



UNCONSTITUTIONALITY OF SOME PROCEDURAL-CRIMINAL PROVISIONS REGARDING THE OBLIGATION TO INFORM ABOUT THE TECHNICAL SURVEILLANCE MEASURE

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Abstract

The concept of "public safety" can be viewed, in relation to the need to respect the fundamental rights of the person during judicial proceedings, from a dual perspective:

- on the one hand, public safety is guaranteed by ensuring that these fundamental rights are respected, because the safety of every person involved in legal proceedings ultimately leads to the preservation of public safety;

- on the other hand, some limitations of these rights (in the sense of interfering with their exercise) may occur, in a state governed by the rule of law, only under conditions strictly provided by law and in cases justified precisely by the need to guarantee public safety. This study addresses, from this second perspective, the possibility of limiting by law the fundamental rights of the person during judicial proceedings (in this case, the right to privacy) and refers to the regulation of technical supervision, as evidence in criminal proceedings, calling into question the unconstitutionality of some criminal procedural provisions regarding the obligation to inform the under-surveillance person about the measure that targeted her.

Keywords: *respect for privacy, judicial procedure, public safety, technical surveillance, unconstitutionality*

INTRODUCTION

Compared to the need to respect the fundamental rights of the person during judicial proceedings, the concept of "public safety" can be viewed from a dual perspective:

- on the one hand, public safety is guaranteed, inter alia, by ensuring the observance of these fundamental rights, because the safety of every person involved in a judicial procedure, regardless of its procedural quality and regardless of the nature of the judicial procedure (criminal, civil, administrative litigation etc.), ultimately leads to the preservation of public safety; in other words, public safety

is the expression of the legal security of each person participating in the social relations established within a state governed by the rule of law;

- on the other hand, some limitations of these rights (in the sense of interfering with their exercise) may occur, in a state governed by the rule of law, only under conditions strictly provided by law and in cases justified precisely by the need to guarantee public safety, as an expression maintaining the balance between personal interests and the general interest of society.

From the second perspective, the possibility of limiting by law the fundamental rights of the person during judicial proceedings (in this case, the right to privacy), we can address some issues regarding the regulation of technical surveillance, as evidence in criminal proceedings.

I. PRINCIPLE OF RESPECT FOR PRIVACY

Article 11 of the current Romanian Code of Criminal Procedure provides for two closely related principles - respect for human dignity and respect for privacy:

“(1) Anyone who is being prosecuted or tried should be treated with respect for human dignity.

(2) Respect for privacy, inviolability of the home and secrecy of correspondence are guaranteed. Restriction on the exercise of these rights is permitted only in accordance with the law and if it is necessary in a democratic society.”

Regarding the observance of privacy, as a novelty, through the provisions of the current Code of Criminal Procedure, the Romanian legislator raises this requirement to the rank of principle of application of criminal procedure law (Lorincz, 2015, p. 50), expressly regulating it in para. 2 of art. 11.

Moreover, this recognition of respect for the right to privacy, as a fundamental principle of the Romanian criminal process, is a transposition into our criminal law of some provisions of a number of international documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Everyone has the right to respect for his private and family life, his home and his correspondence” – art. 8 para. 1) or the Charter of Fundamental Rights of the European Union (“Everyone has the right to respect for his private and family life, his home and the secrecy of his communications” – art. 7).

Also, in the Romanian Constitution is guaranteed respect for intimate, family and private life (art. 26), inviolability of the home (art. 27) and secrecy of correspondence (art. 28); pursuant to these constitutional provisions, the current Code of Criminal Procedure outlines the content of the fundamental principle of respect for privacy in three aspects: respect for privacy, respect for the inviolability of the home and respect for the secrecy of correspondence.

In the second thesis of para. 2 of art. 11 Code of Criminal Procedure (CCP) is provided the possibility of restriction the exercise of the right to privacy (in the broad sense, which includes the three aspects mentioned above) if two requirements are met: the restriction should be carried out only in accordance with the law and the restriction should be necessary in a democratic society. Also, this

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internal regulation of the limitations of the right to privacy is a transposition of the conventional provisions (para. 2 of art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms): "the interference of a public authority in the exercise of this right is permissible only in so far as such interference is provided for by law and if it constitutes a measure which, in a democratic society, is necessary for the national security, **public security**, economic well-being of the country, defending order and preventing criminal acts, protecting the health, morals, rights and freedoms of others".

In this sense, there are in the current Code of Criminal Procedure some provisions that constitute legal exceptions to the principle of respect for privacy, such as those contained in art. 138, on special methods of surveillance or investigation: interception of communications or any type of remote communication, access to a computer system, video surveillance, audio or photography, locating or tracking by technical means, seizing, handing over or searching postal items etc.

**II. TECHNICAL SURVEILLANCE – EXCEPTION OF THE PRINCIPLE
OF RESPECT FOR PRIVACY**

Among the evidentiary procedures regulated in the current Code of Criminal Procedure are also the special methods of surveillance or investigation, as legal ways to obtain the means of proof necessary to find out the truth in cases involving certain crimes expressly provided by law.

According to art. 138 para. 1 CCP, special methods of surveillance or investigation are as follows:

- a) interception of communications or any type of remote communication;
- b) access to a computer system;
- c) video, audio or photography surveillance;
- d) location or tracking by technical means;
- e) obtaining data on a person's financial transactions;
- f) seizing, handing over or searching postal items;
- g) use of undercover investigators and collaborators;
- h) authorized participation in certain activities;
- i) supervised delivery;
- j) obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public.

As it appears from the content of art. 138 para. 13 CCP, by **technical surveillance** is meant the use of one of the following methods:

- a) interception of communications or any type of remote communication;
- b) access to a computer system;
- c) video, audio or photography surveillance;
- d) location or tracking by technical means.

According to art. 139 CCP, the technical surveillance is ordered by the judge of rights and freedoms when the following conditions are cumulatively fulfilled:

a) there is a reasonable suspicion of the preparation or commission of an offense under the law (these are some offenses with a high degree of social danger, such as: offenses against national security, drug trafficking, illegal operations with precursors or other products likely to have psychoactive effects, offenses relating to non-compliance with the regime of weapons, ammunition, nuclear materials, explosives and restricted explosive precursors, trafficking and exploitation of vulnerable persons, acts of terrorism etc.);

b) the measure is proportionate to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the gravity of the offense;

c) the evidence could not be obtained otherwise or obtaining them would involve particular difficulties which would prejudice the investigation or there is a danger to the safety of persons or property.

III. INFORMING THE UNDER-SURVEILLANCE PERSON.

DECISION OF THE CONSTITUTIONAL COURT NO. 244/2017

As it appears from the content of art. 145 para. 1 CCP, after the termination of the technical surveillance measure, the prosecutor must inform, in writing, within 10 days, on each subject of a warrant about the measure of technical surveillance that has been taken with regard to him.

After the moment of informing, the under-surveillance person has the right to take note, upon request, of the content of the minutes in which the technical surveillance activities performed are recorded. Also, the prosecutor will ensure, upon request, listening to conversations, communications or conversations or viewing images resulting from the activity of technical surveillance (art. 145 para. 2 CCP).

In the absence of an express legal provision, in the practice of the criminal investigation bodies, the obligation to release, at the request of the defendant or his defense counsel, some copies of the recordings of the telephone conversations was questioned, the opinion unanimously agreed by the participants in the Meeting of the chief prosecutors of the criminal and judicial investigation section at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts of appeal (26-27 May 2016) being that, although the law does not oblige the release of such copies, this may be a way of fulfilling the obligation to ensure the listening of these recordings, according to art. 145 para. 2 CCP.

The term for formulating the request by the under-surveillance person is, according to art. 145 para. 3 CCP, of 20 days from the informing date.

Paragraphs 4 and 5 of art. 145 CCP contain provisions regarding the possibility of postponing the informing, as well as the limits of such postponement. Thus, the prosecutor may motivated postpone the informing or the presentation of the supports on which the technical surveillance activities are stored or of the minutes of the rendering, if this could lead to:

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a) disrupting or endangering the proper conduct of the criminal investigation in question;

b) endangering the safety of the victim, witnesses or members of their families;

c) difficulties in the technical surveillance of other persons involved.

Such a postponement may be ordered at the latest until the end of the criminal investigation or until the case is closed.

Therefore, the current Romanian Code of Criminal Procedure enshrines the right of any person who has been the subject of a technical surveillance warrant, regardless of his quality, to be informed about the measure that concerned him, even in conditions of a postponement of this informing. The object of the postponement may be either the fact of informing (and, implicitly, the presentation of the materials on which the surveillance activity was recorded), either, after the informing has been made, only the presentation of the supports on which the surveillance activities are stored or the presentation of the minutes.

The doctrine (*Chiriță, 2014, p. 327*) considered that, given that the purpose of the postponement is that the investigated person does not know the existence of the technical surveillance warrant, the motivated ordinance by which the prosecutor postpones the informing is confidential and should be attached to the criminal investigation file only after it has been completed or at the time the prosecutor ordered the informing.

The general provisions of the Romanian Code of Criminal Procedure (contained in art. 145) allow, however, the postponement of informing only until the end of the criminal investigation or until the case is closed. Therefore, at the latest before ordering a solution to the case, the prosecutor has the obligation to inform the person who has been under technical surveillance and to inform her, upon request, of the contents of the minutes of the rendering, as well as to ensure, on request, the possibility to listen/watch the recordings. For this reason, in order to guarantee the exercise of the under-surveillance person's right to be informed, the doctrine (*Volonciu, Vasiliu, Gheorghe, 2016, p. 248*) stated that, if the prosecutor ordered the postponement of the informing, he is obliged to inform, in writing, the person concerned within 10 days of the disappearance of the reason for postponement and to provide her with an interval of 20 days in order to formulate the request. If the postponement concerned only the presentation of the media on which the surveillance activities are stored or of the minutes, the prosecutor will have to provide the under-surveillance person with access to these materials before ordering a solution to the case.

Regarding the provisions of art. 145 CCP, the Constitutional Court of Romania admitted, however, an exception of unconstitutionality, finding that the legislative solution contained in these provisions ***"which does not allow contesting the legality of the technical surveillance measure by the person concerned, which does not have the quality of defendant, is unconstitutional"***.

Thus, in the motivation of Decision no. 244/2017, the court of constitutional contentious, analyzing the provisions of art. 344 para. 2, art. 341 para. 2 and

art. 318 para. 15-16 CCP, regarding the possibility to contest/verify the legality of the technical surveillance measure, noted that these provisions do not allow any under technical surveillance person, regardless of his procedural capacity, to bring an appeal to verify the legality of the measure taken against him/her during the criminal investigation. In other words, from the economics of the criminal procedural provisions governing the procedures subsequent to the settlement of the case by the prosecutor (by referral to court, closing or waiver of criminal prosecution), it follows that only the person who has the capacity of defendant in that case is entitled to an "effective remedy" to enable him to remove a possible breach of his right to privacy.

Therefore, the Constitutional Court found that "with regard to persons subject to technical surveillance measures, other than the defendant, *the state has not complied with its positive obligation to regulate a form of a posteriori control, which the person concerned may access in order to verify the fulfilment of the conditions and, implicitly, of the legality of this measure*", thus violating the provisions of art. 26 ("Intimate, family and private life") and art. 53 ("Restriction on the exercise of certain rights or freedoms") of the Romanian Constitution, as well as those of art. 8 ("The right to respect for private and family life, home and correspondence") and art. 13 ("The right to an effective remedy") of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

IV. LEGISLATIVE INTERVENTION OPERATED BY LAW NO. 58/2019

Law no. 58/2019 introduced, in Law no. 535/2004 on preventing and combating terrorism, a provision (in art. 38⁴) which establishes an exception to the obligation to inform the under technical surveillance person about the measure that was taken in his regard. Thus, in criminal cases having as object the investigation of the commission of a terrorist crime, "*the provisions of art. 145 of the Code of Criminal Procedure does not apply if in the case a closing solution has been adopted pursuant to art. 16 para. 1 letter c) of the Code of Criminal Procedure*".

This means that, if the prosecutor has ordered the closing solution on the grounds that there is no evidence that a person has committed the crime of terrorism, the general provisions contained in the Code of Criminal Procedure on the informing the under-surveillance person do not apply. For example, if it is held, on the basis of evidence, that another person, and not the one against whom the criminal investigation was carried out, committed the crime of terrorism or if, following the evidence administered (including interception of communications) there is insufficient evidence that the suspect or defendant in question has committed the crime of terrorism, there is no obligation to inform the persons concerned of the technical surveillance measure.

Considering this legislative intervention, we can question the conformity of this provision introduced by Law no. 58/2019 with the provisions of the Romanian Constitution and with those of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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We note that this aspect of the "absence of informing the under-surveillance person about the measure taken against him/her" was addressed in the jurisprudence of the European Court of Human Rights, the European court considering that "in principle, the person subject to the surveillance measure has the right to be informed this measure once it ceases", but as an exception, the absence of such informing "is not, in itself, incompatible with the provisions of art. 8 para. 2 of the European Convention" (*Ghigheci, 2014, pp.236-237*). In this regard, the European Court has shown (the judgment of September 6, 1978, in *Klass and Others v. Germany*) that "*the activity or danger covered by a certain series of surveillance measures may be prolonged for several years, even decades after the suspension of these measures. Subsequent notification to each individual who has been subject to the surveillance measure may jeopardize the achievement of the long-term goal initially intended for surveillance. Moreover, as the German Federal Constitutional Court rightly observed, such a notification may lead to the disclosure of working methods, the areas of operation of the secret services and even the identification of their agents. As long as the interference resulting from the contested legal provision is in principle justified under art. 8 para. 2, failure to inform the person concerned at the end of the surveillance cannot in itself constitute an infringement of this article, as this fact ensures the effectiveness of the interference.*"

Moreover, in the same case (*Klass and Others v. Germany*), the Strasbourg Court held that "*democratic societies are threatened by sophisticated forms of espionage and terrorism, so the state must be able to effectively combat these threats, to conduct secret surveillance of subversive elements operating under its jurisdiction*" (Udroiu, Predescu, 2008, p. 821).

Therefore, the exemption, by special law (Law no. 535/2004), from the application of the general provisions of the Romanian Code of Criminal Procedure regarding the informing of the under-surveillance person, does not constitute a violation of the constitutional provisions guaranteeing the right to privacy and nor of the conventional provisions, as long as this derogation is justified, being necessary in a democratic society in order to ensure national security and to prevent/combat acts of terrorism.

CONCLUSIONS

In conclusion, considering the declaration as unconstitutional of the legislative solution contained in art. 145 CCP, which does not allow contesting the legality of the technical surveillance measure by any under-surveillance person, regardless of its quality (therefore, which does not have the quality of defendant), for the implementation of the Decision of the Constitutional Court no. 244/2017 it is necessary to amend/supplement the Romanian Code of Criminal Procedure.

In order to ensure the possibility of accessing, before a court, persons whose legitimate interests have been harmed by the technical surveillance measure aimed at them, the procedural-criminal provisions must allow the verification of the legality of this measure through a form of *a posteriori control*, which may be

exercised after the procedural moment at which the secrecy of the judgment (conclusion of the judge of rights and freedoms) by which the technical surveillance measure was ordered and of the data obtained through that measure is removed.

In fact, through the latest draft law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure (submitted for public debate by the Ministry of Justice on 2 September 2021), it is proposed to introduce provisions (in art. 145¹ - with the marginal name "Complaint against technical surveillance measures") which to regulate the remedy available to the under-surveillance person.

It is true that, in principle, acts and measures of criminal prosecution can be challenged by complaint, but technical surveillance is a measure ordered by the judge of rights and freedoms, and acts, respectively measures ordered by the judge of rights and freedoms are usually challenged by contestation.

Moreover, as stated in the doctrine (*Chiriță, 2014, p. 328*), in the matter of means of evidence obtained through technical surveillance, the illegality of the evidence can be invoked in relation to the substantive and formal conditions of issuing the warrant and performing the technical surveillance. However, as long as, following the request of the under-surveillance person, a verification of the legality of the substantive and formal conditions of issuing the technical surveillance warrant, and not only of the surveillance, will be initiated, we consider that the marginal name of art. 145¹ must be "*Contesting the technical surveillance measure*", and the remedy must be the contestation.

We also consider that the deadlines provided by law for the introduction and settlement of the appeal should be short (48 hours, respectively 5 days), so that such a procedure does not lead to the delay of the case, and the moment from which is calculated the 48-hour period in which the under-surveillance person may lodge a contestation to the prosecutor who made the informing must be that of taking note of the contents of the minutes or of hearing the conversations or communications or viewing the images referred to in para. 2 of art. 145 CCP.

In order to also regulate the situations in which the prosecutor postpones motivated the informing or the presentation of the supports on which the technical surveillance activities are stored, we propose the introduction of a final paragraph of art. 145¹ with the following content: "*If the prosecutor ordered the sending to court or waiving the criminal investigation and postponed the informing according to art. 145, the contestation lodged at the prosecutor after submitting the file to the court is sent, for competent resolution, to the judge of the preliminary chamber to which the case is assigned.*"

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