CRIMINAL PROTECTION OF PRIVATE LIFE

Radu SLĂVOIU[*]

Abstract

This study is meant, first of all, to analyze the incriminations that the new Romanian Criminal Code sets for the protection of a person's private life as a social value of maximum significance both for the human being and for any democratic society as a whole.There are two criminal offences treated in this study that are not to be found in the current criminal legislation: violation of private life and criminal trespassing of a legal person's property. Likewise, the study will bring forth the novelties and the differences regarding the offences of criminal trespassing of a natural person's property, disclosure of professional secret, violation of secret correspondence, illegal access to computerized system and illegal interception of electronic data transfer – acts that when, directly or indirectly, committed can cause harm to the intimacy of a person's life.As an expression of the interdisciplinary nature of this subject, the study also sets out, as a subsidiary aspect, an evaluation of the circumstances under which the new criminal proceeding legislation allows public authorities to interfere with an individual's private life. Thus, the emphasis is on the analysis of the circumstances under which special surveillance and investigation techniques can be used as evidence proceedings regulated by the new Romanian Criminal Procedure Code.

Keywords: *New Criminal Code, the protection/violation of private life, harassment, professional office, means of interception of communications*

Introduction

I. General aspects. Modern society includes, among the individual's most important values, his private life, whilst both international and national legislation being more and more preoccupied with the protection of this fundamental right of human being.

The Universal Declaration of Human Rights stipulates under Article 12, that „No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to the attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Likewise, the International Covenant on Civil and Political Rights provides, in Article 17, „1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, neither to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks." Article 8 of the European Convention of Human Rights shows that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or offence, for the protection of health or morals, or for the protection of the rights and freedoms of others." The American Convention of Human Rights expresses in a similar manner under Article 11, 2-3: "2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or

[*] Ph.D. Candidate, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: raduslavoiu@yahoo.ro)

of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks."

Transposing the international regulations onto national level, Article s 26-28 from the Constitution of Romania establish, as fundamental rights, intimate life, family and private life, home inviolability and the secret of correspondence.

As none of these terms enjoy a legal definition, it was the duty of doctrine and jurisprudence to establish their meaning and content.

In Western juridical literature, private life was, practically, understood as a secret sphere of the individual's life, where the access of third parties[1] is not allowed. Respect for private life implies the guarantee of a person's physical and moral integrity, the protection of his personal or social identity, of his sexuality, of private places[2], as well as the protection of reputation and the prevention of disclosure of confidential information[3]. A person can consider as being part of his private life any aspect that may be associated with his health, moral, religious or philosophical believes, his sentimental and family life, his friendships[4]. It was also noted that private life includes the individual's right to intimate, personal life, his right to social private life and the right to a healthy environment[5].

Striving to find meanings as precise as possible for the concept of "private life", it was noticed that, Romanian doctrine[6] makes a distinction between the texts of the European Convention and those of the Romanian Constitution, the latter using a concept that the first is avoiding, namely intimate life. It has been noted that intimate life is only a part of private life, which, first of all, contains the right to solitude, that is the individual's right to be with himself, to seclude from the others, to keep the secret of his own thoughts, plans and desires, to be left alone with his ideas and aspirations, but also with his behavior through which he intends to express his personality, unhindered by any outside interference. Secondly, intimate life also implies contacts with other persons "in the presence of whom the subject feels like being only with himself", to whom he can express his deepest thoughts; the contacts with these persons can be oral, when the interlocutors are present, but also through letters, telegrams, telephone conversations when absent.

On its turn, private life is considered to be made of the right to intimate life, with all the above mentioned elements included to which we also add a sphere of the subject's business and professional contacts are also added. Thus, we consider that private life represents a particular area of personal thoughts and acts, of communications and conversations that are not suppressed, a personal inviolable space where the individual can express his inner personality; but it also includes intimate or professional contacts with the others.

When approaching the issue of the protection of private life from its values' point of view, another author[7] notices that the risks associated to this fundamental right regard the violation of the person's solitude, interference into his personal matters, disclosure of personal information – which

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[1] See J. Carbonnier, *Droit civil*, tome I, *Les personnes. Personnalité, incapacités, personnes morales*, Presses Universitaires de France, Paris, 2000, pg.156.

[2] See R. Clayton, H. Tomlinson, *The Law of Human Rights*, Oxford University Press, 2001, par.12.85-12.94.

[3] See P. van Dijk, F. van Hoof, A. van Rijn, L. Zwack, *Theory and practice of the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, pg.665.

[4] See G. Cohen-Jonathan, *Respect for private and family life*, in R.St.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht: Nijhoff, 1993, pg.405 and the followings.

[5] See Fr. Sudre, *Dreptul european şi internaţional al drepturilor omului*, Polirom PH, 2006, pg.315; C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articol*e, vol. I, *Drepturi şi libertăţi*, All Beck PH, Bucureşti, 2005, pg. 600.

[6] See E. Tanislav, *Ocrotirea penală a dreptului la intimitate*, Revista de Drept penal nr.3/1998, pg.42-53.

[7] See V. Stati, *Ocrotirea penală a dreptului la viaţă privată în Republica Moldova*, Revista de Drept penal nr.3/2006, pg.146-157.

entails a harm on the individual's image in society – using the name or image of a person for the benefit of the one who uses them, creating IT systems of personal data.

The jurisprudence of the European Court of Human Rights has proven to be an essential source in establishing the constituent elements of private life, although, several times[8], the European court considered that it is not possible and neither necessary to give an exhaustive definition to the concept, because its content changes according to various factors (for instance: the period of time it refers to, the society in which the individual spends his life). The Court considers that private life can not be limited only to the inner circle where a person lives his life the way he wants and from which he excludes the exterior world, but, to a certain extent, it also includes the individual's right to build relations with his fellow men, thus there is no major reason for eliminating professional or business activities. In other words, there are areas of interaction between a person and the others, even in a public environment, which can be included in the concept of private life[9]; similarly, data of public nature referring to an individual can also be considered as part of private life, in case they are collected and systematically stored in the records of public authorities[10]. Likewise, the right to respect for private life also comprises the right to its confidentiality[11], the right to the individual's physical and moral integrity[12], including sexual life, the right to information regarding his own or his parents' identity[13], the right to rest in his own house[14], the right to one's own image[15], the right to act in a certain manner[16].

There is an interrelation between private life and the inviolability of correspondence, meaning the right of one person to communicate his thoughts using any means[17] – verbal, letters, telegrams, fax, telex, pager, phone, e-mail, SMS, and MMS – without being known by third parties or censored. CEDH jurisprudence presents a wide range of cases on this matter[18]. The protection of the

[8] See: ECHR, judgement of 6 February 2001 case of Bensaid versus The United Kingdom; ECHR, judgement of 29 April 2002 case of Pretty versus The United Kingdom; ECHR, judgement of 20 March 2007, case of Tysiac versus Poland.

[9] See: ECHR, judgement of 25 June 1997 case of Halford versus The United Kingdom; ECHR, judgement of 25 October 2007 case of van Vondel versus Olandei.

[10] See: ECHR, judgement of 27 October 2009 case of Haralambie versus Romania.

[11] See: ECHR, judgement of 29 March 2000 case of Rotaru versus Romania; ECHR, judgement of 6 June 2006 case of Segersted-Wiberg and others versus Suediei.

[12] See: ECHR, judgement of 16 June 2005 case of Storck versus Germany.

[13] See: ECHR, judgement of 13 February 2003 case of Odièvre versus France.

[14] See: ECHR, judgement of 7 August 2003 case of Hatton versus The United Kingdom.

[15] See: ECHR, judgement of 28 January 2003 case of Peck versus The United Kingdom; ECHR, judgement of 17 July 2003 case of Perry versus The United Kingdom; ECHR, judgement of 24 June 2004 case of von Hannover versus Germany; ECHR, judgement of 11 January 2005 case of Sciacca versus Italy; ECHR, judgement of 24 February 2009 case of Toma versus Romania.

[16] See: ECHR, judgement of 18 January 2001, case of Chapman versus The United Kingdom.

[17] See: ECHR, judgement of 22 October 2002 case of Taylor-Sabori versus The United Kingdom.

[18] See: ECHR, judgement of 21 February 1975 case of Golder versus The United Kingdom; ECHR, judgement of 25 March 1983 case of Silver and others versus The United Kingdom; ECHR, judgement of 24 April 1990 case of Huvig versus France; ECHR, judgement of 24 April 1990 case of Kruslin versus France; ECHR, judgement of 30 August 1990 case of Fox, Campbell and Hartley versus The United Kingdom; ECHR, judgement of 25 March 1992 case of Campbell versus The United Kingdom; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 20 June 1998 case of Schönenberger and Durmaz versus Switzerland; ECHR, judgement of 23 September 1998 case of Petra versus Romania; ECHR, judgement of 4 June 2002 case of William Faulkner versus The United Kingdom; ECHR, judgement of 24 October 2002 case of Messina versus Italy; ECHR, judgement of 5 November 2002 case of Allan versus The United Kingdom; ECHR, judgement of 19 December 2002 case of Salapa versus Poland; ECHR, judgement of 29 April 2003 case of Poltoratskiy versus Ukraine; ECHR, judgement of 3 June 2003 case of Cotleț versus Romania; ECHR, judgement of 11 January 2005 case of Musumeci versus Italy; ECHR, judgement of 20 December 2005 case of Wisse versus France; ECHR, judgement of 30 January 2007 case of Ekinci

individual's correspondence is so strong that the Court considered a breach of Article 8 of the Convention when the authorities taped the telephone conversations in which the subject allegedly instigated to murder[19] or the case when the subject admitted he was dealing in drugs[20].

Both private life and the right to privacy of correspondence are strongly connected to a person's home[21]. According to the case-law of the European Commission, home is an autonomous concept, which is not limited to the meaning given by the civil law; in order to consider a certain area as home we have to take into consideration the real circumstances of each cause, and considering a sufficient and continuous connection with a certain place[22]. „Home" is usually the defined physical area where a person can live his private or family life, including secondary residences, vacation houses[23], a parcel of land in a nomad destined area[24], but, through extension, it is also the place where a person's professional activity is conducted. The headquarters and bureaus of a company[25] can also be regarded, within certain limits[26], as home.

II. Penal protection of private life in Romania. The New Criminal Code of Romania (NCC)[27], passed by Law No 286/2009, brings a significant improvement to the area of means of protection of the individual's private life, both by introducing new incriminations (violation of private life, violation of professional office, harassment), as well as by rephrasing some of the already existing incriminations (violation of home, disclosure of professional secrecy, violation of the secret of correspondence, illegal access to IT system, illegal intercepting of a IT transmission of data, unauthorized transfer of IT data). In respect to the formal systematization, yet, we note that, although these actions harm in a certain way a person's intimacy, they are not totally stipulated under the chapter "offences against the inviolability of home and private life" (chapter IX, Title I, Special Book). Thus, we find again "harassment" under the chapter destined to "offences regarding the obligation of helping those endangered", violation of the secret of correspondence is part of the category "offences relating to working", while other offences are grouped under Chapter VI ("violation of the security and integrity of IT systems or data"). We consider that such systematization was chosen because of the complex specialized judicial object of these offences, the social values and relations protected by the law being, at the same time, part of a lot of fields that the legislator had in mind.

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and Akalin versus Turciei; ECHR, judgement of 26 April 2007 case of Dumitru Popescu versus Romania; ECHR, judgement of 4 October 2007 case of Năstase-Silivestru versus Romania; ECHR, judgement of 1 July 2008 case of Calmanovici versus Romania; ECHR, judgement of 21 April 2009 case of Răducu versus Romania.

[19] See: ECHR, judgement of 23 November 1993 case of A. versus France.

[20] See: ECHR, judgement of 12 May 2000 case of Khan versus The United Kingdom.

[21] See: ECHR, judgement of 6 September 1978 case of Klass versus Germany.

[22] See: ECHR, judgement of 25 September 1996 case of Buckley versus The United Kingdom; ECHR, judgement of 24 November 1986 case of Gillow versus The United Kingdom; ECHR, judgement of 18 November 2004 case of Prokopovich versus Rusiei.

[23] See: ECHR, judgement of 31 July 2003 case of Demades versus Turciei.

[24] See: ECHR, judgement of 27 May 2004 case of Connors versus The United Kingdom.

[25] See: ECHR, judgement of 16 December 1992 case of Niemietz versus Germany; ECHR, judgement of 25 March 1998 case of Kopp versus Switzerland; ECHR, judgement of 16 April 2002 case of Société Colas Est and others versus France; ECHR, judgement of 13 November 2003 case of Elci and others versus Turkey; ECHR, judgement of 28 April 2005 case of Buck versus Germany; ECHR, judgement of 27 September 2005 case of Petri Sallinen and others versus Finland; ECHR, judgement of 16 October 2007 case of Wieser and Bicos Beteiligungen Gmbh versus Austria; ECHR, judgement of 7 October 2008 case of Mancevschi versus The Republic of Moldova. Following this case-study, the Western doctrine (See J.F. Renucci, *Traité de Droit Européen des droits de l'homme*, Librairie Générale de Droit et de Jurisprudence, Paris, 2007, pg.264) noted there is a consecration of "commercial private life".

[26] See: ECHR, judgement of 6 September 2005 case of Leveau and Fillon versus France. The European court decided that exploitation specialized in pigs breeding, sheltering several hundreds of animals, is not part of – even by extention – the concept of home.

[27] Hereinafter refered to as NCC.

We shall make a short presentation of the novelties brought by the NCC on this matter, generally, approaching a systematization in respect to that part of private life, which is mainly protected by the criminal rule, as follows: the protection of intimacy, the protection of correspondence, the protection of home.

II. 1. The protection of intimacy. We have grouped here the aspects regarding the offences against privacy, the disclosure of professional secrecy and harassment and illegal access to IT system.

Violation of privacy (Article 226 NCC). This incrimination can not be found in the Criminal Code of 1968. The source of inspiration for the Romanian legislator was the legislations of Western states[28].

The NCC regulates the offence relating to the violation of privacy in a standard, aggravating and absorbed form.

In a standard form, the offence consists in unlawfully harming one person's privacy, by taking, catching or recording the picture of a person, by wiretapping or recording a person who is on a private place, room or one of its auxiliary building or a person's private conversation.

Speaking about the external element (actus reus), the material element for this offence is the act of harming a person's private life, namely to injure, hurt, and prejudice one's own intimacy. From a ruling prospective, the material element can be accomplished by the following means:

a) taking, catching or recording pictures of a person.

Taking pictures refers to the operation through which, using a certain device designed for this purpose or that has a technical function for this purpose (for example, a mobile phone), based on certain procedures specific to optic laws, an image is put on a paper, photographic board, photosensitive tablet or on a photographic film.

To catch pictures means to intercept visual representations, using certain technical means.

Recording pictures means to impress, through electromagnetic methods, visual representations on certain data storage devices (magnetic tape, photosensitive film, etc.). The operation of recording not only implies catching but also saving, storing the pictures. Therefore, recording pictures always implies their catching, but the reciprocal is not valid; we can have an operation of catching a visual representation, but without having it recorded (for example, the subject, unlawfully, acquires and visualizes, with the help of such technical means, pictures of the victim staying in his own home, but he does not saves them by recording).

[28] For example, according to Article 201 of the German Criminal Code, constitutes a crime against a person's confidentiality the act of the offender who unlawfully: (1) records on tape the conversation of another person on a private place; (2) uses or gives to another person such a recording; (3) wiretappings with the help of a device to intercept the discussion of another person on a private place; (4) turns to the public, in order to jeoperdize another's person interests, the text or the content of other people's conversation, that he recorded as above. Article 226-1 of the French criminal code, punishes the person who, willfully, by any mean, harms another the intimacy of a person's private life: (1) by intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker; (2) taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned. Article 226-2, same Code incriminates the act of keeping, bringing or causing to be brought to the knowledge of the public or of a third party, or the use in whatever manner, of any recording or document obtained through any of the actions set outunder Article 226-1. Article 226-8 also sanctions to the publication by any means of any montage made that uses the words or the image of a person without the latter's consent. On its turn, the Spanish criminal Code (Article 197-1) incriminates the act of a person who, in order to find out the secrets or to violate the intimacy of another person, without his consent, intercepts his communications or uses the means of wiretapping, recording or reproducing of sounds or images or any other signal of communication. Also the Italian Criminal Code sanctions, under Article 615 bis. (1) the person who, using the instruments for video or audio recording, illegally procures information and images that harm a person's private life who is on private places or one of its auxiliary buildinges. The law also punishes the person who brings to the knowledge of the public or broadcasts, regardless of the means, the information or images obtained by those means.

The three ruling means of the material element are alternative, thus committing any of them constitutes an offence. If the subject commits the act resorting to two or three means, there shall be one single offence.

The doctrine[29] has, reasonably, noticed that the act of tacking a picture or filming a home or a private room is not an offence, but it is required that the act aims at a person being in one of these spaces. Yet, we ask ourselves if the reason and spirit of this regulation – the protection of the individual's intimacy – should not have needed a wider incrimination, which could cover other hypothesis too, when the right to privacy is violated. For example, we consider that a significant harm to intimacy is also made by the act of recording pictures from inside the victim's house, when he is not present, by filming certain personal use staff, indicating a certain sexual orientation (homosexual relations). Such an offence does not fulfil the constituting elements of the offence in question, although it obviously harms the individual's private life. Or, *ubi ratio este, idem est jus*. One could argue that the perpetrator will be hold responsible for home violation, but we find this argument not functional in all the cases. For example, when, with a telephonic approval of the victim, who is outside the city, a neighbor breaks his door in order to turn off the water, which out of negligence, had been left running and there was a risk of flooding; if the neighbor, out of curiosity, exceeds the approval given by the homeowner and films his bedroom, the offence does not constitute a violation of home and neither of privacy.

Thus, we assess that a form of incrimination that answers adequately to the necessities to protect the individual's intimacy, was postulated under Act No 301/2004, which has not been enforced[30] yet. Thus, Article 209 from this law punishes "the violation of a person's right to private life by using any means of remote interception of data, information, images or sounds from inside the places noted by Article 208 point 1 (*namely a dwelling, room or one of its auxiliary buildings – author's note*, *R.S.*), without the consent of the person that uses them or the law authorization". We consider, *lege ferenda,* that the text of Article 226 NCC should be rethought to cover also the hypothesis of unlawful recording of images from a dwelling, room or one of its auxiliary buildings, even when the person is not at home, if this act harms his private life.

The doctrine[31] also considered that, although the law does not stipulate, the protection is also extended to the enclosed area surrounding the victim's residence and which is enclosed. We are reluctant to this point of view, as – according to our opinion – such a hypothesis is stipulated by the incrimination rule. If the law had intended to mention the enclosed area too, it would have done it explicitly, just as in the case of violation of home. Yet, it is undoubtedly that the legislator's choice is questionable, as, for example, a person's intimacy is harmed in the same way as when he is unlawfully filmed in his courtyard, not only when he is inside the house. An individual's private space does not end at his home door. On the other hand, we do not see the reason for which the act of unlawfully entering an enclosed area of a person's residence, even when he is not at home, constitutes an offence, (the violation of home), and the act of filming[32] a person in his own courtyard does not constitutes an offence. We need to mention that if the acts of taking pictures or filming a person who is on enclosed area representing an auxiliary building do not constitute the of offence of violation of private life, it can still constitute the offence of harassment (they can represent actual

[29] See V. Dobrinoiu, N. Neagu, *Drept penal. Partea specială. Teorie şi practică judiciară*, Universul Juridic PH, Bucureşti, 2011, pg.176.

[30] Law No 301/2004 – The Criminal Code was revoked (before its entrence into force) by Article 446 point 2 NCP. For details, See G. Antoniu, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, All Beck PH, Bucureşti, 2004, pg.77.

[31] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.176.

[32] The issue is related to the acts of taking, catching or recording images, and not to the acts of audio recording of a private conversation that – as we shall present below – is incrimnated regardless of where it is held.

means through which the action of observing a person occurs, under the provisions of Article 208 NCC), under the condition that this action is repeated and causes the victim to fear.

b) wiretapping or audio recording

Wiretapping means to seize or overhear sounds, and to record means to fix, impress on a data storage devices sound representations.

These acts regard either simple sounds, or private conversations. Yet, the provisions under Article 226 NCC do not protect all types of private communications, but only direct, verbal ones shared by two or more persons (the so-called indoor conversation). Although private, the communications through technical means (for example, using a telephone) enjoy the protection established by the incrimination of violation of the secret of correspondence, and specifically stipulated under the provisions of Article 302 point 2 NCC. Our conclusion is also confirmed by the verb used by the legislator to designate the material element of the external element; Article 226 point 1 NCC refers to "wiretapping", and not "intercepting" (as it is the case of the violation of the secret of correspondence)[33], the latter being specific to technical means of remote communication.

There are several substantial requirements associated to these means of the material element. Firstly, overhearing sounds or conversations is an offence only when is committed through technical means (tape recorder, recorder, etc.). Merely listening to a conversation held inside a dwelling (for example, by keeping the ear close to the separating wall) does not constitute an offence.

Secondly, the act can be associated to either the sounds uttered by the victim or, depending on the situation, the conversations he has inside a dwelling, room or one of its auxiliary building, or private conversations. There are certain differences between the two hypotheses.

Thus, on the one hand, the law protects against the unauthorized interferences all the sounds and conversations that a persons makes within his private space. Taking into consideration the indissoluble connection between a person's private life and home, we can state that the legislator, implicitly, admits a presumption of confidentiality over all that happens inside the individual's private space, a presumption equally originating both in the special nature of this place and in the fundamental principle of the inviolability of home (Article 8 of ECHR and Article 27 of the Constitution). In terms of private space, in the case of the offence relating to the violation of private life, the law has in view the dwelling, room and its auxiliary building, except for the enclosed area around it.

On the other hand, all the other conversations that the individual has outside his home or his room or outside their auxiliary buildings are protected, under the condition of having a private nature. By the following phrasing, in a rather redundant manner, „ wiretapping […] or audio recording of a person who is in a dwelling or room or one of its auxiliary building *or* of a private conversation *(our note – R.S.)*"; the legislator intended only to emphasize that the concept of private conversation is a wider category compared to the conversation held in a private space. It is a part to whole type of relations. Practically, the protection of the criminal rule extends not only to the conversations inside one's own home, room or auxiliary building, but also to the private conversations that the individual has outside these places, regardless of the place, whether in another person's private place, or just in a public place. For example, it shall constitute an offence the act of, unlawfully, audio-recording a private conversation held in the courtyard of the residence (an area, which, under the strict meaning of Article 226 point 1 NCC, is not a private space).

[33] We are reluctant to the author's opinion (Al. Boroi, *Drept penal. Partea specială*, C.H. Beck PH, Bucureşti, 2011, pg.145) who considers that the material element of this crime is rendered by "the use of means of interception", defined as means by which one can "catch and control a *telephonic conversation, a correspondence*" *(author's note – R.S.)* between two persons […] that can be secretly palced in the room where the conversations are to be wiretapped, *either insdide the telephone, or on a telephonic line (author's note – R.S.)*".

The Romanian legislator thought it necessary to resort to this type of phrase construction of text considering that, in absence of a legal definition of the private conversation, doctrine has outlined two theories (criteria) to distinguish the concept[34]. Thus:

- the theory of the privileged place, specific to the British law. According to this theory, the nature of a conversation exclusively depends on the place where it is held. Consequently, we shall have a private conversation only if it is held in a private space;

- the theory relating to the nature of communication, specific to the American and French legislation. According to this theory, in order to classify a conversation as private, the stress does not fall on the place where it is held, but on the corroboration of two elements – the mental element (mens rea) and the external element. The mental element is represented by the subject's expectation that the conversation is known only by his partner, and the external factor consists in the reasonable nature that this expectation must have considering the dominant rules of society.

The Romanian legislator has provided efficiency to both criteria. The theory of the privileged space received an answer through the incrimination of the act of wiretapping and of audio-recording a person being inside a dwelling, room, or one of its auxiliary buildings. Nonetheless, the theory of the nature of communication was enforced by incriminating wiretapping or audio-recording of any other private conversations than those held in one's own private space. For example, the act of someone who, unlawfully, records a private conversation of the victim with a third party in a theatre loge, in a restaurant booth, on a bench in the park, on the street, in a vehicle shall be punished; thus we notice that public places are also taken into consideration, but the accent falls under the confidentiality of the conversation.

The difficulty emerges when trying to establish how the defendant, in a concrete situation, identifies whether a conversation is or is not private. This, because the law has to be predictable so that the subjects to whom it refers can adapt their behavior to the rule stipulated by the incriminating rule. In public places, people behave differently: some whisper, others speak loudly, some hide, others would try to impress even by speech. For example: two young lovers fight, loudly, on a bench in the park; at a family reunion, at a table in the courtyard, some persons talk fiercely about certain events from the lives of the participants. Are the passers-by authorized to record these talks? Or, is the producer of a TV show authorized to record the talks between a cheated wife, the adulterine husband and his mistress, who are observed in public, if only the wife (who had phoned the so-called detective) had consented to that?

The answer to this problem derives from the provisions of Article 226 point 4 letter b) NCC, according to which there is no offence if the victim explicitly acted with the intent to be seen and heard by the offender. The text reveals, *per a contrario,* that an unlawful recording of a private conversation constitutes an offence in all situations when the victim was apart from any intention to be heard by others or, if such an intention existed, but it was not clearly expressed. Analyzing the entire construction of the Article 226 NCC, we assess that the provisions stipulated under point 4 (including those under letter b) have the status of exceptions from the general rule, namely the private nature of any conversation. Consequently, we believe that the legislator implicitly uses a relative presumption of confidentiality of any communication between two or more persons.

Thus, as we mentioned above, Article 226 NCC protects all the conversations of an individual in his private space, namely his home, room or one of its auxiliary buildings, as well as all the confidential conversations made outside this space. We note that the obligation imposed by the criminal law – not to wiretap or record private conversations on tape – has *erga omnes* effects, thus

[34] See, for details, E. Tanislav, *Protecţia penală a dreptului la intimitate în perspectiva noului Cod penal*, pg.123-125; Al. Boroi, M. Popescu, *Dreptul la intimitate şi la viaţă privată. Elemente de drept comparat*, Dreptul nr.5/2003, pg.163-165.

applying not only to third parties, but also to the participants in the conversation. Moreover, the act of the subject who unlawfully records a conversation, to which he is part of, shall constitute an offence. This conclusion is deduced by interpreting the provisions of Article 226 point 4 letter a) NCC, according to which the act of a person who attended a meeting together with the victim when sounds, talks or images, were registered, it shall not be a offence, but not under any circumstances, except the case when the subject justifies a legitimate interest. At first glance, such an area of incrimination is superfluous, because a recording is nothing but an exact fixing of an audio representation on a special device. Whether it is obvious that the recording made by a third party, who was not accepted to take part in the conversation between other two persons, is consider to be a violation of the privacy of those two, it seems more difficult to identify the reason for which the recording made by one of the participants in a conversation, even without the consent of the other, was categorized as an offence, and when the collected information is not further disclosed, disseminated, reported or transmitted to others (the problem, under these circumstances, also refers to taking, catching or recording images). The conversation itself, being a private one, involves sharing certain elements of intimacy that the allegedly victim is willingly and consciously revealing to the allegedly offender. One could claim that recording such a conversation does not harm intimacy anymore than the victim himself through his confessions. However, we believe that the criminal rule is welcomed, the legislator's object being, probably, to provide the individual with a strong form of protection against those who, under a pretense friendship and by taking advantage of what the victims is telling, sometimes in cases of emotional vulnerability, turn the life of the victim into a subject of public controversy, deepening his suffering. For such a "friend", recording the confessions of the victim constitutes "the supreme evidence", an "excitement", it represents the proof that the subject is real; further more, it protects him from the scepticism of the public (what else than the voice of the victim could be more convincing?)

Postulating that this was also the legislator's reasoning, we consider that further on the discussion must concentrate on the fairness of some authors' opinion who state that "if the images are recorded, the taken pictures or the audio or visual recordings are kept only for personal purpose, without being disclosed to somebody else or to the public, the constituent elements of this offence are not accomplished[35]". The law makes a distinction not in respect to the destination of the images, pictures or recordings, but to whether the offender (who took part in the meeting with the victim) justifies or not a legitimate interest. We would rather assess that, if the circumstances of the case do not reveal that the recordings, pictures or images had been destined to disclosure, dissemination, reporting or transmission to others or to the public, it is unlikely to prove whether there was an intention to harm the victim's private life, thus the act shall not be an offence due to the failure of accomplishing the conditions of the mental element.

In respect to the problem of unlawful wiretapping or recording conversations, we note that – according to our opinion – there shall be as many offences as participants in a conversation, even if the action of the offender is single. Thus, if the agent recorded a private conversation in which three persons participated, there are three distinct offences, which constitute an ideal concurrence. This is due to the fact that, on one hand, private life, as a social value, has an absolutely personal nature, even when intimate issues are shared to others, and on the other hand, criminal law protects each person's private life, and not the private life. However, we must notice that these offences can be committed in different ruling means. Thus, if somebody unlawfully records a conversation held by a person with his guest inside his home, the offence is represented by the act of recording a person in his home for the homeowner, and the offence of recording of a private conversation for the partner.

[35] See P. Dungan, T. Medeanu, V. Pașca, *Manual de drept penal. Partea specială*, Universul Juridic PH, București, 2010, vol. I, pg.253

The aggravating form of the offence of violation of private life refers to unlawful disclosure, dissemination, reporting or transmission of sounds, conversations or images to another person or to the public, according to the provisions of point 1.

To disclose means to publicize, to reveal; disseminating signifies the spreading, propagation of sounds, conversations or images; to report means to present, show, expose them; and to transmit signifies to communicate, to let the others know about those sounds, conversations and images. All these acts represent the activity of the subject who divulges issues concerning a person's intimacy to unauthorized persons.

The object of these acts is represented by illegally obtained images, sounds or private conversations. The text of Article 226 point 2 NCC explicitly postulates: unlawful disclosure, dissemination, reporting or transmission must refer to sounds, conversations or images *"provisioned under point 1 (author's note – R.S.)"*, those that were unlawfully taken, caught, wiretapped or recorded. If the images and conversations that were recorded are unlawfully divulged, certain particularities are encountered. Thus:

- if the active subject holds a certain profession or position that allows him to know personal secrets, he has, at the same time, the obligation to preserve the confidentiality of these data, the act constituting disclosure of professional secret. (Article 227 NCC). For example[36], if a private conversation was recorded by the law enforcement agency on the bases of a judicial authorization[37]. We consider such a solution to be correct also considering the modification of the legal content of the offence relating to the disclosure of the professional secret, since the legislator has abandoned the condition according to which the information had to be "entrusted" to the offender;

- if the offender is any other person, who illicitly intercepted or recorded sounds, conversation or images, the act does not constitute an offence, as it is not stipulated under the criminal law. We regret such oblivion of the legislator. We do not consider the arguments to be pertinent when stating that an unlawful recording of indoor images or private conversations harms intimacy, whilst the unlawful disclosure to the public of some illegally obtained images could not render the same effect. What is the difference, for example, between the situation in which a private event (for instance an onomastic celebration) is unlawfully filmed by an intruder, through the window and then disseminated to the public, and the situation in which one of the attendees films the event with his mobile phone, having the others' consent, and then publishes the film on the Internet, although lacking the others' consent? The same problem also rises in the case of unlawful disclosure of indoor conversations legally recorded. We shall demonstrate, when analyzing the offence relating to the violation of the secret of correspondence that the aggravating form of this act (Article 302 point 4) does not refer to this type of conversations. We consider that not incriminating these acts is a significant loophole for the system of protection of the individual's private life, as it is obvious that they can seriously harm private life. Otherwise, we believe that it is hard to explain the reason for

[36] Another example can be identified in a non-penal law containing criminal provisions. Thus, according to Article 21 Law No 51/1991 regarding Romania national security, the information related to the private life, honor or reputation of the persons incidentally met during the course of collection of data for national security, can not be brought to the knowledge of the public, and the, illegal disclosure or use of this information by the employees of secret services is a crime and is punished by imprisonment from 2 to 7 years (the text is written as it was put forward for change by the project of the Law for the enforcement of the Criminal Code, as it can be found on the site: www.just.ro, 29.01.2012). As it is the case of data obtained during the process of collection of information necessary for national security (therefore, including audio recording operations of indoor private conversations), therefore a licit process, it means that the unlawful disclosure of legally collected information related to private life by the employees of the secret services, constitutes a crime.

[37] For this case, the disclosure of the professional secret could form an ideal concurrence with the disclosure of confidential or non-public information (Article 304 point 1 NCC) or compromising justice interests (Article 277 point 2 NCC).

which the NCC incriminates the act of audio-recording of a conversation by one of the participants, without the consent of the other and without a legitimate interest, but it does not incriminate the unlawful disclosure of the content of such a conversation, if it was legally recorded.

For these arguments, to which we add those to be discussed under the section of offence relating to the violation of the secret of correspondence, we propose that the rule provided by Article 226 point 2 NCC is completed, as follows: "unlawful disclosure, dissemination, reporting or transmission to another person or to the public, of sounds, conversations or images stipulated under point 1, *legally or illegally collected,* is punished […]".

According to the law, the disclosure, dissemination, reporting or transmission must be communicated either to the public, or to "another person", namely to a third party. If the perpetrator reports the recording exactly to the persons that had the conversation, the act does not constitute the content of the aggravating form, and there shall be a concurrence of the offence regarding the violation of private life in its standard form and another offence (for example, assault – Article 206 NCC; extortion – Article 207 NCC).

The actions of taking, catching or recording images, wiretapping, audio-recording, and also the actions of disclosing, disseminating, reporting or transmitting sounds, conversations or images have to be made unlawfully, in other words illegally. Therefore, the actions of video, audio or photographic surveillance do not constitute an offence if made by the law enforcement agencies, as a special technique of surveillance or investigation authorized by the judge for rights and freedoms (Articles 138-139 of the New Code of Criminal Procedure) or in case of a house search (Article 159 point 12 of the New Code of Criminal Procedure).

The absorbed form of the offence regarding the violation of private life is represented by the act of unlawfully placing technical devices of audio or visual surveillance in order to commit the acts pursuant to point 1 and point 2. Placing technical devices for audio or visual recording represents the action of laying, putting, fixing, and installing together with its result. We consider that this equipment must be functional, able to capture sounds or images, regardless of the fact it actually functions or not.

In this case, there are certain preparatory acts necessary to commit the offences pursuant to the standard or aggravating form of the offence, which however, according to the legislator's will, were incriminated as independent and were more seriously punished than the scope-acts themselves. The problem rising is whether there is only one offence or one concurrence, in case a scope-offence was committed. The doctrine[38] stated that only the absorbed form of the offence is to be considered. One can argue this by postulating that if the legislator had intended that the acts constituted a concurrence, he would have explicitly mentioned it, as he had done it in other cases[39].

We consider that one can postulate a separate opinion. We find the uncommon punishing regime for the preparatory acts (even more sever than the one stipulated for the scope-act) reveals the legislator's will that, when the scope-act are committed, the acts shall constitute a concurrence of the offence stipulated by Article 226 point 1 or, depending on the situation, point 2, and the offence under Article 226 point 5 NCC. If only the absorbed form stipulated by Article 226 point 5 is reckoned, the result would be that the preparatory acts absorb the full offence. If the doctrine generally adopts the idea that the full offence naturally absorbs the intended offence and the preparatory acts (the so-called natural complexity[40]), in fact the validity of the mutual thesis has

[38] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.178.

[39] For example, for the crime of establishing an organized criminal group (Article 367 point 3 NCC)

[40] Specifically see V. Dongoroz, *Curs de drept penal*, Cursuri Litografiate PH, Bucureşti, 1942, pg.307; I. Fodor în V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului penal român (citat în continuare Explicaţii)*, Romanian Academy PH şi All Beck PH, Bucureşti, 2003, ediţia a II-a, vol. I, pag.262; C. Mitrache, Cr. Mitrache, *Drept penal român. Partea generală*, Universul juridic PH, Bucureşti, 2006,

never been reckoned. However, it is hard to admit that the offence, which from an objective point of view is less harmful for the society and individual, could comprise the most severe one.

Admitting this opinion could also raise some inequities; for example, the person who placed technical means of audio-recording of a private conversation, but he failed to commit the actual recording, he would be subjected to a sanction that has the same limits as for the person who succeeded to wiretap the conversation. However, an actual harming of the victim's private life, namely what the criminal law intends to prevent, was done in the second case, and not in the first.

Likewise, if we admit this point of view, it would mean that we encourage the person to use the technical devices for audio-recording he had placed, as he is aware that his situation can no longer be aggravated. Or, the distinct incrimination of these preparatory acts has the nature of an obstacle-offence, meaning an act that – as it renders a social peril by the fact that its own commission allows the commission of another, which is more serious – is specifically incriminated to prevent the commission of the latter.

We believe, on the basis of these arguments, that the act of unlawful placing of technical devices to audio or video record, with the scope of violating private life, has the nature of an autonomous offence in relation to the scope-offence. It would have definitely been desirable that, from the point of view of the legislative technique, this offence had a distinct article, and not a point of the Article 226 NCC, but we consider that this legislator's "negligence" does not impede us to consider a concurrence including the instrument-offence and the scope-offence. It is in fact the solution admitted in the case of other similar situations[41].

Regardless we refer to the standard, aggravating or absorbed form of the offence, the resulting effect is a harm of the person's private life.

In respect to the mental element, the act is committed with intention, most of the time direct intention, and the oblique one can also be encountered. In the absorbed form, the culpability is only direct intention based on its scope.

The active subject of this offence can be any person who fulfils the conditions for the mental element, and penal concurrence is possible in all its three forms.

Article 226 point 4 stipulates four justifiable special causes. Thus, the act constitutes an offence under the following circumstances:

a) when the offence was committed by the one who participated in the meeting with the victim, whereat sounds, conversations and images were wiretapped, under the condition to justify a legitimate interest. The legitimate interest refers to the protection of certain important social values (for example, the offender audio records the conversation with his wife – who is confessing that she is having sexual relations with another man – can be justified by the interest to sustain the reasons for divorce);

b) if the victim explicitly acted with the intention of being seen or heard by the offender. As a premise, this justifiable cause implies that there was no meeting between the victim and the offender, as otherwise it would be confounded with the previous hypothesis. For example, this

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ediția a V-a, pg.265-266; C. Duvac în G. Antoniu, C. Bulai, C. Duvac, I. Griga, Gh. Ivan, C. Mitrache, I. Molnar, I. Pascu, V. Paşca, O. Predescu, *Explicații preliminare ale noului Cod penal*, Universul juridic PH, București, 2010, vol. I, pg.361-362. To the contrary, see N.T. Buzea, *Principii de drept penal. Infracțiunea penală*, vol. I, Iași, 1937, pg.138; M. Basarab, *Drept penal. Partea generală*, Fundația Chemarea PH, Iași, 1992, vol. II, pag.348; C. Butiuc, *Infracțiunea complexă*, All Beck PH, Bucuresti, 1999, pg.21.

[41] For example, for the crime relating to the possession of instruments for the purpose of forging of values and the offence relating to forgery of coinage. Specifically see V. Dongoroz în *Explicații*, vol. IV, pag.351 şi pag.356; V. Papadopol în T. Vasiliu. D. Pavel, G. Antoniu, Şt. Daneş, Gh. Dărîngă, D. Lucinescu, V. Papadopol, D.C. Popescu, V. Rămureanu, *Codul penal comentat şi adnotat. Partea specială*, Ştiințifică şi Enciclopedică PH, Bucureşti, 1977, vol. II, pg. 230-231.

special justifiable cause can function when several high school students, seeing that on the corridor of their school, a TV coverage is shot, they start talking loudly, due to their specific rebellious behavior, about what they did in a school trip, being aware and with the intent that these conversations are caught and recorded by the technical device used by the reporter; thus they can not complain later about violation of their intimacy.

This situation excludes the offence, on grounds that the victim himself gave up the right to protection of the intimacy, thus one can not ask for more diligence from the third party. The law stipulates that the intention of the victim to be seen or heard is explicit, meaning an obvious, clear and evident behavior. The intention is explicit if any other person in the offender's place had understood the same think from the victim's behavior: that the latter intends to be seen or heard.

Another issue rises, related to this justifiable special cause, whether it functions in the form pursuant to Article 226 point 1 as well as in that under point 2. Still, we find that such a conclusion must be detailed. The content of the text implies that the victim has to behave with the purpose of being seen or heard by the offender, and not by a third party or by the public. If, on the bases of this consent, there is a justification for the act of taking pictures, filming, audio recording, one can not always claim the same in respect to the disclosure, dissemination, reporting or transmission to other persons the information obtain as such. The doctrine[42] presented the example of a woman who widely opened the window and took off her clothes looking in a provocative manner to the offender, who was her neighbor, and it was reasonably demonstrated that taking pictures of that woman was not an offence. We do not consider that the same conclusion can be drawn in regards to the reproduction and display of the picture in the corridor of the condominium where the victim dwells. One can but reluctantly state that, if the victim acted with the intent to be seen by the offender, who is her neighbor, she also acted with the intent to be seen by all the neighbors and that the offender has the right to show the picture he took to the neigbors. Despite this conclusion, the act of disseminating the picture shall remain unpunished (even if the special justifiable cause does not operate) because, as we previously mentioned, the NCC incriminates nothing else but the disclosure, dissemination, reporting or transmission to third parties or to the public, of the indoor images and conversations that were unlawfully recorded; or, for this example, taking pictures is not forbidden by the law, meaning it is licit. It is our opinion that this is another loophole in the protection system of the individual's intimacy stipulated by the NCC;

c) if the offender observes the commission of an offence or he supports to establish the commission of an offence. This special justifiable cause can be explained by the public interest that the protection of the criminal law over the individual's private life is not debauched into an umbrella for criminality;

d) if the agent notices acts of public interest, which are important for the life of the community and the disclosure of which brings public advantages that are more significant than the prejudice they cause to the victim. The justifiable nature of such circumstances can be explained by the necessity to keep a balance in the interaction between private and public interest, being a specific stipulation of the provisions under Article 26 point 2 from the Constitutional Law, according to which "natural person has the right to decide about himself, if he does not breach […] public order […]".

In the case of the offence relating to violation of private life in its standard and aggravating forms, the prosecution is initiated upon the complaint of the victim. This stipulation does not apply to the absorbed form, which is initiated ex officio.

Disclosure of professional secret (Article 227 NCC). The offence consists of the unlawful disclosure of data or information regarding a person's private life, which can cause harm to a person,

[42] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.179.

by the one who obtained them due to his profession or position and who has the obligation not to disclose these confidential data.

In the Criminal Code of 1968, this offence was incriminated by Article 196. The NCC does not bring significant changes to the legal content of the offence, but it presents certain elements more accurately.

Thus, the generic phrase "the disclosure of certain data", which had an indefinite aspect and thus relatively uncertain, in favor of the one relating to "data or information regarding a person's private life" (for example, those regarding the individual's health, sexual orientation, etc.).

Likewise, the NCC specifies more adequately the active subject, meaning a person who accumulates two conditions: he knows the respective information due to his profession or position and has the obligation not to disclose those confidential data. In the system of the Criminal Code of 1968, the offender could also be a person to whom the information had been entrusted. Article 227 NCC does not maintain this condition, which makes us assess that the offence is committed whatsoever the active subject had known those data with the victim's consent or not[43].

For this offence, the NCC decided for a harsher punishing system than the one under the Criminal Code of 1968.

Harassment (Article 208 NCC). This offence is not included in the Criminal Code of 1968. Similar incriminations can be encountered in foreign legislations[44].

Harassment is regulated in a standard and a mitigating form.

The standard form is the act of a person who systematically and unlawfully or without legitimate interest, observes a person or monitors his residence, professional office or other places that the victim usually attends, thus causing him to fear.

The mitigating form is the act of making phone calls or communicating through electronic devices, which due to frequency or content, causes a person to fear.

The standard form, the material element of the offence is, alternatively, represented by the action of observing a person or monitoring his residence, office or other places he usually attends.

To observe a persons – as postulated under Article 208 NCC – means to keep under observation, to lurk, monitor his behavior, programme, and life, such a manner that the victim becomes anxious and worried. We do not believe that *verbum regens* is limited only to the strict meaning of the verb "to observe", meaning only the action of walking or running after someone; in fact, the incrimination refers to keeping a person under observation, in any way. We base our opinion on the meaning of the term "to harass", meaning not leaving alone, bother, causing all sorts of displeasures.

Consequently, we consider that the material element of the external element is render not only by the offender's action of taking the same road as the victim (although they do not know each other), walking close behind him every morning, despite the fact that the victim – who notices this – changes his schedule or itinerary; or waiting and observing the victim by car, every evening when the latter leaves his working place for home; but also when, for example, the boss repeatedly gives tasks to a subordinate, forcing him to stay over, just in those days when the latter must be, due to family reasons, at a certain hour in a certain place (for example, the school where his child studies), or repeatedly and temporarily hiding objects that are indispensable (for instance, the mouse of the computer) for the victim to urgently write a paper; or ostentatiously displaying food products in the office where a certain person works, each day when the latter, due to religious conviction, fasts (for example, on Fridays), thus being the subject of his colleagues' amusement. For this reason, we

[43] On the contrary, related to the compulsion that the offenders had known the data with the consent of the victim, SeeV. Dobrinoiu, N. Neagu, *op. cit.*, pg.181.

[44] For example, Article 222-16 of the French Criminal Law sanctions the malicious and repeted telephonic calls or the sounds that troubles the others' rest.

consider that, unlike other authors[45], the legislator did not excluded *ab initio* the teasing gestures of the neighbors from the incrimination sphere of harassment; one must investigate, from case to case, whether such actions are the expression of a control that the offender has over the victim's regular programme. For instance, the fact that every time the victim gets ready to leave home by car, he finds the access area to the parking place blocked by one of his neighbors' car may be considered observation as stipulated under Article 208 NCC.

To monitor a certain place means to lurk, keep under control, under attention. The act of monitoring must refer to the dwelling, working place or other places usually visited by the victim. "Usually visited places" must be understood as those places where the victim regularly goes (for example, a medical office where a pregnant woman systematically goes, the faculty where a student goes almost every day, the bar where the victim meets with his friends every weekend). All theses places mentioned by the legislator – home, working place, usually visited places – define the constancies of a person's behavior, so that their observance indicate the action of keeping under observation the victim's everyday programme. We note that the law does not require that the victim is in those places at the moment when the offender commits the act of observation, this fact being irrelevant.

Both ruling means express actions through which the offender has a certain control, even temporarily, over the victim's regular life. According to our opinion, this is the substance of the offence of harassment.

Three fundamental conditions are necessary to be fulfilled. First of all, both observing and monitoring must be repeated, which makes harassment a habitual offence. An isolated act of observation or monitoring does not constitute the content of this offence. The law claims for multiple actions (in the case of habitual offences, our judicial practice usually stops at three), made at certain time periods, thus rendering the offender's habit. A thorough investigation of the period of time between actions, but corroboration with the victim's schedule, is extremely significant in the process of establishing whether the offender has or not the victim's schedule under observation. According to our opinion, the key is not the objective period of time between the offender's actions, but whether they are regular in respect to the victim's schedule. For instance, if the victim takes the same route to his working place everyday, the offender's presence on the same route every time, can constitute harassment; likewise, the offender's appearance in front of the victim's house whenever he celebrates his marriage day. For both examples, even if the elapsed time between the material acts is obviously different (a day – a year), there is a correspondence between the offender's and the victim's behavior, thus we can talk about harassment. On the other hand, the sporadic, irregular appearance, endows a rather occasional nature to the offender's action, questioning the existence of the offence.

A second fundamental condition is that the observation or monitoring is unlawful or without a legitimate interest. The act of observing a person's moves and activities, as a special technical of surveillance or investigation used by the law enforcement agencies (Article 138 point 6 New Code of Criminal Procedure), does not constitute the offence of harassment, when it is authorized by the competent judge. Likewise, we assess as legitimate a husband's monitoring of his wife's lover, while the latter is inside, or a journalist's monitoring a dignitary about whom he possesses information of being involved in an illegal activity.

A third fundamental condition is implicit, derived from the resulting effect of the offence, which is the victim's state of fear. The actions of observation or monitoring must be known, observed by the victim[46], even if he does not know who the offender is; otherwise, they could not induce him a state of fear. Such acts do not constitute the offence of harassment, but they can

[45] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg. 105.
[46] See also P. Dungan, T. Medeanu, V. Pașca, *op. cit.*, pg.158.

obviously have criminal relevance under different circumstances (for example, repeated covert observation of the victim's everyday schedule can constitute a preparatory act for an offence of theft or robbery).

For the mitigating form, the material element is given by the action of making calls or communications through means of remote communication. The telephone call implies the action that produces a signal, usually an audio one, which indicates the intent of initiating a telephonic connection. To communicate means to reveal, transmit information; in order accomplish the content of this form of harassment, the communication must be made through means of remote communication (telephone, telegraph, mail), and not directly.

The telephonic calls or communications must be made in such a way that, due to frequency, or content, they cause a person to fear.

We agree to the opinion expressed by the doctrine[47] according to which, also in the case of the mitigating form, the offence is still a habitual one, as the law uses the plural (telephonic calls or communications). If there is only one communication that, through its content, causes the person to fear, the action does not constitute harassment, but can constitute an offence of threatening (Article 206 NCC).

We consider it useful, hereby, to stress an essential difference between the offences of harassment and of threatening. The two acts are similar in respect to the resulting effect (state of fear), but are different in respect to the material element of the external element. In the case of threatening, the action is to cause the passive subject a state of fear that harm will be done to him due to an offence or a another damaging act against him or another, whereas in the case of harassment, the state of fear is induced by the circumstances that the victim's life is the object of the offender's observation. In the first situation, the cause of fear is the direct threat coming from the offender; while in the second, there is an indirect cause derived from what might happen if the offender has the control over the victim's regular schedule. In the case of threatening, the peril for the passive subject is known (he is to suffer the offence or the damaging act that he is threatened with), in the case of harassment, the fear comes from an infinite of eventual perils due to the circumstances that the offender has his behavior under control and observation. Hence, we believe that this is also the reason for the subsidiary nature of harassment in respect to the act of threatening, thus, every time, the repeated observation of the victim is doubled by threats of committing offences, and the act shall constitute a continuous offence of threatening and not harassment. For example, when, every evening, on his way from the office back to home, the victim is observed by the offender who threatens to kill him.

The criminal punishment for the offence of harassment is different in regards to the forms postulated under Article 208 NCC. Thus, for the standard form, the penalty is 3 to 6 months imprisonment or a fine. In the case of mitigating form, the offender is liable to imprisonment from one to 3 months or a fine, if the act does not constitute a more serious offence. Such a case could be encountered when, due to the offender's repeated telephonic calls, the victim panics and thereafter commits suicide; if the offender had a clear foresight and accepts the attendant consequence, the offence is of determining or facilitating suicide (Article 191 NCC), and the law stipulates a harsher punishment.

The prosecution for the offence of harassment is initiated upon the complaint of the victim.

II.2. The protection of home. We shall refer, for this matter, to the offences relating to the violation of home and the violation of professional office.

The violation of home (Article 224 NCC). The standard form of this offence is identical to the one in the Criminal code of 1968.

[47] See Al. Boroi, *op. cit.*, pg.108.

The NCC has introduced a modification in respect to the aggravating form, abandoning the hypothesis in which violation of home is committed by two or more persons together. When the offence is committed by three or more persons together, this shall determine the legal aggravating circumstances under Article 77 letter a) NCC to be considered.

Another modification was also made in respect to procedural issues, thus the prosecution is initiated upon the complaint of the victim for both the forms of the offence relating to the violation of home.

Likewise, the legislator opted for a milder punishing regime, in respect to the Criminal Code of 1968, in the case of this offence.

The violation of professional office (Article 225 NCC). This offence was not incriminated by the Criminal Code of 1968; but it was stipulated under the Law No 301/2004, which did not come into force, under a similar regulation as the offence of violation of home[48].

This new incrimination is intended to protect intimacy in a working place, the commercial private life, closely tied to the professional premises – the Romanian legislator's source of inspiration being ECHR jurisprudence.

The act is incriminated in a standard and an aggravating form. The standard one constitutes of unlawful entering, by any means, in any of the offices where a legal or natural person conducts its professional activity or the denial to leave it when the entitled persons asks so. The aggravating form can be encountered when the act is committed by an armed person, during the night or by fraudulent capacities.

As to the legal content, the violation of professional office is significantly similar to the violation of home. For example, the material element is represented by the same actions (the act of entering a certain place or the denial to leave it), there is the same essential condition (unlawfully), the aggravating form is similar, and the punishing regime is identical.

Several comments are necessary regarding the material object of the offence. It is the case for any of the premises where the natural or legal person conducts his professional activity.

Office generally means the place where a public institution, organization or company has its administration and conducts its activity. It is the attribute meant to place an agency within space. From a criminal point of view, the concept of office is not limited only to legal persons, and it also extends to natural persons who conduct a professional activity. It can be a place where central or local authorities, public authorities, companies, familial organizations, authorized natural persons; privateers[49] (lawyers, doctors) conduct their activities.

It is essential that the incriminated activity refers to a place where a professional activity is conducted. As long as this condition is fulfilled, it does no longer matter whether the office is a partially or totally opened space (for example, an enclosed construction site or a land demarcated by signs, from which agricultural workers harvest), if it is immobile or can be divided and moved (for example, a tent where circus rehearsals are conducted). Otherwise, the act of entering a place called office, but where no activity is conducted, does not constitute an offence: for instance, the office of the so-called "shell-companies".

We consider compulsory that the professional activity, related to the office, is a legal one. We do not consider that criminal law intended to provide protection to the spaces where, constantly, illicit activities are carried out, as the legislator can not protect what himself prohibits. Consequently, the protection stipulated under Article 225 NCC does not operate, for example, in the case of the office of an unauthorized cigarettes or fuel factory, brothels, clandestine casinos. On the other hand,

[48] For details, see G. Antoniu, *op. cit.*, pg.73-77.

[49] The protection of liberal professions is also regulated by certain specialized laws (see, as an example, Article 35 of the Law No 51/1995 on the organization and conduct of lawyer profession).

we can discuss he problem of committing, associated to these places, the offence of violation of home, under the circumstances those spaces are used at the same time also as home by those involved in such activities (for example, a prostitute who lives in the same building where she receives her clients).

We agree with the opinion that the passive subject of this offence is but a natural person using the office being violated[50], even if the office is owned by a legal person[51]. The offence of violation of professional office is part of the crimes against private life, therefore it can not be otherwise analyzed but in connection with the natural persons. The incriminating form protects the individual's intimacy at his working place, and not the authority of the natural or legal person that conducts the activity inside that office, as the doctrine has stated[52].

II.3. The protection of correspondence. We consider this category includes the offences relating to the violation of the secret of correspondence, illegal surveillance of a transmission of IT data and the unauthorized transfer of IT data.

Violation of the secret of correspondence (Article 302 NCC). The act is incriminated in a standard, three aggravating and an absorbed form.

A first comment over this offence is related to the fact it was included in the chapter relating to professional offences. We find the legislator's motivation criticisable. It is undeniably that violation of the secret of correspondence, if committed by a public servant, also harms the social relations associated to the well-development of the activities and the reputation that public authorities and institutions ought to receive, but we consider that the key social value that is therefore harmed by this offence, especially when the offender is a public servant, continues to be the individual private life[53]. Moreover, this thesis is also valid if the offence is committed by a non-special subject. As if to deepen more the confusion, the Law of enforcement of the criminal Code (Article 245)[54] stipulates that "the provisions under Article 302 of the Criminal Code apply *regardless of them having been committed* within professional relationships or *outside of them (author's note – R.S.)*".

For the standard form, the offence is committed by unlawfully opening, taking, destroying or retaining a correspondence that is addressed to another person, as well as the unlawful disclosure of the content of a correspondence, even when this was sent opened or was accidently opened.

The offence is more serious when it is committed by unlawful interception of a conversation or communication made by telephone or by any other electronic means of communication.

In principle, these two forms of the offence have a content similar to the one in the Criminal Code of 1968, but it has been adopted a more correct systematization of the rules. Thus, the standard form of the NCC includes the ruling means related to the so-called classic correspondence (for example, letters), whilst the form under Article 302 point 2 refers to telephonic correspondence or by other electronic means of communication.

In regards to the second form, we notice – on the one hand – that the legislator refers to the communications made by any electronic means of communication, thus including by e-mail. It would have been better to avoid such a concurrence of rules, especially in the case of a comprehensive law as the Criminal Code. We consider that the offence under Article 361 NCC absorbs the offence of violation of the secret of correspondence, thus it being obvious that its special judicial object is

[50] V. Dobrinoiu, N. Neagu, *op. cit.*, pg.173

[51] Other authors (P. Dungan, T. Medeanu, V. Paşca, *op. cit.*, pg.243) consider that the passive subject can also be a legal person.

[52] Idem.

[53] See V. Dobrinoiu, N. Neagu, *op. cit.*, pg.512. By comparison, the authors properly note that the unit of offence related to profession, it would have been more appropriate to include the offence related to the disclosure of professional secret, and not the one related to the violation of the secret of correspondence.

[54] We envisage the form existing on the site: www.just.ro, on 29.01.2012.

represented not only by the social values and relations associated with the security and integrity of IT systems and data, but also with the individual private life. Likewise, even the punishing system, which is harsher than in the case of illegal interception of a transmission of IT data leads to this conclusion.

On the other hand, direct private conversations and communications between individuals shall not constitute the object of protection stipulated by Article 302 point 2 NCC. Unlawful wiretapping constitutes the offence of violation of private life (Article 226 NCC).

For the second aggravating form, the acts stipulated under point 1 and point 2 are committed by a public servant who has the legal obligation to respect the professional secret and confidentiality of the information he has access to. We notice that the NCC has limited the sphere of the active subject for this form of violation of the secret of correspondence, mentioning only the public servant[55] (as it is defined under Article 175 NCC), and not any other servants.

A third aggravating form consists of unlawful disclosure, dissemination, reporting and transmission to another person or to the public of the content of an intercepted conversation or communication, also when the offender knew about it by mistake or accidently.

We can make some interesting comments in respect to this form of the offence.

Firstly, the way the legislator conceived the Article 302 point 4 NCC reveals that the law penalizes the disclosure, dissemination, reporting and transmission to another person or to the public of the content of any conversation or communication made by telephone or electronic devices, regardless of it having been legally or illegally intercepted. The content of the Article 302 point 4 makes no reference to the hypothesis under point 2, thus unlawful interceptions have not been taken into consideration. If the NCC would have intended to exclusively refer to illegal interceptions, it would have explicitly mentioned them, as it is the situation, for example, of violation of private life (Article 226 point 2 NCC incriminates disclosure, dissemination, reporting and transmission of "sounds, conversations or images *stipulated by point 1 (author's note – R.S.)*", thus of those unlawfully recorded). Consequently, the act of unlawful disclosure of a legally intercepted conversation or communication shall constitute an offence, as well as the unlawful disclosure of an illegally intercepted conversation.

Secondly, if the content of an e-mail correspondence is disclosed, we shall have the aggravating form of violation of the secret of correspondence if that specific communication was legally intercepted, and if not, we shall have a concurrence of offences (violation of the secret of correspondence in its aggravating form and the illegal interception of IT data). This is due to the fact that the chapter relating to the offences against the security and integrity of IT systems and data does not incriminate the act of unlawful disclosure of illegally intercepted IT data[56].

Thirdly, the offence of Article 302 point 4 NCC does not envisage the content of direct communications between two persons. Their unlawful disclosure can constitute violation of private life, in its aggravating form, if the conditions under Article 226 point 2 NCC are accomplished.

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[55] Under the particular situation in which the active subject is an employee of an intelligence service, the right judicial regulation for this act is under Article 20 din Legea nr.51/1991, which postulates: "running, without a warrant, the activities subject to the authorization under Article 13 *(it is also the case of interception of conversations and communications– author's note, R.S.)*, except for those carried out under the situations postulated under Article 15, or exceeding the authorized warrant is punished by imprisonment from 1 to 5 years, if the act is a more serious cime". Thus because, although the offender is a public servant who has the legal obligation to respect the professional secret and the confidentiality of the information to which he has access, Article 20 of Law No 51/1991 has a the nature of a specialized rule compared to the general rule of Article 302 NCC.

[56] According to Article 181 point 2 NCC, IT data means any representation of facts, information or concepts in a form that can be processed in an IT system.

This issue needs a more comprehensive analysis. By analyzing the incrimination manner of illegal interception of personal conversations helps us notice that the Romanian legislator has somehow distanced from the meaning that ECHR jurisprudence consecrates to the concept of correspondence: the communication of thoughts and information by any means (verbally, by letters, telegrams, fax, telex, pager, telephone, e-mail, SMS, MMS). Inside the NCC, correspondence by means of remote communication (letters, telegrams, telephonic conversations, etc.), the elementary rule that penalizes the interception is Article 302 – the violation of the secret of correspondence; otherwise, for direct private communications or conversations, the basic text is Article 226 – the violation of private life.

We shall analyze the way the legislator regulates the issue of disclosing someone else's correspondence. As we have mentioned above, the unlawful disclosure, dissemination, reporting and transmission of the conversations and communications made by telephone or electronic means of communication, regardless of being legally or illegally intercepted, constitutes violation of the secret of correspondence (Article 302 point 4). The unlawful disclosure of the content of the recorded indoor conversations constitutes violation of private life, but only when the recording was illegally made (Article 226 point 2).

Otherwise, the new criminal law does not stipulate – in principle – that the act of unlawful disclosure of the content of an indoor conversation that was legally recorded[57]. For example, when handwriting a testament, the testator admits him being the father of a child outside marriage, in order to dissolute any eventual doubts, and he asks a friend to assist him and audio-video record him while reading the testament. He also asks him to give the tape to the legal inheritances only after his death. Not happy with his share of the fortune, the friend, before the subject's death, shows this tape to the wife of the testator, thus finding out about her husband's past extramarital affair. The act obviously harms the testator's intimacy. However, it is not stipulated as so by the penal law; the communications of the victim were recorded with his consent, thus their unlawful disclosure does not constitute violation of private life and neither the violation of the secret of correspondence, as they were not made by means of remote communication.

The above mentioned hypothesis could be considered as included under the provisions of Article 302 point 4 NCC, which refers to conversations or communications, but it does not include also the rest of the phrase in point 2 ("made by phone or any other means of electronic communication"), thus not being detailed. *Ubi lex non distinguit, nec nos distinguere debemus.*

We are reluctant to this argument. The etymology of the terms used by the legislator show that Article 302 NCC has never taken into consideration the indoor conversations, and only those made by means of remote communication. In the case of violation of the secret of correspondence the adjective "intercepted" was used, being derived from the verb "to intercept", which means to detect and control a telephonic conversation, a correspondence between two persons[58]. The new criminal legislation uses the concept of "interception" only when it refers to the conversations and

[57] Some exceptions were mentioned for the analysis of the crime relating to violation of private life.

[58] See Dicționarul Explicativ al Limbii Române, Romanian Academy PH, București, 1975, pg.434. The doctrine did not give a very accurate definition of this term. Sometimes (See: V. Dobrinoiu, N. Neagu, *op. cit.*, pg.514; Gr. Theodoru, *Tratat de drept procesual penal*, Hamangiu PH, București, 2008, ed. a II-a, pg. 414), the concept of interception was connected exclusivelly to conversations or communications made by telephone or by electronic means of communication, whilst audio recording aimed at all the conversations or communications, thus including the indoor ones. Other authors (See D.I. Cristescu, *Investigarea criminalistică a infracțiunilor contra securității naționale și de terorism*, Solness PH, Timișoara, 2004, pg.195-197) gave a definition to the operation of interception by refering to any confidential communications made directly or indirectly by a person. Personally, we noted that this latter opinion that we adopt (See M. Udroiu, R. Slăvoiu, O. Predescu, *Tehnici speciale de investigare în justiția penală*, C.H. Beck PH, București, 2009, pg.17-18).

communications made by means of remote communication (in the case of violation of the secret of correspondence, of illegal interception of IT data transfer), whilst in the case of direct conversations between two or more persons, face to face, only the terms "wiretapping" and "recording" are used (as in the case of violation of private life). The criminal proceeding legislation adheres to the same semantics. The Criminal Proceedings Code of 1968 refers, in Article 91^1, to the "interception and recording of conversations and communications *made by telephone or by any other electronic means of communication (author's note – R.S.)*", whilst Article 91^4, refers to indoor conversations, the legislator uses only the term of recording, avoiding interception. The New Criminal Proceeding Code stipulates it more clearly: according to Article 138, not only interceptions of conversations and communications, but also video, audio or photographic surveillance are considered special techniques of surveillance or investigation. The phrase interception of conversations and communications is defined under Article 13 point 2, by referring to conversations or communications "*made by telephone, IT system or any other means of communication (author's note – R.S.)*", excluding direct (indoor) conversations, as the latter are associated to video, audio or photographic surveillance, which also means "recording the *conversations" (author's note – R.S.)*" of persons.

On the basis of these arguments, we reiterate the proposal – already postulated under the analysis of the violation of private life – that the text of Article 226 point 2 NCC is properly completed.

The absorbed form of the offence was introduced by the draft of the Law for the enforcement of the Criminal Code (Article 246 point 10)[59] and consists of unlawful possession or manufacturing of special means of intercepting and recording communications. The act is currently incriminated in a similar manner under Article 19 thesis II Law no15/1991[60].

This form is nothing but the incrimination, as a stand-alone offence, for the preparatory acts of violation of the secret of correspondence.

Several comments ought to be made regarding the absorbed form of the offence.

Firstly, we notice that the legislator atypically uses the term "communications" and not "conversations" or "communications". By communication we understand the action to communicate and its result, meaning to bring something to knowledge, inform, notify, and conversation means a talk, a discussion. Yet, the concept of communications defines the means of communication between different points or technical systems used to accomplish the action of communicating. Thus, communications represent the means through which individuals communicate (telephone, telegraph, mail, radio, electronic mail, etc.) as this is the accurate meaning of the terms, we consider it obvious that it is not the "communications" that can be intercepted or recorded (for example, it is not the telephone that is wiretapped – as we often encounter in everyday speech), but "the communications" or, depending on the situation, "the conversations", namely the communicated information (for instance, by telephonic communications). Therefore, we consider that the legislator misused the word "communications", the syntagma of "special means of intercepting or recording of communications", hereinafter referred to as conversations and communications.

Secondly, as the law does not mention the type of conversations or communications, we assess that unlawful possession or manufacturing constitutes an offence when the special means is destined to intercept or record telephonic conversations or by any electronic means of communication and also when it is destined to wiretap or record private indoor conversations. The exception is for IT devices and recordings designed and adapted to commit the offence of illegal

[59] We envisage the form on the site: www.just.ro on 29.01.2012.

[60] According to the text, which is to be abolished by the enforcement of the NCC, it shall be a crime and therefore punished by imprisonment from 2 to 7 years, if the offence constitutes a more serious crime, "illegal possession, manufacturing or use of specialized means for the interception of communications".

interception of a transmission of IT data, and whose unlawful possession or manufacturing is separately incriminated (illegal operations using illegal IT devices or programmes – Article 365 NCC).

Thirdly, as the absorbed form of the violation of the secret of correspondence postulated under Article 302 point 6 NCC, has the nature of a habitual-offence (it is incriminated in order to prevent the commission of more sever offences, the unlawful interception of a conversation), we consider that it is not absorbed by the aggravating form postulated under point 2, and therefore they shall form a concurrence of offences. Certainly, we envisage the situation in which the possession and interception have the nature of relatively autonomous activities in respect to their frame time, and not the situation when, absolutely naturally, the first is comprised by the second; it is obvious that the operation of interception inherently implies the possession of special means, thus, it can not be the case of concurrence. However, it shall be concurrence when, for example, a private detective possesses such means, in his office, for a long time, using them only on certain occasions, when a client asks him so.

A particular situation is met when the unlawful possession or manufacturing regards the special means for recording the indoor conversations. Thus, if they are placed and later used, we consider it shall be no concurrence of three offences: violation of private life in its standard form (Article 226 point 1), violation of private life in the absorbed form (Article 226 point 5), and violation of the secret of correspondence in the absorbed form (Article 302 point 6).

In respect to the criminal punishment of the violation of the secret of correspondence, we note that unlawful disclosure of the content of an intercepted conversation or communication is punished more sever that the disclosure of the content of a classic communication. The situation is justified due to the ampleness of the interpersonal communication by technical means in modern society. We find it hard to understand the legislator's choice to stipulate a milder penalty for the disclosure of the content of the intercepted communication (imprisonment from 3 months to 2 years or a fine) compared to the offence relating to the unlawful interception of a conversation or communication made by telephone or by any other means of communication (the penalty being imprisonment from 6 months to 3 years or a fine). We find it very important the harm brought to private life, for example, when certain intimate information are disclosed to the public by the offender, thus the person's intimacy becoming a general subject of gossip, compared to the situation in which the offender is the only one to find about that information, when he intercepts a victim's telephonic conversation. Likewise, it is difficult understand why the legislator opted a such a penalty system for the violation of the secret of correspondence, whilst in the case of violation of private life by audio recording of a private conversation and, respectively, by disclosing such a conversation to a third party or to the public, the penalties stipulated by the law are increasing: imprisonment from one month to 6 months or a fine relating to recording, respectively, imprisonment from 3 months to 2 years or a fine relating to disclosure.

Such an inconsistency allows us to conclude that it is a concurrence of the offence provided by point 2 and the one provided by point 4, at least for the case of violation of the secret of correspondence, if the offender discloses the content of a telephonic conversation that was unlawfully intercepted. The situation is relatively unusual as the disclosure is not possible without a prior interception, whereas the penalty requires it; thus being hard to accept that an offence stipulating a milder sanction (the disclosure) could absorb the one stipulating a more severe one (the interception).

The legislator devoted only two of the justifiable special causes specific to the violation of private life, for the violation of the secret of correspondence (if the offender notices the commission of an offence or contributes by evidence that an offence was committed or if he notices acts of public interest, which are significant to the life of the community and whose disclosure has public

advantages that are more important than the prejudice caused to the victim); the other two not being compatible with the acts of interception of correspondence or of the conversations or communications made by telephone or electronic means.

From the proceeding point of view, the offence of violation of the secret of correspondence, the prosecution is initiated upon the complaint of the victim, only for the standard form; the initial text of Article 302, which excludes ex officio investigation for any form of the offence, being advanced for a modification under the Law for the enforcement of the Criminal Code.

Illegal Interception of a transmission of IT information (Article 361 NCC). The NCC copied this offence, without any modification in respect to the constituent elements, form the Article 43 of the Law no161/2003. The only distinction refers to the penalty regime, which became milder.

Unauthorized transfer of IT data (Article 364 NCC). The offence of unauthorized transfer of IT data is encountered, in an identical form, under the provisions of Article 44 point 2-3 of the Law no161/2003. Likewise, for this offence, the legislator opted for a milder punishment.

IV. Legal interference with private life. If it is compelling that the law assures a complete and adequate system of protection of the individual's intimacy, making also appeal to the coercion specific to the criminal law, nonetheless we must admit that private life is not an absolute right. Every society admits, for the general interest of its members, the legal possibility of certain public authorities to interfere in a person's intimacy, home or correspondence, related to, for example, the prevention and combat of the criminal phenomenon.

Considering the provisions of the New Criminal Proceedings Code[61], enacted by the Law No 135/2010, we further propose certain comments regarding the methods and proceedings, which are used by the judicial agencies, implying interference with the individuals' private life.

Thus, Article 138 NCPC also regulates, under the phrase of special techniques for surveillance and investigation, the following proceedings:

- interception of conversations and communications – meaning the interception, access, monitoring, collection or recording of conversations or communications made by telephone, IT system or any other means of communication, as well as the recording of trafficking data that indicate the source, destination, data, hour, dimension, duration or the type of communication made by telephone, IT system or any other means of communication;

- access to an IT system – means entering an IT system or IT data storage device, either directly, or remotely, by the use of specialized programmes or of a network, in order to look for evidence;

- video, audio or photographic surveillance – means to photograph persons, to observe or register their conversations, moves or any other activities;

- to locate or survey by technical means – the procedure implies the use of certain devices that determine the place where a person is at;

- to withhold, release or search mail communication – means checking, through physical or technical means, the letters, other mail communications or the objects sent or received by any means, made by the offender, suspect, defendant or any other person suspected of receiving or sending those goods from or to the offender, suspect or defendant.

These measures are taken by the judge for laws and freedoms, if three conditions are accomplished at the same time: *(i)* there is a reasonable suspicion regarding the preparation or commission of a serious crime (for example, those against national security, acts of terrorism, arms trafficking, drugs trafficking, human being trafficking, corruption[62]); *(ii)* the measure is proportional

[61] Herinafter refered to as NCPC.

[62] With exception, withholding, release and search of mail communications can be instituted in case of reasonable suspicions regarding the preparation or commission of any crime.

with the restraint of fundamental rights and freedoms, considering the particularities of the cause, the importance of the information or evidences to be collected or the seriousness of the crime; *(iii)* the evidences could not be collected in any other means or their collection may imply great difficulties that could jeopardize the investigation or there is a peril for the safety of people or certain valuable goods.

The measures are mandated during the course of investigation, for a period of maximum 30 days, and can be prolonged, for justifiable reasons; every prolongation must not be longer than 30 days. The total period for these specific surveillance or investigation techniques, related to the same person and the same offence, is of maximum 1 year; the exception being video, audio or photographic surveillance that, when made in private places, can not exceed 120 days.

By derogation from the above mentioned procedure, Article 141 NCPC allows the prosecutor to authorize these proceedings, if the three conditions previously mentioned are accomplished, and also in case of emergency when the time to obtain a warrant from the competent judge could lead to a significant delay of the investigation, or to a loss, impairment, annihilation of evidences, or it could jeopardize the safety of the victim, witness or members of their families. The prosecutor can institute those measures for a period of maximum 48 hours, having the obligation to inform the judge in order to obtain their validation, in a 24 hours timeframe.

Considering the intrusive conspicuous nature of such measures, the law compels the prosecutor to immediately stop the surveillance if the bases on which it was started are no longer justifiable and to inform the person in writing, in maximum 10 tens, regarding the measure taken against him. If the subject, who has been under surveillance, asks for, he has the right to listen to the conversations, communications or discussions and to see the images.

Another specific surveillance technique that implies interferences with the person's intimacy is that of obtaining the list of telephonic conversations. The measure is instituted by the prosecutor, with the previous consent of the judge for rights and freedoms.

Likewise, house search implies interference in the individual's private life. This measure can be instituted if there is a reasonable suspicion regarding the commission of an offence by a person and it is expected that the search leads to the detection and collection of evidences regarding this offence, to the preservation of the traces of the offence or to the catching of the suspect or offender. House searching is instituted by the judge for rights and freedoms, during investigations, and by the institution invested to take it to court, during the course of a trial.

The law explicitly stipulates that house search must not constitute a disproportionate interference in the private life (Article 156 point 2 NCPC). The judicial agencies that perform the search can adequately and proportionately use of force, in order to enter a house, in two situations: *(i)* for reliable reasons to anticipate armed defence or other types of violence or in case of risk of destroying the evidences; *(ii)* in case of denial or if no answer was given to the judicial agencies' requests to enter the house (Article 159 point 17 NCPC). Likewise, the judicial agency has the right to open, by force, and avoiding unjustified damages, the rooms, spaces, furniture items and other items that might store objects, documents, evidences of the offence or of the searched persons, if the possessor is absent or does not wilfully want to open them (Article 159 point 12 NCPC).

The law allows that the place and the persons or objects found during the search to be photographed or recorded on tape or film (Article 159 point 12 NCPC).

Conclusions.

A complete analysis of the provisions of the NCC allows us to assess that the system for the protection of the individual's private life has substantially improved. This is welcomed both from the point of view of the practice requirements and also in order to provide the Romanian legislation with

the compatibility with the European standards in this matter, and the decision to incriminate certain acts evidently representing attacks on a person's intimacy and that happen more and more often in every day life (the violation of private life or the violation of the professional office). We shall see, in the following years after the NCC enters into force, to what extent the legislation will ensure the prevention function of the criminal law and how it will contribute to the civilizing function that any legal system ought to have for the society to which it addresses.

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