starting the criminal process, so in the moment of acquirement, contravene to the right of private life, and in the moment of using these, the stipulations referring to the right to a reasonable process are defeated.

As a matter of fact, lacking of the legal text delimitations regarding the forms of the law-breaking, it comes to the conclusion that making the interceptions can be authorized even though it is discovered that the existence of preparatory acts or of a not inculpativ attempt, aspect that brings into discussion not only respecting the principle of adequacy and also the equity of the criminal process. Thus, related to these aspects, in order to appreciate the adequacy of the intromission with the aim pursued, it is necessary to be quantified the gravity of the law-breaking. In the circumstances in which this was not actually committed, it cannot be evaluated the respecting of this principle. Related to the aspects presented, we estimate that, in the circumstances in which all the modifications regarding the dispositions relative to interceptions and audio-video registrations, were meant to let the legal texts without an ambiguous meaning, these are, anyway, in probation, applied and used, many times, to the detriment of the person executed and whose communications are wished to be intercepted and registered.

Even DNA public prosecutors expressed in the doctrine a series of considerations according to which the interception and audio-video registering cannot be realized but after starting the criminal prosecution. We reunite to this opinion and appreciate that, in as far as only the assessment records of acknowledging making the precursory documents can constitute probation means, and the audio-video registering are brought under regulation as means of probation, freestanding and also in the consideration of the fact that gathering the probations is realized only in the course of the criminal prosecution. In this way we mention that making interceptions in the phase of the precursory acts must be reported at the stipulations of the article 64 last line C pr. Pen, the means of probation obtained illegally couldn't be used in the criminal process.

Starting from the formal character, of strict application, of the norms of criminal procedure, we appreciate that through the expression 'cannot be used in the criminal process', the legislator understood to introduce a procedural sanction exactly for removing, by the operation of estimating the probations those means of probation obtained with breaking the law. The procedure of the invalidation of the interceptions and registrations obtained with breaking the legal instructions was presented in the specialty literature by realizing also in front of the prosecutor, by a simple solicitation or memoir through which it is invoked the illegal character of the probations or through a complaint. Formulated on the bases of the article 278 C pr.en, but also in the judicial phase, either on plea modality that is put under the discussion of the parties, or by exerting a way of charging. It was appreciated that these probations will follow the common regime of the invalidities, stipulated by the article 197 C.pr.en, the solution of returning to the prosecutor not having application in this situation, because form the legal text it is drawn the conclusion that the probations in this way obtained cannot be done again, no matter of the nullity type.

Anyway, it is considered that, in the consideration of the article 64 line 2 and of the arguments for which it was adopted, representing a new guarantee of the right to defend, it should be admitted that the defendant could use, in his defense, by a probation obtained illegally. (Mateut, 2004, pp. 133-144)

Our point of view, in the sense of inadmissibility of the interceptions in the phase of the precursory documents, is sustained by a part of specialized literature, by the stipulations of the new Code of criminal procedure, by the Constitutional Court of Romania, and also of several decisions from the judicial probation¹ that mentions solutions according to which the probation means were removed that were constituted of audio-video registering. Done previously to the initiation of the criminal prosecution by considering being contrary to the stipulations of the article 91¹ C.pr.pen.

As for the specialized literature, an opinion that comes in supporting the point of view above mentioned shows that the interceptions and audio-video registrations cannot make part of the category of the precursory documents, conditions in which, under no circumstances, cannot be done within the precursory documents. Specific documents to the criminal prosecution phase as a distinct procedural phase of the criminal process, but neither documents that are not necessary for the criminal prosecution. (Mateuț, 1997, p. 47) According to the author of this opinion, the audio or video registering represent ways of investigation used by the organs of criminal prosecution, for discovering the malpractices and of the identity of the law breakers, and their result can constitute a means of probation that leads to establishing the truth objectively. (Mateuț, 1997, p. 70) The previous point of view is strengthened by the argumentations of another author² that give the opinion in the way that this measure can be disposed only after the start of the criminal prosecution, procedural moment that delineates the legal frame in which the organs of criminal prosecution can develop all the associated activities of the object of criminal prosecution. It was also shown in the doctrine the fact that, because the precursory acts are done before starting the criminal prosecution, about which the causer does not know yet, for realizing this activity cannot be done acts that trench the interests and rights of a person. (Pintea, 2000, p. 94)

At last, one last opinion in this way, (Jidovu, 2000, pp. 202-203) sustains the fact that for authorizing the interceptions and registering of the conversations and communications it is necessary the start of the criminal prosecution, at least *in rem*, taking into consideration some arguments of normative text. Thereby, it is mentioned that the authorization request for interception and recording is raised by the district attorney that executes or supervises the criminal prosecution and in this regard, the legislator leaves no possibility of interpretation. Likewise, the authorization can be given only by the court that would have the necessary competency to judge the case in first degree jurisdiction or that has in its constituency the Public Prosecutor from which the District Attorney executing or supervising the criminal prosecution is part of. Also considered relevant in this respect is the interdiction of using the recordings between the lawyer and the represented or assisted party. This disposition refers to a well-established procedural framework, being known that the common procedural act triggering the criminal process is, usually, the starting resolution of criminal proceedings and only by exception the minutes of the audience offense or flagrant crime, or even the district attorney's order resolves a conflict of jurisdiction. Another argument is the text of the article 91², second paragraph of the Criminal Procedure Code, which expressly refers to the situation of serious prejudice to the criminal investigation activity, if the district attorney that executes or supervises it wouldn't dispose, temporarily, by order, authorization of interception. Moreover, the order is entered in the special register stipulated in the article 228, paragraph 1¹ of the Criminal Procedure Code, where only the starting resolutions of the criminal proceedings are mentioned. Additionally, in the line of reasoning is

¹ The Court of Justice Brașov, criminal section, Criminal sentence no. 51/S/03.02.2010, www.jurisprudenta.com; the Court of Justice Neamț, Criminal section, Criminal sentence no. 116/P/09.06.2010, not published

² Anastasiu Crișu, Procedural problems regarding the law application for preventing, discovering and punishing the corruption actions, in the magazine Fight against corruption and organized criminality, edited by the Public Ministry – the Centru of Continuous training of the prosecutors, p.152.

invoked that according to the article 91³, paragraph 2 of the Criminal Procedure Code, the interception rendering minutes is certified for authenticity by the district attorney that executes or supervises the criminal prosecution, whether they bear or do not bear interest by contents. Moreover, the non-court solutions referred in the article 91³, paragraph 3 are release from prosecution, termination of criminal prosecution or closure. The legislator refers in the article 91³, paragraph 6 to the investigation resuming, in which case the records that couldn't be exploited can be consulted or copied. However, all situations of resuming the criminal investigations, as they are regulated in the article 270 of the Criminal Procedure Code, necessarily involve criminal investigation. In the purpose of these observations, it was tried modifying the Criminal Procedure Code regarding the interception and recording, in order to expressly incorporate the need of beginning the criminal investigation prior authorization to conduct intercepts. Thus, the draft law for approval of the Government Emergency Ordinance 60/2006, in its initial form was submitted for promulgation, has introduced three new paragraphs in the article 91¹ of the Criminal Procedure Code, according to which "The request of the district attorney that executes or supervises the criminal investigation, referred in the first paragraph must be together with a copy of the starting resolution of the criminal prosecution ordered according to the article 228 of the Criminal Procedure Code. The interception authorization given by infringing the provisions of this article is null. Interceptions and recordings made under an invalid authorization cannot be considered during the criminal proceedings. Romania's President has raised a request for review in this matter, requiring the removal of the three paragraphs, motivated by the fact that these are obviously blocking the activity of the criminal prosecution bodies and the new provisions would result in depriving effectiveness of the provisions relating to interceptions and audio or video recordings. The Public Ministry's point of view was expressed in terms that this alternative text is not justified. The mandatory beginning of criminal prosecution would be contrary to reason of the institution of interception and recording calls or communications. According to view formulated this way, the request for interception authorization for a person in criminal proceedings, together with the obligation of the prosecution body to inform the person concerned about this circumstance is equivalent with preventing the author of a crime.

In this view, this applies into practice by disclosing the investigation before the initiation of the operational moment, and by transforming it in something written, in the Code of Criminal Procedure, of evidence¹, consequently, the mentioned texts remaining in their original form, as they were stipulated. Following the request for review of the President of Romania, the provision that stipulated that the application for authorization be accompanied by a copy of the prosecutor's resolution for initiation of criminal prosecution has been removed. Regarding this law for approval, as amended after the application for review, the Constitutional Court, through Decision no. 54 of 14.01.2009, found that the provisions of the only article pt. 1-23 of the Law on the approval of Government Emergency Ordinance no. 60/2006 are unconstitutional².

Our opinion is supported by some of the solutions given in practice, so in the first case, the Brasov Court³ noted that "though the Decision dated 27.11.2006, of M. Court, the interceptions were found unlawful, and through the decision of removal the documents in the case were maintained, the court can not take into account these evidence, that are to be taken out." The same resolution to remove the

¹ The views of the Public Ministry on the amendments to the Code of Criminal Procedure and Criminal Code regarding the Government Emergency Ordinance no. 60/2006 amending and supplementing the Criminal Procedure Code and other laws, www.mpublic.ro.

² The Constitutional Court, Decision no. 54 of 14 January 2009, regarding the unconstitutionality of the unique Article pt. 1-23 of the Law on the approval of Government Emergency Ordinance no. 60/2006 amending and supplementing the Criminal Procedure Code and other laws, published in *Monitorul Oficial (Official Journal)* no. 42 of 23 January 2009.

³ Brasov Court, criminal section, judgment no. 51 / S / 03.02.2010, www.jurisprudenta.com.

evidence obtained by intercepting and recording telephone conversations of defendants, being considered illegal, was also adopted by the Court in Neamt¹. Also, by Ordinance dated 28.06.2004 issued by the Prosecutor's Office of the Court in Iasi, the case prosecutor assessed that audio and video recordings acquire probative value only in the context of the initiation of the criminal proceedings, otherwise requiring their removal as being illegal. Moreover, it considers that "such an interpretation <<add to law>> (criminal procedure law is interpreted strictly, and on behalf of a single text-art. 91 Criminal Procedure Code) denies the principle of corroborated interpretation of all paranthetical texts.

Thus, it is to be recorded that this procedure is governed by Title III of the Code of Criminal Procedure (Evidence) evidence being administered during the trial (after the initiation of criminal proceedings) and not outside it (extrajudicial). The view according to which the audio and video interception and recording can not be approved during the submission of documents stage is also supported by the Court of Appeal Constanta, Criminal Section and the juvenile and family cases, according to criminal judgment 59/P/30.04.20092. Thus, in the above mentioned decision, the court has analyzed the legality of the administration of evidence, namely audio-video recordings from the ambient environment, which are regarded as illegal. The reason adduced noted that under Art. 64 parargraph 2 Criminal Procedure Code, the evidence must be legally obtained to the contrary they can not be used to assert guilt. For this reason, the court established that "regarding the minutes of the playback of the telephone call in the ambient environment between the defendant and the informer, and well as the carrier with the copy of the discussions in the ambient environment of the two, are not taken into account, the objection of the defence being well-grounded because the recording had been done before the initiation of the criminal proceedings, contrary to the provisions of art. 911 Criminal Procedure Code.³" Against that Judgment, the National Anticorruption Directorate appealed, on the grounds that this evidence was improperly removed since it was satisfied the only condition that is required by the law that is to have solid data and clues related to the existence of a crime, considering that the interception of ambient talks before the initiation of the criminal proceedings is allowed. The High Court of Cassation and Justice' Decision no. 2521 from July 1, 2009⁴ considered the criticism from DNA, regarding Judgment 59/30.04.2009, as being just, taking into account the constant practice that the Supreme Court which assessed that interception and audio or video recordings may be allowed during the preliminary stage.

Moreover, the High Court of Cassation and Justice, noted that „compliance with the provisions of the article 91¹, paragraph 1 and 2 of the Criminal Procedure Code is the only validity condition as evidence in the criminal case of communication interception and recording, regardless of the circumstance as being made during the preceding acts were or were not recorded in the contents of a report, accorrding to the article 224, paragraph 3 of the Criminal Procedure Code. Consequently, the minutes for playback of the incercepted telephone conversation and recorded on magnetic tape available on the criminal prosecution file, conducted during the preliminary acts, with compliance to the conditions and where indicated by law, are considered relevant evidence”.⁵

There is an uniform practice of the High Court of Cassation and Justice in this regard.

¹ Neamt Court, criminal section, judgment no 116/P/9.06.2010, unpublished.

² Prosecutor's Office attached to Iasi Courtl, file no. 297/P/2003, Ordinance dated 28.06.2004.

³ Judgment No 59P/30.04.2009 Constanta Court of Appeal, Criminal Section for cases involving minors and family www.mateut-budusan.ro/revista/

⁴ High Court of Cassation and Justice, Criminal Section, Decision no. 2521 July 1, 2009, www.mateut-budusan.ro.

⁵ High Court of Cassation and Justice, Criminal Section, Decision no. 4481 of 12 July 2006, www.juris.ro.

Thus, by 10/07.01.2008 Decision, it is reiterated, by analyzing stipulations of the article. 91¹, paragraph 1 and 2 of the Criminal Procedure Code, which strictly establishes the legal requirements of realizing interceptions and audio or video recordings, that their legality is not subject to criminal proceedings¹. However we note that even in theory have been expressed view diametrically opposed to the one expressed by us. In supporting this view is taken into account also the fact that in order for a procedural measure to be ordered, the person concerned has a certain quality (accused or indicted), the legislator always mentioning this. However, the provisions governing the interception and recording material are aimed to the “people” or “offender” who bears the calls and not to the “accused” whose conversations are recorded with authorization from the District Attorney. Also, it is argued that in order for this to be an effective measure, it is required that records be made without the concerned people to be aware of this, which would be possible, in principle, just in the pre-prosecution stage. (Ciobanu, 2003)

This view is supported by another expert opinion, (Slăvoiu, 2010, pp. 177-186) according to which, compliance with those guarantees instituted by disposition article 172, paragraph 1 of the Criminal Procedure Code, where audio or video interceptions seriously diminishes the effectiveness of the evidential process, whereas disclosing the accused of the beginning of criminal investigation determines the self-defense reaction, as well as avoidance to use technical means of communication. Also, it is considers that by disclosing the accused about beginning the criminal investigation one of the specific features of special techniques of investigation is compromised, as defined in Recommendation (2005) 10 of the Committee of Ministers of the Council of Europe. According to the enactment invoked, the techniques used in the context of criminal investigation, whose purpose is gathering information in order to detect and investigate crimes, will be conducted so that the concerned people are not alerted. Also in the doctrine was expressed the view that, as audio or video recordings may be authorized for criminal identification and localization, which involves informing work, it is considered that, without a prohibitive text, these recordings may be realized also as preceding acts, if authorized by law². It is considered that authorizing this evidential process is not subject to the initiation of criminal proceedings, this measure can be ordered also in the pre-prosecution provisions, in order to improve the fight against corruption, organized crime or human or drug trafficking, regardless of whether a crime was committed or its perpetration is prepared³.

At the same time, it is noted that the legislator has specified in regulating the necessary conditions that in order to authorize an interference with the privacy only the crimes for which an interference is permitted, without concerning the person that must bear the intrusion. (Udroiu & Predescu, 2008, p. 826)

In the reference literature also the principles that must be taken into account are highlighted in order to intercept and record conversations, respectively the principles of pro-active investigation (data or grounds about training), as well as reactive investigation (data or solid grounds about committing a crime), principle of measure proportionality of privacy right restriction due to interception, recording, tracking or tracing, by referencing to the particular circumstances, the importance of the information of evidence to be obtained or the seriousness of the crime and the subsidiarity principle, emphasizing the exceptional nature of the interference with the private life, in order to ensure the fairness of the procedure by avoiding that a significant part of the probation that is taken in a cause to consist in communication, conversation or image interceptions or recording. (Udroiu & Predescu, 2008, pp. 129-

¹ High Court of Justice, penal section, Decision no. 10 of 07 January 2008, www.scj.ro.

² Grigore Theodoru, Criminal Procedure, p. 399.

³ Mihail Udroiu, Criminal Procedure, p. 130.

131) Contrary to these views though, the Constitutional Court recently ruled that legal provisions regarding audio or video interceptions or recordings are within the mean that they cannot be performed under any circumstance before the initiation of criminal proceedings, these not allowing managing the evidence outside the criminal trial, namely the preparatory act phase.¹ But, because these aspects are mentioned in a rejection decision of an exception of non-constitutionality regarding the stipulations of the article 91¹ Criminal Processual Code its effects are produced only *inter partes*, and *not erga omnes*. More than that, in the context in which the Court of Justice does not have attributions in the sense of institutionalization, the prosecutors and the courts are not kept by this point of view. Taking into account the irregular probation of the courts of justice, we think in the way in which it was imposed the working out of an appeal in the law interest recurs for ensuring and uniform interpreting of the legal stipulations cases in the matter. A possible appeal in the interest of the law is needed to be solved in the meaning of the impossibility of making the interceptions and audio-video registrations in the phase of precursory acts. Thus, starting from the presented perspectives, we appreciate that making within the precursory acts of the registrations and interceptions audio or video, opens practically the possibility of the abuse regarding some rights and fundamental liberties of the persona. Consequently we emphasize the necessity of removing the discrepancies generated by the considerations of certain decisions of the Court of Justice, related to the possibility of the authorization of the communications interception and in the phase of the preliminary deeds, not only through an express regulation and free of ambiguity and also through a compulsory decision in view of interpretation and unitary application of these texts.

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¹ Constitutional Court, Decision number 962 of the 25th June 2009, regarding the dismiss of the plea of unconstitutional provisions of article 91¹ of the Criminal Procedure Code, published in the Official Monitor number 563 of the 13th of august 2009.