AUDIO AND VIDEO INTERCEPTIONS AND RECORDINGS IN CRIMINAL LAW IN ROMANIA

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Abstract
Within the present study we propose to undertake an analysis of an institution introduced in 1996 in the Code of Criminal Procedure, and which, by reference to a relative recent date of legislation, causes controversial discussions in the Romanian legal environment: the interception and recordings of conversations and communications made by phone or by any mean of electronic communication. Also, the controversial aspects with respect to this evidence mean are generated by the conflict existing between very important social values, specific for this field, between the necessity to ensure a social climate characterized by sanctioning those who commit offences, on one side, and the right of every human individual to be protected against interferences in their private life (by violating the right of privacy of the correspondence and communications). To this end, we shall proceed to present the legislative framework established by the Code of Criminal Procedure provisions, and, mainly, we shall emphasize the shortcomings of the law text, proposing solutions to the Romanian legislator.

Keywords: *the criminal law in Romania, the audio and video interceptions and recordings, the evidence, the right to private life, serious offences.*

Introduction

The possibility to use in the criminal law in Romania the sounds or images recordings was regulated, for the first time, by the Law no 141/1996. Thus, by this normative act, at Title III "*Evidence and Evidence Means"*, Chapter II "*Evidence Means"* was introduced Section V[1] "*Audio or Video Recordings".* Subsequently, by Law no 281/2003, the name of this section was changed to "*Audio or Video Interceptions and Recordings".* The new regulation added to the already existing evidence means, two new more: audio recordings and the images recordings (video or photo).

Literature review

The issue of the judicial authorities' interference in the private life of the individual by violating the right to correspondence privacy is widely discussed by the national specialized literature, and mostly by the international one. We are taking into account, on national level, a series of studies, as follows: **Ioan Lascu,** *Particularităţile de investigare şi cercetare a infracţiunilor de corupţie în lumina noilor modificări legislative,* Revista Dreptul no 11/2002, pages 137-148; **Mircea Damaschin**, *Înregistrările audio sau video şi fotografiile*, Revista de Drept Penal no 3/2001, pages 49-56; **Augustin Lazăr**, *Interceptările şi înregistrările audio sau video*, Revista de Drept Penal no 4/2003, pages 36-51; **Angela Hărăştăşanu**, *Interceptarea şi înregistrarea convorbirilor sau comunicărilor*, Revista de Drept Penal no 2/2004, pages 69-75;

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Dan, *Unele observaţii privind interceptările şi înregistrările audio sau video*, Revista Dreptul no 2/2005, pages 169-171; **Camelia**, *Interceptările audio şi video*, Revista de Drept Penal no 1/2006, pages 106-113.

Referring to the studies published in important international law magazines, we would like to mention **Frédéric Sudre,** *Droit de la Convention Europeene des droits de l'homme* published in La Semain Juridique – Edition generale, 05 février 2003; Andy Roberts, *Identification of suspects from CCTV and Video Recordings,* Journal of Criminal Law, no 67/2003; **Nick Taylor,** *Abuse of process: Destruction of CCTV Evidence,* Journal of Criminal Law, no 67/2003, **Andrew Roberts,** *Covert Video Identification: European Convention on Human Rights, Article 8*, Journal of Criminal Law, no 67/2003; **Nick Taylor**, *Interception of Communications: Failure to Comply with the Right to Private Life* Journal Of Criminal Law, no 67/2003; **Andrew Roberts**, *Regulation of Investigatory Powers Act 2000: Private Surveillance*, Journal of Criminal Law, no 70/2006.

Audio and Video Interception and Recordings in Criminal Law in Romania

1. Preamble

According to article 91¹, paragraph 1 of the Code of Criminal Procedure, the interception and recording of conversations and communications made by phone or by any other mean of communication are made only based on the motivated authorization of a judge, upon the request of the public prosecutor who performs or surveys the criminal investigation, under the conditions prescribed by the law, if there are solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio, and the interception and recording are essential to establish the matter of fact, or because the identification or the localization of the participants may not be made by other means, or because the investigation would be delayed too long.

By reference to the former article 91¹, paragraph 1, previous to passing the Law no 356/2006 ("the interception and recordings of certain conversations or communication, on magnetic tape or any other type of support, shall be performed only with the motivated authorization of the court, upon the request of the public prosecutor, in the cases and under the conditions prescribed by the law, if there are solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio, and the interception and recording are essential in order to determine the truth"), there may be expressed a series of observations, as follows. First of all, it was completed the regulation which mentions the interception and recordings object. Thus, previous to the Law no 356/2006, the interception and recordings aimed "the conversations or the communications". De lege lata, are taken into account "the conversations or communications made by phone or by any other electronic mean of communication" Secondly, for a greater strictness of expression, the interception and the recordings are ordered upon the request "of the public prosecutor who performs or surveys the criminal investigation". Previously, the court was notified by the "public prosecutor".

As a conclusion, the interception and the recordings of conversations and communications presumes the fulfillment of the following conditions:

a). the existence of the judge's motivated authorization;

b). the existence of solid clues and data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio;

c). the interception and the recordings are essential to establish the matter of fact, or because the identification or the localization of the participants may not be made by other means, or because the investigation would be delayed too long.

2. Essential conditions for performing the interception and recordings of the conversations and communications made by phone or by any other electronic mean of communication

2.1. Regarding the **first condition,** previous to the modifications occurred during 2006, the authorization to perform interception and recordings was ordered by the president of the court which had the authority to try the case in the first instance. As a result of the provisions introduced by the Government Emergency Ordinance no 60/2006, the activity of authorizing the audio interception and recordings was granted to the president of the competent court, if the president is absent, the authorization may be given by a judge appointed by the court's president. Despite the obvious hesitations of the legislator, we consider that the current effective law text, subjected to analysis, complies best with the imperatives aiming to determine the truth in a criminal trial, but also, but also with the requirements on observing the fundamental rights and liberties of individuals (for the present case, the right to private life and correspondence privacy).

By the new provisions, it was regulated an alternative territorial authority, the authorization may be ordered at the level of the court which would have the authority to try the case in the first instance, or at the level of the court corresponding as rank to the court which would have the authority to try the case in the first instance, under which jurisdiction it is found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation. The regulation is not above criticism. Thus, the court which tries in the first instance is determined by reference to the provisions of article 31, paragraph 1, in case of simultaneous notification. Of these courts, the authority belongs to the court under which jurisdiction was performed the criminal investigation, meaning to the court under which jurisdiction it is found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation. Therefore, in the event the criminal investigation is performed under the jurisdiction of a court other than the one authorized to try in the first instance a legal transfer of authority shall take place, justified by the criminal trial promptness. In this way, it is established an alternative territorial authority between two courts but for which there are used wordings signifying a sole court, the one that shall try the case in first instance.

Under certain special situations, in case of emergency, when a delay in obtaining the authorization under the common conditions, showed above, would generate serious damages to the investigative activity, the public prosecutor who performs or surveys the criminal investigation may order, as a temporarily title, by motivated ordinance, recorded in the register particularly provided by article 228, paragraph 1^1,[1] the interception and recording of conversations and communications on a period of maximum 48 hours (article 91^2, paragraph 2 of the Code of Criminal Procedure, as modified by Law no 356/2006).

In light of article 91^2, paragraph 3 of the Code of Criminal Procedure (as modified by Law no 356/2006), within 48 hours since the expiration of the term provided in paragraph 2, the public prosecutor shall submit the ordinance, along with the support on which were performed the interception and recordings and an official report with the conversations summary, to the judge of the court which would have the authority to try the case in first instance or to the judge of the court corresponding as rank to the above one, under which jurisdiction it is the found the prosecutor's office of the public prosecutor who performs or surveys the criminal investigation, for validation.

We underline the modification of the provisions according to which the interception and recordings may be ordered, as a temporarily title, by the public prosecutor. Thus, in the previous

[1] According to article 228, paragraph 1^1 of the Code of Criminal Procedure, at the headquarters of the criminal investigation bodies it shall be established a special register which shall help to maintain the account of the criminal investigation papers that are very important to the criminal trial (for instance, the criminal investigation commencement decisions)

regulation it was determined the duration of these temporary recordings, by establishing the public prosecutor obligation to inform the court about the evidence activities ordered, within 48 hours since starting the interception and recording.

According to the present regulation, the temporary interception and recording of conversations may be ordered for a maximum period of 49 hours. Also, another difference, as compared to the previous regulations, consists of that the court shall be informed by the public prosecutor within 48 hours from the expiration period for which the interception and recording may be performed without an authorization from the judge. It results that, in light of the previous rules, the judge was informed on the interception and recordings performance, *without his authorization,* within maximum 24 hours since the ordinance issuing, while, *de lege lata,* the public prosecutor shall inform the judge on this fact within maximum 96 hours.

Establishing a term of 48 hours during which a person's conversations may be intercepted and recorded, in the absence of a judge authorization, is an aspect which renders the criminal investigation more efficient. In this way, by this regulation there were given, to the criminal investigative bodies, the instruments adapted to the present conduct of the persons who commit criminal unlawful acts, thus aiming to establish a proportion between the expert governmental bodies' reaction and the criminal phenomenon (mostly the phenomenon of organized crime).

Despite all this, we could not grasp the reason based on which the judge is informed on the evidence activity only after the expiration of 48 hours term since the interception and recording completion. We make this observation under the conditions in which the evidence activity, for most of the cases, is performed by other bodies than the public prosecutor. At the same time, it could be invoked the necessity to establish such a time frame to draft the documents which shall be submitted to a judge in order to validate the recordings. According to the new regulation, informing the judge, presumes, among other things, the presentation of an official report of *the conversations summary,* unlike the previous provisions according to which the recorded conversations are *completely reproduced* in writing.

Also, maintaining the wording "delay in the authorization obtaining would generate serious damages to the *criminal investigation activity",* leads to the conclusion that the temporary interception and recordings, performed based on the public prosecutor ordinance, implies the existence of an already opened criminal investigation. Therefore, these evidence operations may not be performed by invoking the existence of certain serious grounds and data on *preparation* of an offence perpetration, but only within an already existing criminal trial.

Also, we notice the faulty wording of article 91^2, paragraph 2 of the Code of Criminal Procedure, according to which the public prosecutor submits to the court the support on which are made the *interception* and the recordings. The interception operation may not be made on a certain support, what is being preserved, in fact, is the recording. Any recording implies a previous interception, but not the other way around, because an interception activity is possible without recording any conversation or communication. As a consequence, what is found on the used technical support is the conversation or the communication recorded as a result of the interception, and not the interception itself.

The judge decides on the lawfulness and the thoroughness of the ordinance with in maximum 24 hours, by a motivated decision passed in the council chamber. If the ordinance is validated and the public prosecutor has requested the extension of the authorization, the judge shall authorize the interception and recording continuation, under the conditions of article 91^1, paragraph 1-3 and 8 of the Code of Criminal Procedure. If the judge does not validate the public prosecutor ordinance, he shall order the immediate ceasing of the interception and recordings, and those already performed shall be erased or, if necessary, destroyed by the public prosecutor, to this end being drafted an official report, and a copy of it shall be submitted to the court. In this case, we

notice the ambiguity of the expression "*those already performed",* this term having, in its grammatical interpretation, the meaning of "*interception and recordings"*. And it is obvious the fact that the interception, operation essential to the recording, may not be erased or destroyed.

In reference to the same legal provision, it is noticed the exhaustive character of the wording *"the recordings shall be erased or destroyed",* text which covers all possible factual situations. Thus, the legislator made the necessary delimitation between the *"erasing"* operation and the *"destroying"* one, taking into account, for instance, the fact that the pictures (which may be defined as static image recordings) may not be erased, the only possible option being their destruction. To this end, there are recordings which may be erased from the support on which they are made, but there are, also, recordings which imply the destruction of their support.

Also, it is noticed the fact that the legislator did not take into account the regime applicable to the official report of recorded conversations summary. We consider that to erase or destroy the temporary recordings performed at the order of the public prosecutor, without destroying the official report of recorded conversations summary, has no finality; this conclusion is needed because the interception object is preserved, in this way, by the official report drafted. Thus, during the erasing or destroying operation it is necessary to consider the official report drafted, too, therefore it shall remain no trace of the performed activity, which, in the end, it was not validated by the judge.

Compared to the previous regulation, the present regulation in this field clearly provides that the trial session, during which the judge decides if it is necessary to validate or to invalidate the public prosecutor's ordinance of performing the interception and the recordings, takes place in the council chamber. The discussed rule completes the confidential character of this evidence activity.

2.2. Relative to **the second legal condition** (to exist solid clues and data on the preparation or perpetration of certain offences for which the criminal investigation is performed ex officio), arises the conclusion that the offence for which it shall be ordered the authorization to use this evidence proceeding must imply the commencement of the criminal proceedings ex officio. In article 91^1, paragraph 2 of the Code of Criminal Procedure, the Romanian legislator used the technique of exemplifying enumeration, stating that the authorization may be granted in case of offences against the state security, provided by the Criminal Code and by other special laws, as well as in the case of drug trafficking offences, weapons trafficking offences, human trafficking offences, acts of terrorism, money laundering, money or other values counterfeit offences, in the case of the offences provided by Law no 78/2000 (corruption deeds) or other serious offences which may not be determined or whose perpetrators may not be identified by other means, or in the case of offences committed through means of electronic communication.

By reference to the previous wording of article 91^1, paragraph 2 of the Code of Criminal Procedure, it is noticed the substitution of "*offences which are committed by means of telephonic communication or by other telecommunication means"* wording with the phrase "*offences which are committed by means of electronic communication".*

The legislative technique proceeding, consisting of exemplifying enumeration, leads to the possibility of resorting to the interception and recordings of conversations or communications for offences other than those provided by the law text, but which must fulfill an essential general condition: to exist solid clues or data on the preparation or perpetration of an offence for which the criminal investigation is performed ex officio. *Per a contrario,* in the case of offences for which the criminal investigation is not performed ex officio, these evidence means are inadmissible.

In relation to this specification we notice the possibility to express some different interpretations of the law text. Thus, the reason based on which it was resorted to the condition that the offences which are prepared or are perpetrated, to be investigated ex officio, resides, in our

opinion, in the low social danger posed by the other offences, for which the criminal investigation starts as a result of a previous complaint. In this way, it is established an agreement between the Code of Criminal Procedure and the provisions of the Constitution of Romania where, in article 53, paragraph 2, is stipulated the principle of proportionality between violating a fundamental right, on one side, and the danger generated by the perpetration of the criminal offence, on the other side (in the case of these evidence means, it is about the relation between violating the right to private life, consisting of conversations and communications privacy, and the social danger generated by committing an offence or the presumed social danger if we are in the situation of having solid clues or data on the preparation of certain offences perpetration). Despite all this, in the same category of offences for which the criminal investigation is not performed ex officio, fall also the offences which are not characterized by a low degree of social danger. To this end, we are taking into account some offences which are investigated upon the previous complaint of the injured party (the simple sexual assault provided by article 197, paragraph 1 Criminal Code), but mostly, offences which may generate a high degree of social danger and for which the order to commence the criminal investigation is conditioned by a manifestation of will, so which are not investigated ex officio (e.g. the application of the Chamber of Deputies, of the Senate and of the President of Romania, for the offences perpetrated by members of the Government in relation to the exercise of their powers; thus it is possible to invoke the inadmissibility of this mean of evidence in order to determine the truth within criminal cases having as passive subject a member of the Government, since this are criminal cases for which the criminal investigation commencement is not made ex officio being needed previous authorizations). This interpretation exceeds the reason and the initial intentions of the legislator, which gives us the right to conclude that, in order to identify the real finality of the discussed rule, it is necessary to resort to the restrictive interpretation. Thus, there shall be considered inadmissible the interception and recordings of conversations and communications only for the offences for which the criminal investigation commences as a result of a previous complaint of the injured party, and not for all the legal cases where the principle of criminal investigation authoritative character is abolished.

2.3. Regarding the **third condition**, we also notice new aspects compared to the period previous to 2006. Thus, according to the previous regulation it was established that the interception and recording *are necessary in order to determine the truth;* now we must notice that the interception and recording are necessary: 1. to establish the matter of fact; 2. because the identification or localization of the participants may not be made by other means; 3. because the investigation would be delayed to long.

Under this conditions, we notice that the court's president who shall issue the authorization, or the judge appointed by the president, must decide that the interception and recording of conversations are necessary in order to establish the matter of fact or because the identification or localization of the participants may not be made by other means or because the investigation would be delayed to long.

The authorization for interception and recording is made by motivated decision, which shall comprise: the actual clues and facts that justify the measure; the reasons for which the matter of fact may not be established or the identification or localization of the participants may not be made by other means, or why the investigation would be delayed to long; the person, the mean of communication or the location subjected to surveillance; the period for which the interception and recording are authorized (art. 91^1, paragraph 9 of the Code of Criminal Procedure). By modifying the third condition required for the interception and recording authorization, it was modified also the content of the order. Thus, previous to 2006, the decision had to contain the actual clues and facts which justified the measure; the reasons for which the measure is essential to determining the

truth; the person, the mean of communication or the location subjected to surveillance; the period for which the interception and recording are authorized.

3. The duration of the interception and recording of conversations and communications made by phone or by any other electronic communication mean

The authorization is granted for the duration required to intercept and record, but for no more than 30 days, with the possibility of being renewed, before or after the expiration of the previous one, under the same conditions, and for serious justified reasons, each extension not exceeding 30 days. The overall duration of the authorized interception and recordings, regarding the same person and the same deed, shall not exceed 120 days (art. 91^1, paragraphs 3 and 4). By the new provisions it was modified the wording *"4 month"*, representing the overall duration of the authorized interception and recordings, with the *"120 days"*. In this way the time unit used is unique, being avoided the situations where a person had its conversations intercepted and recorded for 4 months, time period which may comprise 120, 121 or 122 days.

Also, it was replaced the wording *"the overall duration of the authorized interception'* by the "*the overall duration of the authorized interception and recordings, regarding the same person and the same deed"*. By this rule it is established, firs of all, a maximum term for the interception operations necessary to the evidence activity of the recording. Secondly, from the used wording, we may conclude that to establishing the overall duration there were taken into account two cumulative criteria, person unit and deed unit. It results, for instance, that in case the indicted is tried for an offence and there are discovered data regarding the preparation or perpetration of a serious offence, it shall be possible to determine that it is the same person but a different deed. So, it is possible to legally request the authorization of another interception and recording, considering the new offence prepared or perpetrated by the person whose conversations or communications were recorded. This reasoning may be also used for the factual hypothesis "other persons, same deed". In this way, the perpetrator whose conversations were initially intercepted and recorded, shall still be subjected to this surveillance if it is determined that at the preparation or perpetration of the deed were involved other persons, too. This is the way in which are created the conditions necessary to intercept and record the conversations or communications of a person for a period longer that the 120 days deadline, a major differentiating aspect as compared to the previous regulation.

4. Performing the interception and recordings as a result of the request of the injured party

The recordings provided in paragraph 1 may be performed as a result of a motivated request of the injured party, regarding the conversations and communication addressed to it. To this end, according to article 91^1, paragraph 8 of the Code of Criminal Procedure, *'upon the motivated request of the injured party, the public prosecutor may request to the judge the authorization for intercepting and recording the conversations or communications made by this party by phone or by any other electronic communication mean, regardless of the nature of the crime which constitutes the object of the investigation"*.

There are noticed the modifications occurred with respect to the regime applicable to the interception and recordings of the injured party. First of all, the present procedure allows the possibility of these interception and recordings, the motivated request being submitted to the relevant public prosecutor, in order for him to inform the court, and not directly to the court, as it could be interpreted from the previous wording of article 91^1, paragraph 6 of the Code of Criminal Procedure.

Secondly, from the analyzed rule it results the conclusion that the request of the injured party to be performed the interception and recordings may be rejected by the public prosecutor,

because he has the power and not the obligation to inform the relevant court. We notice that this way of interpretation results from the manner in which the discussed rule was drafted, and according to which the public prosecutor ***may*** request from the judge the authorization to use this evidence proceeding.

Thirdly, it was eliminated the condition regarding the nature of the crime which represented the object of the investigation. Thus, by the previous regulation, not being stipulated different conditions for the injured party conversations, the authorization was granted by reference to the general conditions existing in the field. *De lege lata,* the authorization may be granted ***notwithstanding the nature of the crime,*** which represents the investigation object.

This regulation shows a significant moving off from the principles which have determined the introduction in the criminal law in Romania of the "audio or video recordings" institution. Thus, for the juridical nature of this institution it is essential to observe the constitutional principle of proportionality between limiting the exercise of the right and the cause which determines this restriction. According to article 53, paragraph 2 of the republished Constitution of Romania, "*such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it…".* The initial regulation observed the proportionality principle, stipulating that in order to decide the restriction to exercise the right of correspondence confidentiality, namely the right to particular, family and private life, it was necessary that for the invoked offence, the criminal proceedings to be commenced ex officio. In other words, the restriction of the above mentioned fundamental rights is not possible if the offences for which the criminal proceedings commences upon a previous complaint of the injured party.

Applying the same constitutional principle, the regulation was completed, by using the legislative procedure of exemplifying enumeration, listing some offences which may justify the authorization of interception and recordings, offences which have as common ground the high degree of social danger.

According to this regulation, as a result of the injured party motivated request, it is possible to order some interception and recordings in case there are solid clues or data regarding the preparation or perpetration of an offence of threat, for instance.

5. **Other provisions regarding the procedure of interception and recording of conversations and communications made by phone or by any electronic communication mean**

According to the law (article 91^2, paragraph 1 of the Code of Criminal Procedure), the bodies which perform the interception and recordings, provided by article 91^1, are:

- the public prosecutor who performs or surveys the criminal investigation;
- the criminal investigative body, following the public prosecutor order.

The persons who are called to offer technical support to the interception and recordings are compelled to maintain the confidentiality of the performed operation, the breach of this obligation is sanctioned according to the Criminal Code.

About the performance of the interception and recordings of the conversations or communications which concern deed representing the object of the investigation or which contributes to the identification or localization of the participants to the offence perpetration, the public prosecutor or the employee of the judicial police, delegated by the public prosecutor, drafts an official report where the conversations or the communications are rendered entirely[2]. Within the

[2] **C. Şandru**, *Interceptarea convorbirilor telefonice, în jurisprudenţa programelor de la Strasbourg*, IRDO, Drepturile omului, nr. 6-7, 1994, p. 25; **D. Ciuncan**, *Autorizarea judiciară a înregistrărilor audio şi video*, în P.L., nr. 2, 1998, p. 30.

official report is mentioned the authorization granted by the court for their performance, the number and the numbers of the telephone sets or other identification data of the links between which the conversations or communications were made, the names of the persons who had them, if known, the date and time of each conversation or communication and the registration number of the support used to record (article 91^3, paragraph 1 of the Code of Criminal Procedure, as it modified by Law no 356/2006).

According to the previous regulation on the performance of the recordings, there was drafted an official report by the public prosecutor or by the criminal investigative body. *De lege lata,* the investigative body of the judicial police shall not draft this official report ex officio, but only as a result of the *competent public prosecutor delegation.* This decision leads to noticing the fact that the institution of interception and recording of conversations or communications was places, only under the public prosecutor authority, even in the cases where the criminal investigation is developed by the investigative bodies of the judicial police.

Also, article 91^3, paragraph 1 of the Code of Criminal Procedure was completed by the mention "*other identification data of the links between which the conversations or communications were conducted."* This completion is justified by the new provisions, according to which, the communications or conversations that can be intercepted and recorded are made by phone or by any electronic communication mean. For instance, a communication intercepted and recorded via the Internet implies identification data specific to this communication method.

The official report is certified for authenticity by the public prosecutor who performs or surveys the criminal investigation. If the offences are perpetrated through conversations or communications which contain state secrets, the registration shall be made in different official reports, and the provisions of article 97, paragraph 3 of the Code of Criminal Procedure are applied accordingly.

The previous text was operating with two different terms, "state secret" and "professional secret". Thus, it was established the interdiction to mention within the official report about the conversations or communications which contained state or professional secrets. The first ones had to be registered in different official reports. Such a regulation could lead to the conclusion that the recordings of conversations or communications which contained professional secrets could be rendered in the content of a different official report.

In the effective law text, these specifications regarding the professional secrets are not stipulate any more, which means that these shall be registered within the content of an official report, drafted according to article 91^3, paragraph 1. Excepted from this rule are the conversations and communications which are not subordinated to the lawyer professional secret, under the conditions of article 91^1, paragraph 5.

Taking into account the above mentioned, we may conclude that the new regulation represents a restriction of the scope of the "professional secret" institution in the criminal law. As a result, we consider that the regime established for the "state secret" hypothesis must be extended also for the "professional secret" hypothesis.

The correspondence had other languages than Romanian shall be transcribed in Romanian, with the support of a translator/interpreter.

To the official report it is attached, in a sealed envelope, a copy of the support which contains the conversation recording. The original support is kept at the prosecutor's office, in special places, inside a sealed envelope, and it shall be submitted to the court upon its request. After the court is informed, the copy of the support containing the conversation recording and the copies of the official reports are kept at the court clerk's office, in special places, inside a sealed envelope, being exclusively available to the judge or to the panel of judges appointed to solve the case.

By modifying the previous regulations, which established the public prosecutor obligation to submit to the court the "*magnetic tape or any other type of support with the conversation recording", de lege lata,* to the court shall be submitted "*a copy of the support which contains the conversation recording",* the original being kept at the prosecutor's office. We consider this regulation as being faulty because it creates the possibility to transfer, by copying, the information existing on different electronic supports, and the possibility to produce multiple copies in easy conditions.

Also, it is mentioned the fact that the "original support is kept at the prosecutor's office … and it shall be submitted to the court upon its request", under the conditions in which "the support copy … is kept at the court clerk's office …". It may be deduced that to the court it shall be presented the copy of the support, and, possibly, the original support, while, from the content of article 91^3, paragraph 7 results the rule stipulating that the original support, namely, its copy must be kept at the court's office, after the case is solved. This specification of the law text leads to the conclusion that there is a moment when the original support is handed over to the court of law, but this moment it is not specified.

In addition to the previous regulation, within the effective law text it is stipulated the obligation relative to the trial of the public prosecutor to submit the drafted official reports to the accused or the indicted, when the criminal investigation documentation is presented. On this occasion, upon request, the accused or the indicted may request to hear the recordings (article 91^3, paragraph 4 of the Code of Criminal Procedure).

In relation to this aspect we must underline the fact that, according to the dispositions regarding the criminal investigation documentation presentation, this activity may be developed by the public prosecutor as well as by the investigative bodies of the judicial police. According to article 91^3, paragraph 4 of the Code of Criminal Procedure, the criminal investigation documentation presentation which contains the official reports of the interception and recordings performance becomes an activity related to the exclusive competence of the public prosecutor. Taking into account that the majority of the offences listed in article 91^1, paragraph 2 falls under the criminal investigation authority of the public prosecutor, and by reference to the more and more obvious tendency of the legislator to transfer these powers to the public prosecutor, it may be stated that the regulation mentioned above is justified.

Yet, we notice the futility of the provisions of article 91^3, paragraph 4 of the Code of Criminal Procedure, taking into account the fact that the official reports which register the interception and recording of conversations or communications are criminal investigation actions, representing parts of the criminal investigation file. From this perspective, the accused or the indicted possibility to take notice of their content may not be questioned, because the official report mentioned in the law is not part of the papers characteristic to criminal investigation partially confidential, as are, for instance, those regarding the actual identity of the undercover investigator or the identity data of the witnesses.

The drafting comprised within the law content which refers to the possibility of the accused or the indicted to be showed the "official reports where are reproduced the *recorded conversations"* is faulty, because by a *per a contrario* interpretation, the registered aspects regarding the *recorded communications* may not be showed to him, fact which, obviously, contradicts the legislator. As a consequence we notice that in order to apply the law, an extensive interpretation of this provision related to trial must be made, in the sense that to the accused or the indicted are presented the official reports where are reproduced the conversations and the other communications recorded.

The same observation must be made regarding the possibility that, upon request, the accused or the indicted must be able to hear the conversation recordings. The law text imperfection

consists in the fact that for the communications which may not be listened, but viewed (for instance, a text sent by electronic mail is a communication between persons which may be intercepted and recorded, but may not be listened), the accused or the indicted may not request to have easy, direct visual and audio contact. In relation to this regulation we notice that the legislator intention was to offer to the accused or the indicted the possibility to hear the audio recordings, or to view the recordings which interest him/her.

Regarding the same issue, an intercepted communication consisting of a text sent by E-mail shall not be deemed as being an *image recording,* and because of this, the provisions of article 91^5 of the Code of Criminal Procedure become applicable, text not modified, which stipulates that the legal provisions of article 91^1-91^3 of the Code of Criminal Procedure are applied to the image recordings case also.

According to article 91^3, paragraph 5 of the Code of Criminal Procedure, "if because it was decided by a decision of not commencing the trial, the public prosecutor is compelled to inform *about this* the person whose conversations or communications were intercepted and recorded".

This regulation is not above critical observations because it contains a reiteration of the provisions of article 246 and article 249 of the Code of Criminal Procedure, and as consequence the text appears as being futile.

De lege ferenda, this law text must be modified as to be clearly highlighted the will of the legislator regarding the public prosecutor obligation to inform the persons whose conversations or communications have been intercepted and recorded, under the circumstances of not commencing the trial.

Thus, in a criminal investigation file where were performed interception and recordings of conversations or other communications, finalized by a decision of not commencing the trial, the person who made the information, the accused or the indicted and the other interested persons shall receive the copy of the decision of not commencing the trial and, additionally, the persons whose conversations or communications have been intercepted and recorded shall be informed of the restriction of the fundamental rights resulting due to this evidence activity.

In the event of a solution of not commencing the trial, the support on which are made the conversations recordings are archived at the prosecutor's office, in special places, in a sealed envelope, ensuring the confidentiality, and are kept until expiration of the prescription term of the criminal liability for the deed which constituted the object of case, when they are destroyed, to this end being drafted an official report (article 91^3, paragraph 5, II Thesis of the Code of Criminal Procedure).

Subsequent to the archiving, the support of the recorded conversations may be viewed or copied if the investigations are resumed or under the provisions of article 91^2, paragraph 5 of the Code of Criminal Procedure, and only by the public prosecutor who performs or surveys the criminal investigation, and in other cases only with the authorization granted by the judge.

In the event of a final verdict of conviction, of acquittal or of ceasing the criminal trial, the original support and its copy are archived along with the file of the case at the court's office, in special places, in a sealed envelope, ensuring the confidentiality. After archiving, the support of the recorded conversations may be viewed or copied only under the provisions of article 91^2, paragraph 5 of the Code of Criminal Procedure, with the previous consent of the court's president.

6. Interception and recordings of conversations and communications made by phone or by other electronic communication mean, between the lawyer and the party he/she represents or assists

The recording of the conversations between the lawyer and the party he/she represents or assists in the trial shall not be used as evidence, unless from its content results convincing and

useful information or data regarding the preparing or perpetration of an offence by the lawyer, offence provided by paragraph 1 and 2 (art. 91^1, paragraph 6 of the Code of Criminal Procedure).

In reference to the previous regulation, according to which the conversations between the lawyer and the person he/she represents were protected by the professional secret institution, being confidential, *de lege lata,* it is stipulated the possibility to use these conversations as evidence in the criminal trial. The condition which must be fulfilled consists of demonstrating the existence within these conversations of certain *convincing and useful information or data regarding the preparing or perpetration of an offence by the lawyer, offence provided by article 91^1, paragraph 1 and 2 of the Code of Criminal Procedure.*

We notice the modification of the terminology used to indicate the professional relationship existing between these participants in the criminal trial. Thus, initially it was used the wording *"lawyer and litigant",* unlike the present regulation which uses the wording *'lawyer and the party he/she represents or assists in the trial".* Even though by the term "*litigant*" is indicated the party to which is granted judicial assistance, the present wording is more accurate, not subjected to interpretations.

The conditions need to be fulfilled for commencing the interception and recording of the conversations between the lawyer and the party he/she assists or represents are the same as for the other interception and recordings. The supplementary element consists of the legal condition which shall be fulfilled subsequent to the interception and recordings. Thus, the recorded conversation shall contain *convincing and useful information or data regarding the preparing or perpetration of an offence by the lawyer.* Imposing this condition subsequent to the evidence proceeding performance is futile, under the conditions in which upon authorizing, there were invoked *convincing information or data regarding the preparing or perpetration of an offence.* This regulation method gave rise to a current law text that is "*overloaded"* and has many interpretation difficulties.

7. Other recordings

According to article 91^4 of the Code of Criminal Procedure, the procedure examined above is to be applied to the recordings performed in the surrounding environment too, localization and tracking by GPS or by other means of electronic surveillance.

The previous text contained provisions according to which the interception and recordings procedure was applying with regard "to the conversations performed by other means of telecommunication".

De lege lata, it was regulated the possibility of recordings in the *surrounding environment,* operation which implies the recording of the discussions which takes place between two or more persons, directly, without resorting to technical means of communication.

Also, the established regime is valid with regard to the operations of GPS localization or tracking, or other such surveillance activities.

Article 91^5 of the Code of Criminal Procedure stipulates that the same rules are applicable in case of image recordings, including their certification procedure, except the typed form which may or may not be possible, as is the case.

8. Verification of the recordings of conversations and communications made by phone or by any other electronic communication mean

According to article 91^6 of the Code of Criminal Procedure, the evidence obtained as a result of using this evidence proceeding, may be subjected to a technical examination, upon the public prosecutor request, upon the request of the parties, or ex officio. This regulation goal is to eliminate not only the suspicion of conversation or other communication recordings counterfeiting, but also certain reserves regarding these means of evidence.

The audio or video recordings performed by the parties or by other persons represent means of evidence when they concern the conversations or communications had by these persons with third parties. Any other recordings may represent means of evidence when are not forbidden by the law (art. 91^6, paragraph 2 of the Code of Criminal Procedure). This is the way in which it may be made the distinction between the recordings performed by the parties or by other persons, which concern their own conversations or communications, on one side, and other recordings performed by the parties or by other persons, on the other side. The first ones represent means of evidence, while the second ones *may constitute* means of evidence, if they are not forbidden by the law.

Conclusions

On the scene of the criminal law in Romania it is welcomed the initiative of introducing these new methods of evidence, the audio and video recordings being, in many cases, the most important means of evidence which lead to the solving of a criminal case. But, at the same time, the relatively recent legislative establishment of this new trial institution and the sensitiveness of the field where these means of evidence are obtained (field with very important, fundamental social values, and in most cases, antagonistic, like the need to ensure public order by violating the right to private life) led to the creation of some new contradicting thesis, generated the uneven judicial practice, and even now, there exist legal provisions which are, at least, debatable.

By this study we have attempted to detect the legislative aspects which may be improved, from our point of view.

Thus, for instance, the new regulation enables the public prosecutor (judicial body that has the right to order the interception and recording of conversations or communications, only by exception) to authorize the use of this evidence mean for a longer period of time as compared to the effective legislation in 2003, under the legal conditions which do not prove the necessity of this measure.

Also, the law text faulty wording are obvious, like in the case of the rule according to which the interceptions may be made on a certain type of support (in reality, what is preserved on that support being the recordings which imply a previous interception of a conversation or communication).

In our opinion, it is also very important the legislator's failure to mention what is the regime applicable to the official report of recorded conversations summary. Thus, erasing or destroying the temporary recordings performed by order of the public prosecutor, which is not followed by the destruction of the official report of recorded conversations summary has no finality, because the object of interception is preserved in this way through the official report drafted. So, in an erasing or destroying operation it is necessary to take into account the official report drafted, also, to the end of not leaving any trace of the performed activity, which, in the end, was not validated by a judge.

Also, we notice that one of the principles which stood at the base of the audio and video interception regulation is represented by the balance between breaking the correspondence privacy and the criminal law, by perpetrating an offence for which the criminal investigation is commenced ex officio. Thus, as rule, for the offences for which the criminal investigation does not commence ex officio, the interception and recordings are not possible. But, among these offences are serious crimes, in some cases, the authoritative character being removed not by taking into account the social danger of the deed but by reference to other aspects (like the existence of a certain quality of the perpetrator). Under these conditions, we already noticed that the evidence proceeding may be used even if the criminal investigation may not be commenced ex officio, the reason being the high social danger of the deed.

Finally, we notice that the criminal matter legislation must be improved with regard to the provisions of the Criminal Procedure Code, but, mostly, with regard to the provisions of the special laws, which stipulate the possibility of using this evidence proceeding.

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