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Use of Extra-judicial Technical Surveillance in Criminal Decision-making: European Limitations and National Challenges[1]

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Abstract: *At the European level, the general rule for the gathering of evidence and the use of investigative methods involving the restriction of fundamental rights and freedoms is that these activities should only be carried out by bodies with judicial powers, only by means of judicial instruments and only in the framework of judicial proceedings. This judicial exclusivity is respected even when pro-active criminal investigations, as it ensures a mechanism of checks and balances on measures consisting in violations of individual rights. The case law of the European Court of Human Rights in Strasbourg has consistently stated that even a severe threat to national security, such as acts of terrorism, or other risks of a global nature are not to be relied upon in order to override this form of protection and control. The present study aims to address the particular situation of technical surveillance carried out through specific intelligence gathering activities that restrict the exercise of fundamental rights or freedoms. Beyond the essential issue of the admissibility of the use of information obtained by officers (bodies) specializing in national security activities as evidence in criminal proceedings, the analysis aims to identify controversies and offer solutions on other issues of interest: the ability of non-judicial bodies to become involved in the conduct of criminal investigations, the effectiveness of the mechanisms for controlling these intrusive methods, the conformity with the European law of national regulations allowing such participation, the way in which information gathered by extrajudicial bodies can influence the criminal decision-making process. The analysis will be carried out from both the European and the national perspective, taking into account the particularities of the Romanian judicial system.*

Key Words: *Criminal Law; Criminal Procedure Law; Technical Surveillance; Criminal Decision-making; Romanian Intelligence Service; Evidence; Extrajudicial Bodies; the European Union; Romania.*

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I. National context

As regards the particular situation of Romania, the problem of use of extrajudicial technical supervision in criminal cases must be referred, from the beginning, to two primary normative coordinates.

According to the constitutional provisions (Articles 131 and 132 of the Constitution of Romania) and of the Code of Criminal Procedure of Romania (Articles 55 – 57 of the Code of Criminal Procedure), according to all modern European criminal procedural systems, there is a veritable judicial monopoly as regards the conduct of criminal investigations.[2]

Thus, the conduct of criminal investigations and, as a result thereof, the bringing of criminal charges against some persons can only be carried out in a judicial context, by judicial bodies and only by judicial means expressly provided for by law. This judicial exclusivity is one of the fundamental pillars of the rule of law and has its origin in the constitutional principle of the separation of powers in the State, transposed and specialized in procedure in the primary principle of the separation of judicial functions. The judicial monopoly arising from this form of exclusivity has also made it necessary to establish a special single authorisation procedure, with the judge at its centre as the only viable guarantor of the rights and freedoms of an individual in criminal proceedings.[3]

Taking into account the old public law rule *delegata potestas non delegatur*, a judicial authority of constitutional rank may not unilaterally delegate elements of its original functional competence to other extrajudicial State bodies.[4]

However, in Romania, in the specific matter of gathering evidence by means of technical surveillance methods (normatively referred to as special surveillance or investigation methods),[5] this natural form of judicial

[2] LANGER, M. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. In: S. C. THAMAN, ed. *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*. 1st ed. Durham, NC: Carolina Academic Press, 2010, pp. 29-30. ISBN 978-1-59460-573-4.

[3] MATEUȚ, G. *Procedură penală: Partea generală* [Criminal Procedure: General Part]. 1-a ed. București: Universul Juridic, 2019, p. 673. ISBN 978-606-39-0393-9.

[4] See *Decision of the Constitutional Court of Romania Ref. No. 26/2019* [2019-01-16], para. 172.

[5] These evidentiary hearings are part of the "special investigative techniques" concept from Recommendation 10 of the Committee of Ministers of the Council of Europe (2005), which includes techniques employed by competent judicial authorities in criminal investigations, aimed at detecting or investigating serious offences and suspects, in order to

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monopoly has been replaced by a delegated form of administrative monopoly.

Without taking into account the substantial period prior to 2014 (before the entry into force of the current Code of Criminal Procedure), in the judicial activity carried out within the fight against corruption, closely monitored at the European Commission level through the Cooperation and Verification Mechanism (CVM) and for which Romania was constantly encouraged and congratulated, the main actor in obtaining, selecting and storing evidence obtained through technical surveillance was an administrative authority, one of the secret services – the Romanian Intelligence Service. The importance of this finding is also based on the generally accepted judicial reality that the so-called electronic evidence is nowadays prevalent in all criminal judicial proceedings.[6]

From the beginning, it should be emphasized that this interference of the Romanian Intelligence Service in the carrying out of technical surveillance was carried out in the context in which, since its establishment in 1991, the main secret service of Romania has been operating according to an extremely clear legal provision, which fully complied with the constitutional framework of the judicial monopoly to which we have referred. Thus, pursuant to the Article 13 of Law No. 14/1992, *"the bodies of the Romanian Intelligence Service may not carry out criminal investigation acts, may not take the measure of preventive detention or arrest and may not have their own detention facilities."*

Analysing the primary and sub-legal normative acts that have generated the activity of the Romanian Intelligence Service and the relations of this administrative authority with the Public Prosecutor's Office, we can identify three procedural forms through which the secret service has substituted itself for the judicial bodies and has actively involved in criminal investigations:

gather information in such a way that the persons concerned are unaware of it. See UDROIU, M., R. SLĂVOIU and O. PREDESCU. *Tehnici speciale de investigare în justiția penală* [Special Investigation Techniques in Criminal Justice]. 1-a ed. București: C. H. Beck, 2009, pp. 1-3. ISBN 978-973-115-494-7.

6 See MASON, S. and A. SHELDON. Proof: The Investigation, Collection and Examination of Digital Evidence. In: S. MASON, ed. *Electronic Evidence*. 2nd ed. London: LexisNexis, 2010, p. 51. ISBN 978-1-4057-4912-1; and WALDEN, I. *Computer Crimes and Digital Investigations* [online]. 1st ed. Oxford: Oxford University Press, 2007, pp. 353-401 [cit. 2024-10-14]. ISBN 978-1-383-04375-4. Available at: https://doi.org/10.1093/oso/9780199290987.001.0001.

1) The execution of ordinary technical surveillance warrants issued by judges according to the rules of the Code of Criminal Procedure;
2) Carrying out technical surveillance on the basis of special technical surveillance warrants issued on the basis of the Law on National Security – Law No. 51/1991;
3) The active participation of the Romanian Intelligence Service officers in joint operative teams (together with prosecutors or criminal investigation bodies of the Judicial Police) in carrying out criminal prosecution acts on the basis of the secret Protocols concluded between the Romanian Intelligence Service and the Public Prosecutor's Office in 2009 (Protocol of 4. 2. 2009) and 2016 (Protocol No. 09472 of 8. 12. 2016).

In spite of the exclusively administrative nature of the competence of the secret service, the main consequence of this involvement gained, against the law, a judicial dimension materialized in obtaining evidence used in judicial proceedings to substantiate judicial decisions that affected the freedom and other fundamental rights of the individual.

One by one, the legal or sub-legal provisions that substantiated these forms of intervention in the judicial activity have been sanctioned by the Constitutional Court as breaching the constitutional provisions related to the rule of law in its component as regards the guaranteeing of the fundamental rights of citizens (indicating a wide range of rights violated, particularly the right to a fair trial, the right to intimate, family and private life, individual freedom), regarding the principle of legality, the legal security of the individual being breached, since its legitimate trust in the values of the Constitution has not been complied with. From a formal standpoint, this protection is expressed in the legal requirement that any surveillance measure must be commensurate to the restriction of fundamental rights and freedoms, as viewed through the following alternative criteria: the particularities of the case, the importance of the information or evidence to be obtained, or the seriousness of the offence.[7]

In its decisions, the Court has expressly indicated not only the sanctions applicable to acts carried out with the support of extrajudicial bodies, but also the conduct to be followed by the courts (or judicial authorities in the broad sense) based on such decisions. This way of proceeding,

[7] UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 814. ISBN 978-606-18-1322-3.

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with a view to ensuring the full effectiveness of its binding rulings, was referred by the Constitutional Court (Decision No. 26/2019, para. 205) as a *two-step mechanism*.

The rationale for its implementation, even within the sanctioning decisions, of a legislative solution or a specific behaviour of a judicial authority (such as the Public Prosecutor's Office in the case of the legal conflict of a constitutional nature generated by the conclusion of the protocols of collaboration with the Romanian Intelligence Service) is found in the profound change of the judicial paradigm that it has caused and in the phenomenon of rejection manifested at the level of some courts.

Considering the generally binding and strong effects for the future of the Constitutional Court Decisions, for all public authorities and all individual subjects of law, as a result of several consecutive decisions, delivered within a period of 6 years, the Constitutional Court determined that:

(i) The acts by which extrajudicial authorities (such as secret services) have contributed to the taking of evidence in criminal trials are absolutely null and void;
(ii) This severe sanction is determined by the violation of a form of general and primary competence of judicial bodies, the only bodies empowered to act judicially;
(iii) Corollary to the declaration of nullity, the evidence obtained as a result of these vitiated acts must also be sanctioned by exclusion,[8] which makes it impossible to use compromised evidence in criminal proceedings;
(iv) In addition to the main effect of the exclusion of evidence (loss of informational capacity), the secondary effect must be applied, which is manifested in material (administrative) terms: the physical removal of the support on which the evidence from the case file was objectified;
(v) This joint sanctioning mechanism is the only one that can effectively guarantee the fundamental rights infringed by the transfer of pow-

[8] On the exclusion mechanism in the Romanian law, see NEGRU, A. I. *Administrarea și aprecierea probelor în procesul penal* [Administration and Assessment of Evidence in Criminal Proceedings]. 1-a ed. București: Universul Juridic, 2022, pp. 231-256. ISBN 978-606-39-0827-9; for the penalty of the exclusion of evidence in Italian law, DELLA RAGIONE, L. *Manuale di Diritto Processuale Penale*. 5ª ed. Molfetta: Neldiritto, 2019, pp. 215-217. ISBN 978-88-327-0440-2; for the French law, PRADEL, J. *Procédure pénale*. 16e éd. Paris: Cujas, 2011, pp. 343-354. Référence. ISBN 978-2-254-11410-8.

ers to extrajudicial bodies, while ensuring that the relevant regulatory framework is very clear, precise and predictable;

(vi) A positive procedural obligation is established on all judicial, investigative and decision-making authorities to verify, in pending cases, the extent to which such an infringement of the primary powers of the criminal prosecution authorities has occurred and to order the appropriate legal measures;

(vii) In the case law of the Constitutional Court (Decision No. 685/2018, para. 198), the scope of the notion *"pending cases"* has been expressly and extensively defined to include *"both pending cases and cases finalized to the extent that the litigants are still within the time limit for exercising the appropriate extraordinary remedies"*.

It should be emphasized that this process of radical reconfiguration of the paradigm of the secret services involvement in obtaining and using evidence in criminal judicial proceedings has been a laborious one characterized by discontinuity.

Beyond the phenomenon of rejection and opposition manifested at the level of a significant segment of the judicial authorities who considered that the application of these constitutional rulings would significantly affect the process of fighting against crime and in particular the fight against corruption, the period during which these consecutive decisions were delivered meant a veritable judicial and normative epic, manifested in non-uniform practice and jurisprudential controversies, lack of legislative predictability, changes in attitudes at the level of the criminal policy, etc.

The following temporal landmarks of this period, which are still in the process of crystallization, are eloquent:

- as regards the situation of evidence obtained as a result of ordinary surveillance but with the support of extrajudicial bodies, specialized in intelligence gathering, the consequences of the Constitutional Court Decisions No. 51/2016, No. 302/2017, No. 26/2019, No. 22/2018 have manifested themselves, temporally, in the following stages:

1. for the period until 14 March 2016 (the date of entry into force of the Government Emergency Ordinance No. 6/2016 caused by the original "pilot" Decision No. 51/2016), all acts of execution of (ordinary) technical surveillance warrants by *other State bodies*, without judicial powers, have become null and void – as a result of the violation of

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rules of functional competence or primary material competence – which, once declared judicial, led to the exclusion of the evidence thus obtained followed by the removal from the case file of the material supports in which they had been objectified: means of evidence, content of the procedural documents in which they had been reproduced/copied;

2. for the period 14 March 2016 – 11 April 2022 (date of publication in the Official Gazette of the Constitutional Court Decision No. 55/2022), the acts of execution of the technical surveillance warrants by the Romanian Intelligence Service bodies were validly carried out since, according to the Article 57 para. (2) Code of Criminal Procedure and the Article 13 of Law No. 14/1992 on the Organization of the Romanian Intelligence Service, these bodies could be appointed as special criminal investigation bodies with a unique vocation to execute technical surveillance warrants pursuant to the Article 57 para. (2);

Note: after it was declared unconstitutional by the Decision No. 55/2022, Article 57 para. (2) the Code of Criminal Procedure, it was formally repealed by Law No. 201/2023 which, paradoxically, did not operate the natural, consequential amendment of the Article 13 of Law No. 14/1992.

3. After 11 April 2022, the bodies of the Romanian Intelligence Service can no longer execute technical surveillance warrants, however, by Decision No. 64/2023, the High Court of Cassation and Justice decided that *the making available of the necessary infrastructure by the National Centre for Interception of Communications within the Romanian Intelligence Service, in order to ensure the technical conditions for the implementation of technical surveillance measures, does not constitute an activity of execution of the technical surveillance warrant, according to the Article 142 of the Code of Criminal Procedure*.

- as regards the surveillance carried out on the basis of national security warrants, the temporal milestones are:

1. the period until 20 April 2018 (the date of publication in the Official Gazette of the Constitutional Court Decision No. 91/2018), the evidence obtained from the execution of the warrants issued according to Law No. 51/1991 was considered legally acquired and judicially exploited without reservation;
2. between 20 April 2018 and June 2020 (the date of publication of the Constitutional Court Decision No. 55/2020) the evidence obtained

from the surveillance carried out by means of national security warrants issued according to the Article 3 letter f) of Law No. 51/1991 could no longer be used in cases having as object offences of corruption, money laundering, crimes against the person, etc. (common law offences), even if they had been obtained prior to the publication of the aforementioned decision;

3. between June 2020 and 9 July 2023 (date of entry into force of Law No. 201/2023), the recordings obtained as a result of the activities authorized under Law No. 51/1991 could no longer be used as evidence in any criminal case, as they lacked their primary aptitude and could not be used as evidence under the Article 139 para. (3) Code of Criminal Procedure;
4. starting with 9 July 2023, the information obtained through national security warrants may be used as evidence, conditionally, according to the provisions of the Article 139[1] of the Code of Criminal Procedure.

One of the insidious forms of the involvement of the Romanian Intelligence Service in the activity of gathering evidence used in criminal cases can be found in the technical surveillance carried out on the basis of national security warrants.

Regulated even since the entry into force of Law No. 51/1991 on the national security of Romania, the intelligence gathering procedure involving the restriction of the exercise of fundamental rights or freedoms has meant for a long time a parallel mechanism for obtaining evidence with the support or direct involvement of bodies without judicial powers. Essentially, this procedure was triggered by a finding on the part of specialized national security workers related to the existence of a threat to Romania's national security. The provision of such a legal condition is essential, even if not subject to an adequate burden of proof, because in the absence of an adequate risk or threat, a proportionality test cannot be realistically exercised.[9]

[9] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. București: Solomon, 2021, p. 565. Pro Foro. ISBN 978-606-8892-82-5. If the provisions regulating such techniques are not regulated by a clear and foreseeable legal framework, the essential conventional standard that the interference with the right to privacy must be provided under the law cannot be deemed as fulfilled. See *Case of Kruslin v. France* [1990-04-24]. Judgement of the European Court of Human Rights, 1990, Application No. 11801/85, para. 36.

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The phrase *"threat to national security"* is legally defined in the Article 3 of Law No. 51/1991 and included:

a) plans and actions aimed at suppressing or undermining the sovereignty, unity, independence or indivisibility of the Romanian State;
b) actions aimed, directly or indirectly, at provoking war against the country or civil war, facilitating foreign military occupation, servitude to a foreign power or aiding a foreign power or organization to commit any of these acts;
c) treason by helping the enemy;
d) armed or any other violent acts aimed at weakening the state power;
e) espionage, the transmission of state secrets to a foreign power or organization or their agents, unlawful procurement or possession of State secret documents or data with a view to their transmission to a foreign power or organization or their agents or for any other purpose not authorized by law, as well as disclosing state secrets or negligence in keeping them;
f) undermining, sabotage or any other actions meant to remove by force the democratic institutions of the State or which seriously prejudice the fundamental rights and freedoms of the Romanian citizens or which may prejudice the defence capacity or other such interests of the country, as well as acts of destruction, degradation or rendering in a state of disuse the structures necessary for the proper functioning of social-economic life or national defence;
g) acts that threaten the life, physical integrity or health of persons who perform important functions in the State or of representatives of other States or international organizations, whose protection must be ensured during their stay in Romania, according to the law, treaties and conventions concluded, as well as international practice;
h) initiating, organizing, committing or supporting in any way totalitarian or extremist actions of communist, fascist, legionary origin or any other nature, racist, anti-Semitic, revisionist, separatist, which may endanger in any way the unit and territorial integrity of Romania, as well as incitement to acts that may endanger the rule of law;
i) terrorist acts, as well as initiating or supporting in any manner whatsoever any activities the purpose of which is to commit such acts;
j) attacks against a community, committed by any means;
k) the theft of arms, ammunition, explosive or radioactive, toxic or biological materials from establishments authorized to hold them, their smuggling, their production, possession, alienation, transport or use

in conditions other than those provided by law, as well as the carrying of arms or ammunition, without right, if by so doing they endanger national security;

l) initiating or establishing organizations or groups, or joining or supporting them in any form, for the purpose of carrying out any of the activities mentioned at letters a) – k), as well as the secret carrying out of such activities by organizations or groups established according to the law;

m) any actions or inactions that harm the strategic economic interests of Romania, those that have the effect of endangering, illegally managing, degrading or destroying natural resources, forest, hunting and fishing stocks, waters and other such resources, as well as monopolizing or blocking access to them, with consequences at national or regional level;

n) cyber threats or cyber-attacks against information and communication infrastructures of national interest;

o) actions, inactions or states of affairs with national, regional or global consequences that affect the State's resilience to hybrid risks and threats;

p) actions carried out by a state or non-state entity, by conducting propaganda or disinformation campaigns in cyberspace, likely to affect the constitutional order.[10]

The text has been deliberately regulated in a permissive manner, as it has determined, on the occasion of its interpretation and application at judicial level, the inclusion in this category of common criminal offences (corruption, money laundering, etc.), and has been used to circumvent the rules for obtaining surveillance warrants according to the ordinary procedure.

Therefore, the Constitutional Court was asked to examine the extent to which these provisions meet the requirement related to the need to regulate the invasion of privacy by an accessible and predictable law.

According to two successive decisions,[11] the constitutional administrative court found that the phrases *"any other actions that seriously in-*

[10] On the legal conditions to be met for the authorisation of special techniques constituting specific intelligence-gathering activities, see SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. București: Solomon, 2021, pp. 565-568. Pro Foro. ISBN 978-606-8892-82-5.

[11] *Decision of the Constitutional Court of Romania Ref. No. 91/2018* [2018-02-28]; and *Decision of the Constitutional Court of Romania Ref. No. 802/2018* [2018-12-06].

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fringe the fundamental rights and freedoms of the Romanian citizens" (Decision of the Constitutional Court of Romania No. 91/2018) and *"or other such interests of the country"* in the Article 3 letter (f) are unconstitutional.

Therefore, after ascertaining a threat to national security, the secret service bodies could initially ask the prosecutor, subsequently only a specifically designated judge of the High Court of Cassation and Justice, for authorization to carry out specific intelligence gathering activities, based on a warrant, such as:

a) interception and recording of electronic communications, carried out in any form;
b) the search for information, documents or records which, in order to obtain them, it is necessary to enter a place, access an object or open an object;
c) picking up and putting back an object or document, checking it, extracting information from it, recording, copying or obtaining extracts by any procedures;
d) the installation of objects, their maintenance and removal from the places where they have been deposited, surveillance by photographing, filming or other technical means or personal findings, carried out systematically in public places or carried out in any way in private places;
e) locating, tracking and obtaining information by GPS or other technical means of surveillance;
f) intercepting postal items, picking up and putting them back, checking them, extracting the information they comprise, as well as recording, copying or obtaining extracts by any means;
g) obtaining information concerning a person's financial transactions or financial data, as provided by law.

One should note that some of these specific information-gathering activities involving the restriction of fundamental human rights and freedoms do not have an equivalent among the ordinary surveillance techniques under the criminal procedural law, are tantamount to classic espionage techniques and have been criticised for their complementary nature as opposed to ordinary techniques, and the ambiguous legal framework in which they are regulated.[12]

[12] See in this regard, TUDORAN, M. V. *Teoria şi practica interceptărilor şi înregistrărilor audio sau video judiciare: Abordare dual actualele şi noile Cod penal şi Cod de procedură*

These activities could be carried out for a period of 6 months, which could be extended thereafter by 3 months. In its original form, the law allowed, in urgent cases, for this technical surveillance to be carried out without authorization directly by secret service officers for a limited period of 48 hours.

At present, the request related to the issue of a national security surveillance warrant, even if made by the Romanian Intelligence Service officers, has to go through a filter at the level of the Public Prosecutor's Office in order to be referred before a judge at the High Court of Cassation and Justice.

Although initiated and carried out by administrative authorities, the main purpose of this procedure in the field of national security was that data and information obtained extrajudicially could be used as evidence in ordinary criminal proceedings.

In relation to the significant intrusive potential and impact on fundamental rights and freedoms, the technical surveillance carried out according to national security warrants has shown a number of systemic shortcomings from the perspective of the European standards of protection:

- the absence of minimum guarantees to temper excesses in the use of these measures; unlike ordinary technical surveillance carried out through the judicial mechanisms provided for by the Code of Criminal Procedure, the ordering of surveillance according to national security warrants has never required the existence of a criminal case with a lawfully triggered investigation;
- not only has the law not established the requirement of a minimum standard of proof, that of reasonable suspicion or plausible grounds for the commission of an act under criminal law; not even the existence of a judicial decision to initiate a criminal investigation has been

penală [Theory and Practice of Judicial Interceptions and Audio or Video Recordings: Dual Approach to the Current and New Criminal Code and Criminal Procedure Code]. 1-a ed. București: Universul Juridic, 2012. 408 p. Biblioteca profesioniștilor. ISBN 978-973-127-872-8; MÂȚĂ, D. C. *Securitatea națională: Concept: Reglementare: Mijloace de ocrotire* [National Security: Concept: Regulation: Means of Protection]. 1-a ed. București: Hamangiu, 2016, pp. 371-373. ISBN 978-606-27-0614-2; and UDROIU, M., R. SLĂVOIU and O. PREDESCU. *Tehnici speciale de investigare în justiția penală* [Special Investigation Techniques in Criminal Justice]. 1-a ed. București: C. H. Beck, 2009, p. 30, 47 and 51. ISBN 978-973-115-494-7.

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established as a primary condition for the carrying out of surveillance by the secret service;

- through a mechanism distorted from its original purpose, a means of anticipatory evidence-gathering was thus implemented with the circumvention of fundamental judicial mechanisms of balance and control.
- although the intrinsic rationale for this surveillance was naturally the existence of a threat to national security, the data and information obtained through this parallel mechanism were subsequently used (sometimes years after they were obtained) exclusively as evidence in criminal trials[13] having as object common law offences;
- another negative feature of this procedure was the unreasonable length of time for which it could be ordered, abolishing the fundamental principle that the restriction of a fundamental right has mandatorily a temporary character and must be proportionate to the purpose for which it was ordered.

If ordinary surveillance is ordered for an initial period of 30 days, only after criminal proceedings have been initiated, which may be extended, for duly justified reasons, by 30 days, not exceeding 120 days in the case of surveillance in private premises or 180 days in the case of ordinary surveillance, in the case of surveillance on the basis of national security warrants, the warrant is now issued for an initial period of 6 months, which may be extended by 3 months, the maximum duration of surveillance in these circumstances being 2 years.

However, it should be noted that this maximum duration of 2 years operates only in respect of the same data or information from which the existence of a threat to national security is established, which means, *per a contrario*, that invoking other data or information may justify exceeding the maximum duration even if the surveillance concerns the same person and the same factual threat.

Moreover, it is to be noted that between 1991 and 2014 the law on the Romanian National Security did not establish a maximum duration

[13] The probative value of the results of special techniques under Law No. 51/1991 was the subject of serious controversy even before the adoption of the New Code of Criminal Procedure (1 February 2014). See DABU, V. and V. RADU. Interceptions Legality during Preliminary Acts. *Revista de Drept Penal* [Penal Law Review]. 2012, vol. 19, no. 1, pp. 1-14. ISSN 1223-0790.

for the authorization of this special surveillance, which could be extended without time limit.

The extent of special surveillance and its use as a parallel way of obtaining evidence prior to any criminal trial.

In the context of an obvious information deficit, apparently justified by reasons related to the confidentiality of national security activities, the estimated number of national security warrants issued between 2009 and 2018 was over 26,000.[14]

The official point of view of the Romanian Intelligence Service[15] indicates a number of 28,784 national security warrants requested by the secret service between 11. 12. 2004 (the date when Law No. 535/2004 entered into force, which introduced for the first time the requirement of authorization by a judge of the High Court of Cassation and Justice for special surveillance) and 16. 2. 2016 (the date when the first solution of the Constitutional Court sanctioning the involvement of secret services in judicial activity was issued).

With regard to a later period much more concentrated in time, the official point of view of the High Court of Cassation and Justice[16] (No. 81/EP/28.12.2021) showed that in the first 11 months of 2021 (placed under the pandemic challenge spectre) there were 3,132 requests for surveillance authorization based on national security warrants.

These statistics justify the assessment made in the literature[17] in the sense that such an *a priori* control is not sufficient, leading to the possi-

[14] MAREŞ, M. Mandatele de supraveghere în domeniul securităţii naţionale, dincolo de statistică. *Universul Juridic* [online]. 2020-06-05 [cit. 2024-10-14]. Available at: https://www.universuljuridic.ro/mandatele-de-supraveghere-in-domeniul-securitatii-nationale-dincolo-de-statistica/.

[15] Point of view evoked in DOBRESCU, P. Câte mandate de interceptare pe siguranţă naţională a emis ICCJ în ultimii 9 ani [How Many National Security Interception Warrants Has the HCCJ Issued in the Last 9 Years]. In: *Libertatea* [online]. 2018-06-12 [cit. 2024-10-14]. Available at: https://www.libertatea.ro/stiri/cate-mandate-de-interceptare-pe-siguranta-nationala-emis-iccj-ultimii-9-ani-2290478.

[16] Point of view published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiţie pe mandatele de securitate naţională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

[17] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 566. Pro Foro. ISBN 978-606-8892-

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bility of automatic authorization of any proposal coming from a secret service.

If we add to these official figures those ones corresponding to the 13-year period as of the entry into force of the National Security Law until the time of the first communications made by the authorities involved (1991 – 2004), and take into account that a single surveillance warrant can cover dozens of individuals and telephone numbers, the overall picture of special surveillance carried out by secret services without judicial powers is disturbing.

It should not be forgotten that, in addition to this surveillance on the basis of national security warrants, affecting private life by special surveillance methods was also carried out during the same period by means of ordinary technical surveillance warrants issued under common law by judges of all courts in the country.

Taking into account the technical monopoly in the field of surveillance means held by the Romanian Intelligence Service, these ordinary technical surveillance warrants were executed, for the most part, also by specialized national security workers, without judicial powers.

We can therefore speak of a form of mass surveillance carried out under the pretext of threats to national security without, during the reference period, Romania being confronted with any consistent threat in this area and without any case having been registered on the national courts' docket regarding any offence against national security.

From a judicial perspective, all data and information obtained as a result of this substantial special surveillance has been used exclusively in criminal cases involving common criminal offences.[18]

82-5; *Case of Iordachi and Others v. Moldova* [2009-02-10]. Judgement of the European Court of Human Rights, 2009, Application No. 25198/02, para. 50; *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 230; and ÖLÇER, F. P. The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights. In: S. C. THAMAN, ed. *Exclusionary Rules in Comparative Law* [online]. 1st ed. Dordrecht: Springer, 2013, p. 394 [cit. 2024-10-14]. Ius Gentium: Comparative Perspectives on Law and Justice, vol. 20. ISBN 978-94-007-5348-8. Available at: https://doi.org/10.1007/978-94-007-5348-8_16.

[18] CASAGRAN, C. B. Surveillance in the European Union. In: D. GRAY and S. E. HENDERSON, eds. *The Cambridge Handbook of Surveillance Law* [online]. 1st ed. Cambridge: Cambridge University Press, 2017, pp. 652-653 [cit. 2024-10-14]. ISBN 978-1-316-48112-7. Available at: https://doi.org/10.1017/9781316481127.028.

In practice, the judicial decision related to these common law offences, which often meant a guilty plea and a custodial sentence, was based, from an evidential point of view, on material gathered in advance, in an extrajudicial context, without going through the usual mechanisms that guarantee effective protection of fundamental rights, which are secret and for which there was no effective remedy at the normative level to verify the legality of its administration.

What is striking in the above-mentioned official statistics is the almost total absence of effective control by the jurisdictional authorities in the procedure for issuing these national security warrants. However, the authorisation and effective control of the measure by an independent judicial authority (judge or court), which cannot proceed *ex officio* but only within the limits of its jurisdiction, is an essential condition for the compliance of any surveillance technique with the European protection safeguards.[19]

Thus, for the approximately 30,000 proposals for authorization of special surveillance between 2009 – 2018, there were only two rejected proposals!

It should be emphasized that none of the official replies made public indicated the total number of persons subject to these special surveillance methods, the refusal to communicate this type of information being justified by invoking the legal provisions on the protection of classified information.

As regards the period 1. 1. 2012 – 1. 12. 2021, the same official reply[20] of the High Court of Cassation and Justice shows that, out of a total of 3,132 applications for authorization on the national security law, 3,128 were admitted and 4 were rejected, resulting in an approval rate of

[19] *Case of İrfan Güzel v. Turkey* [2017-02-07]. Judgement of the European Court of Human Rights, 2017, Application No. 35285/08, para. 96; *Case of Klass and Others v. Germany* [1978-09-06]. Judgement of the European Court of Human Rights, 1978, Application No. 5029/71, para. 56; and *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 233.

[20] *Reply of the High Court of Cassation and Justice of Romania No. 83/EP* [2022-01-13] published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiție pe mandatele de securitate națională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

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99.8 % by the High Court judges; at the same time, for the approval filter set up at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, in the official reply[21] communicated to the author of the article cited by this judicial authority indicates that, for the same period of 11 months of 2021, out of the 2,835 requests for authorization for national security surveillance received from the intelligence service, 2,833 were approved and sent for analysis to the High Court of Cassation and Justice. The approval rate for the two rejected requests was 99.92 %.

In order to highlight plastically the dimension of this special surveillance, the author of this article presents a comparison of the situation of warrants approved by the United States Foreign Intelligence Surveillance Courts (FISA courts) in 2020 for electronic surveillance for national security offences in the USA, a country with a population 17 times larger than Romania and facing real and constant threats to national security: of the total 489 requests for 2020, 68.3 % were fully approved, 24.7 % were modified, 4.4 % were partially denied, and 2.4 % were totally denied, the maximum number of individuals targeted by these FISA warrants being a maximum of 499.

In the same context of the problem of the absence of effective judicial control, other additional aspects should also be mentioned, some of which naturally derive from the specific nature of the work of the services responsible for security or national security.

The absence of some foreseeable and accessible legal criteria for designating the magistrates involved in this extrajudicial procedure, both at the level of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the High Court of Cassation and Justice, Law No. 51/1991 only establishes that the magistrate empowered to approve or authorize the surveillance is either the head of the court or the magistrate appointed by this one.

This regulatory gap is compounded by the absence of a regulation that meets the requirements of clarity as regards the actual procedure for

[21] *Reply of the Public Prosecutor's Office at the High Court of Cassation and Justice of Romania No. 1475/VIII-3/2021* [2021-12-13] published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiție pe mandatele de securitate națională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

the judicial authorization mechanism at the level of the High Court of Cassation and Justice.

Compared to the ordinary procedure for authorizing surveillance governed by the Code of Criminal Procedure, the special surveillance procedure, which is provided for exclusively by the Law on National Security, contains rules limited in number and content, which are not capable of ensuring effective subsequent control as to the lawfulness of the surveillance.

In this regard, according to the Article 15 of Law No. 51/1991, the proposal to authorize specific intelligence gathering activities is submitted to the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and is examined for legality and reliability within 24 hours as of the registration or immediately in urgent cases by prosecutors[22] appointed[23] by this one. Where the proposal is well-founded and the conditions established by law are met, the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice or his legal substitute shall apply in writing to the President of the High Court of Cassation and Justice for authorization of the proposed activities.

Subsequently, this request will be examined, as a matter of urgency, in closed session by one of the judges appointed by the President of the High Court of Cassation and Justice, who may immediately request in writing that the arguments submitted be supplemented if he considers that there is insufficient information to determine the authorization of technical surveillance.

If the judge finds that the request is justified and that the surveillance activities are necessary, this one shall order authorization by rea-

[22] Based on the model of ordinary surveillance, in this special procedure the law also allows prosecutors to order measures in urgent cases and for a limited period of time. At the European level (*Case of Blaj v. Romania* [2014-04-08]. Judgement of the European Court of Human Rights, 2014, Application No. 36259/04), it was held that a violation of the right to privacy cannot be held solely on the basis that wiretapping was ordered in emergency situations by the prosecutor, as long as the measure was subsequently subject to judicial review.

[23] This procedure does not imply a form a judicial delegation. On the nature of the delegation in the Romanian system see CRISTE, L. Unele considerații privind delegarea organelor judiciare [A Few Aspects Regarding the Delegation of Criminal Judicial Bodies]. *Caiete de Drept Penal* [Criminal Law Writings] [online]. 2023, no. 3, pp. 64-65 [cit. 2024-10-14]. ISSN 1841-6047. Available at: https://doi.org/10.24193/CDP.2023.3.4.

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soned judgment. Otherwise, the request will be rejected by a reasoned decision which will be final.

A new request for authorization for a technical surveillance measure in respect of the same person may be requested and issued only if the request indicates new data and information which would justify such an interference with the right to privacy.

Probably the main challenge in relation to the use and judicial challenge of data and information obtained as a result of national security surveillance relates to the secrecy of the whole procedure (both the authorization and the actual conduct). There is no doubt that preventing the defendant's access to the entire body of evidence on which the accusation is based and restricting their right to challenge the legality of the evidence are among the grounds for exclusion of the so-called secret evidence.[24]

As a consequence of the specific nature of the national security authorities, the entire documentary support of the activity of authorizing and carrying out special surveillance is classified under the Law on the Protection of Classified Information, Law No. 182/2002, being classified as *state secret* or, where appropriate, *official secret*.

In this regard, the rules governing the surveillance based on national security warrants have expressly provided, since its regulation in 1991, that both the authorization procedure for specific activities and the carrying out of the authorized activities shall be carried out in compliance with the legal provisions regarding the protection of classified information.

Therefore, paradoxically, although the result of the special surveillance could be used in criminal cases, the documentary support in which the whole activity of authorization and realization was objectified, being of a secret nature, is not attached to the case file, and cannot be consulted under the same conditions as the material collected by the judicial bodies.

[24] On the principles which may justify the exclusion of evidence unlawfully collected lato sensu in the common law system, see GLOVER, R. and P. MURPHY. *Murphy on Evidence* [online]. 13th ed. Oxford: Oxford University Press, 2013, p. 65 [cit. 2024-10-14]. ISBN 978-0-19-966987-5. Available at: https://doi.org/10.1093/he/9780199669875.001.0001; and ASHWORTH, A. and M. REDMAYNE. *The Criminal Process* [online]. 4th ed. Oxford: Oxford University Press, 2015, pp. 343-345 [cit. 2024-10-14]. ISBN 978-0-19-181135-7. Available at: https://doi.org/10.1093/he/9780199547289.001.0001.

Documents originating from the extrajudicial authority, including administrative correspondence with judicial bodies, bearing the mention strictly secret/official secret/secret, etc., are kept separately in specially arranged offices near the heads of the court.

The access to these documents is allowed only to magistrates, on the basis of protocols concluded between the Superior Council of Magistrates and the services responsible for national security.

The lawyer of the defendant for whom the criminal charges are based on classified information may not consult it unless the issuing authority declassifies it or downgrades it, in which case access to the information is subject to the authorization of access provided by law.

However, the procedure for obtaining this ORNISS (National Registry Office for Classified Information) certificate is difficult, takes several months and, by the way it is regulated, has the characteristics of an intrusion into the autonomy and independence of the lawyer profession.

Until the year 2023, if the chosen lawyer of the defendant did not have a security certificate or access authorization valid for the level of security of classified information, this information could still be used in the judicial decision-making process even if it could not be known by the person against whom it was used.

Thus, in its consistent case law (Decisions No. 1120/16 October 2008, No. 1335/9 December 2008, No. 21/15 January 2008), the Constitutional Court has established that, to the extent that these legal provisions do not have the effect of effectively and absolutely blocking access to information, but only of making it conditional on the fulfilment of certain procedural steps, justified by the importance of such information, it cannot be argued that there has been a violation of the right to a fair trial or of the principle of uniqueness, impartiality and equal justice for all.

We consider that such an approach is excessive, as it conflicts with one of the fundamental principles of the free and independent practice of the legal profession, requiring the accused to refer to lawyers who have such access authorization.

It is only with the amendments made by Law No. 281/2003 that the usual procedural rules provide for the possibility for the judge, in cases where the defendant's lawyer does not hold the access authorization provided by law and the defendant does not choose another lawyer, to

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appoint a court-appointed lawyer who does hold such authorization, thus guaranteeing access to classified information.

Such a compensatory mechanism lacks effectiveness, as it only formally resolves the issue of access to classified information used in special surveillance.

The lawyer, whether elected or appointed *ex officio*, even after having consulted the secret information, cannot make full use of it, since he cannot consult with his client about it, discuss it in a public procedure or refer to it in writing, and the same restrictions apply to judges who, although they can use this information, cannot use it in the grounds of their decisions.

In these circumstances, the requirements of subsidiarity and proportionality which may justify, according to the law, the authorization of special surveillance can never be effectively challenged and verified as to legality as long as it is based on confidential information with limited access.

Judicial practice has shown that, since the secret service never declassifies in full the documentary material drawn up when authorizing and carrying out surveillance, the only documents that were declassified in full and to which the defendants' lawyer had access, without the security certificate being necessary, were the actual resolutions and warrants issued by the judges of the High Court of Cassation and Justice.

However, this declassification operation, which was not always authorized, was carried out only upon the request of the person concerned and not *ex officio*.

Another shortcoming of this procedure concerns the decisive role of the bodies responsible for national security and outside judicial control in initiating and carrying out the procedure.

The mechanism by which the law allows this procedure to be triggered excludes the intervention of judicial bodies and makes them secondary actors.

This way, it has been allowed, related to the scope mentioned above, to create a substantial database of data and information obtained through technical surveillance not determined by the suspicion of the commission of an offence, concerning public officials, political decision-

makers, magistrates, members of the executive and legislative powers, judges of the Constitutional Court, etc.

In the absence of the aforementioned checks and balance, there is no guarantee that this information has not subsequently been used in criminal proceedings in a selective and circumstantial manner.

Beyond the referrals addressed to the investigative bodies which, on the basis of this data and information, triggered their own investigation carried out according to the usual procedural rules, the result of technical surveillance was often used directly as evidence in criminal trials, being directly submitted as evidence obtained in advance, according to the Article 139 para. (2) of the Code of Criminal Procedure, by secret service officers, following a *post factum* request by the judicial authorities or *ex officio*.

This data and information gathered in an extrajudicial framework has been used in court as evidence, sometimes at substantial intervals of time from the moment they were obtained.

We cannot speak of effective and real control over the management of this information as long as its storage or use exceeds the scope of judicial control, as does the selection of the elements considered to be of interest.

Neither the judicial bodies, and even less so the persons subsequently charged, have had the benefit of effective mechanisms to ensure that the information sent represents the totality of the data obtained as a result of special surveillance.

The secret service's monopoly also manifested itself with regard to the process of objectification of the information gathered, the transcription of intercepted conversations and communications, for example, being made by transcribing them into minutes also concluded and certified by the Romanian Intelligence Service officers.

Moreover, the optical support on which the surveillance activities were stored was never sent in original to the judicial authorities, so that what could be technically examined upon the request of the accused persons was always a copy.

On the same note, the administrative control which could be exercised over the special surveillance activity following petitions from parliamentary committees with powers in the field of surveillance of nation-

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al security bodies is not capable of becoming an effective remedy for any unlawful or excessive actions, as long as they were not intended to cancel or render ineffective the activities carried out.[25]

The difficult route of the regulation of the possibility of using as evidence in criminal cases the data and information obtained as a result of extrajudicial surveillance, a significant impact, with the potential to show even a paradigm change in criminal policy, was made by the Constitutional Court Decision No. 55/2020 (Official Gazette No. 517/17.06.2020).

The constitutionality control was exercised with regard to the provisions of the Article 139 para. (3) of the Code of Criminal Procedure which, through judicial interpretation considered excessive or even distorted,[26] has allowed the probative value of evidence to be attributed to data and information obtained on the basis of national security warrants.

The Constitutional Court ruled that *"the provisions of the Article 139 paragraph (3) final sentence of the Code of Criminal Procedure are constitutional insofar as they do not concern recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental human rights or freedoms carried out according to the law, authorized under Law No. 51/1991"*.

In the reasoning of this decision it was held, in essence, that *"the regulation of the possibility of conferring evidentiary value on recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental human rights or freedoms is not accompanied by a set of rules allowing their legality to be effectively challenged. By simply regulating the possibility of conferring the status of evidence on such recordings, without creating the appropriate framework for the possibility of challenging their legality, the legislature has failed to comply with the requirements of clarity and predictability*. [para. 55].

However, the lack of clarity and predictability of the regulatory framework applicable to the challenge of the legality of recordings – means of evidence – resulting from specific activities of gathering information

[25] ROTARU, C. Tehnici speciale de supraveghere sau cercetare. Supravegherea tehnică – interceptarea convorbirilor şi comunicărilor [Special Techniques of Surveillance and Investigation. Technical Surveillance – Telephone Tapping]. *Caiete de Drept Penal* [Criminal Law Writings]. 2011, no. 1, p. 18. ISSN 1841-6047.

[26] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 581. Pro Foro. ISBN 978-606-8892-82-5.

which involve restricting the exercise of fundamental human rights or freedoms, used in criminal trial, in fact leads to a formal and ineffective review, with the consequence that the fundamental rights and freedoms laid down by the Constitution are infringed. However, conferring the status of evidence in criminal proceedings on certain elements is intrinsically linked to the creation of the appropriate framework which makes it possible to challenge their legality. [para. 56].

Thus, conferring the status of evidence in criminal trials on recordings resulting from the specific activity of gathering information which entails restricting the exercise of fundamental human rights or freedoms, according to Law No. 51/1991, can be achieved only to the extent that that regulation is accompanied by a clear and explicit procedure for verifying the legality of that element." [para. 57].

After a period of ideological convulsions and broad social debates on the purpose and limits of the secret services' involvement in gathering information that can be used as evidence in criminal trials, as of 9 July 2023, the date of entry into force of Law No. 201/2023, a new normative paradigm change has taken place in this matter.

Therefore, nowadays, following the express qualification made by law, the recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental rights or freedoms can be used, subsequently and conditionally, as evidence in criminal proceedings (Article 139^1 of the Code of Criminal Procedure).

There are two legal conditions that must be met cumulatively in order for information obtained on the basis of national security warrants to be considered as evidence.

However, once these conditions are met, the legal value of the evidence can no longer be ignored or challenged in court, and the probative value of this evidence will be complete, unaffected by any modality or conditionality.

These conditions are:

1. from the content of the recordings made, data on the preparation or commission of an offence referred to in the Article 139 para. (2) of the Code of Criminal Procedure.

This first condition evokes an apparent specialized or particularized character of technical surveillance, which should be limited, in terms of

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use, only to certain categories of criminal cases, where the seriousness of the facts would justify the intrusion into privacy.

Referring to the body of rules governing special surveillance, this condition of specialization is manifested in two successive forms: the primary, original, provided for in Law No. 51/1991, which makes such surveillance conditional on the existence of a threat to national security, and the secondary, subsidiary one provided for in the Article 139 para. (2) of the Code of Criminal Procedure.

In reality, however, this condition does not have the ability to limit the use of special surveillance, since the scope of the acts to which the condition applies is extremely wide: *"Technical surveillance may be ordered in the case of offences against national security provided for by the Criminal Code and special laws, as well as in the case of drug trafficking offences, offences against the regime on doping substances, illegal operations with precursors or other products that may have psychoactive effects, offences concerning non-compliance with the regime on arms, ammunition, nuclear materials, explosive materials and restricted explosives precursors, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of currency, stamps or other values, counterfeiting of electronic payment instruments, in the case of offences committed by means of computer systems or electronic means of communication, offences against property, extortion, rape, unlawful deprivation of liberty, tax evasion, corruption offences and offences treated as corruption offences, offences against the financial interests of the European Union or other offences for which the law provides for imprisonment of 5 years or more."*

In this regard, it is worth recalling the criticisms in the literature[27] related to the normative shortcomings of the criteria for determining the offences for which technical surveillance methods may be used, which allow their excessive use, since not only the seriousness, but even the manner of commission would lead to the fulfilment of the condition.

[27] See in this regard, SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, pp. 52-53. Pro Foro. ISBN 978-606-8892-82-5; UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 813. ISBN 978-606-18-1322-3; and PAŞCA, V. Principiul egalităţii armelor în procesul penal român – O realitate sau o ficţiune? [The Principle of Equality of Arms in the Romanian Criminal Trial – Reality or Fiction?]. *Revista Universul Juridic*. 2016, no. 8, p. 8. ISSN 2393-3445.

The mechanism for applying these criteria is also prone to excesses, since it is based not only on reactive elements, but also on elements specific to proactive investigations; even if they are also known in other European systems and tend to evoke a new paradigm of criminal procedural systems,[28] since these proactive elements are not regarded *de plano* as incompatible with the protection guaranteed by the Article 6 or the Article 8 of the European Convention on Human Rights, they are capable of distorting the original purpose of the methods of technical surveillance.[29]

2. the second condition concerns compliance with the initial requirements of legality, in the sense that the national surveillance warrant must have been issued lawfully.

To make this condition effective, the law has established three ways to challenge the legality of surveillance activities authorized under the Law on National Security:

(i) in the pre-trial chamber procedure, which entails a criminal case subsequently opened in which criminal charges have been brought against a person referred to the court called to establish his possible guilt also on the basis of the evidence obtained through special surveillance;
(ii) in the complaint procedure against the decision to close the case, which involves the opening of criminal proceedings, the bringing of criminal charges against a person by initiating criminal proceedings against this one followed by the closing of the file by discontinuance of proceedings (non-prosecution);
(iii) in an autonomous procedure, which entails initiating criminal proceedings without the need to bring criminal charges against a person or bringing criminal charges followed by the adoption of other non-trial solutions (dropping criminal proceedings).

The essential premise for the activation of one of the three challenge procedures is the prior information of the supervised person either fol-

[28] See SERELL, T. Preventive Policing, Surveillance, and European Counter-terrorism. *Criminal Justice Ethics* [online]. 2011, vol. 30, no. 1, pp. 2-3 [cit. 2024-10-14]. ISSN 1937-5948. Available at: https://doi.org/10.1080/0731129x.2011.559057; and ASHWORTH, A. and L. ZEDNER. *Preventive Justice* [online]. 1st ed. Oxford: Oxford University Press, 2014, p. 10 [cit. 2024-10-14]. ISBN 978-0-19-178082-0. Available at: https://doi.org/10.1093/acprof:oso/9780198712527.001.0001.

[29] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 51. Pro Foro. ISBN 978-606-8892-82-5.

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lowing consultation of the case file at the time of the referral to the court or following an official notification made according to the law.

In this regard, the regulation is deficient in that, although it refers to the general rules on informing persons subject to technical surveillance, it does not include express provisions on the fixed time limit within which the information must be provided (within 10 days as of the end of the technical surveillance measures).

However, the provisions relating to the possibility of postponing, for reasons of jeopardizing the investigation or the protection of victims or witnesses, the information until the case has been settled at the latest have been taken over.

Normatively regulated as an exception, this legal provision has been transformed by the courts into a genuine rule.

This regulatory shortcoming must be linked to another challenge of a temporal nature, since there is no time limit in the entire regulation for the subsequent use of special supervision in criminal proceedings.

Considering that the application of procedural rules is governed by the principle of timeliness (*tempus regit actum*), the entry into force of the new provision on the matter in July 2023 will also allow the use of previously issued (without time limit) national security surveillance warrants that could not be used for a long time.

In this regard, however, the binding case law of the Constitutional Court should be mentioned, which, even since 2018, sanctioned the legislative solution intensively used in the issue of national security warrants, namely the one that allowed this special surveillance also for threats to national security not expressly regulated (such as acts of corruption, money laundering, etc.).

In spite of the six years that have passed since the two decisions became binding (the constitutional deadline is a maximum of 45 days for remedial intervention), Article 3 letter f) of Law No. 51/1991 has not been formally amended, but has amplified the judicial controversies over its application.

In conclusion, related to these binding decisions, the national security warrants previously issued on the basis of the Article 3 letter f) of Law No. 51/1991 (the text declared unconstitutional) cannot be considered as issued in compliance with the legal provisions.

In principle, data and information obtained as a result of the authorized activities of the secret services can nowadays be used as evidence in criminal proceedings (including in relation to common law offences), except for those obtained as a result of national security warrants issued on the basis of texts declared unconstitutional.

Last but not least, as the condition of the legal issue of such warrants is an essential requirement for the information obtained as a result of special surveillance to be considered as evidence, the legality of such information should be verified in one of the three autonomous judicial procedures provided for by the new provisions, not only upon the request of the persons concerned, but *ex officio* by the judge.

II. With regard to the European benchmarks related to the standards of protection applicable in the case of technical surveillance, the following should be mentioned:

- *case Weber and Saravia v. Germany*, the Court held that *the regulation of special secret surveillance measures, such as the interception of communications, must essentially be caried out by clear, detailed rules, since the technology available for carrying them out is constantly becoming more sophisticated*. Kopp v. Switzerland case (para. 72) and Valenzuela Contreras v. Spain case (para. 46) go to the same direction;
- *case Huvig v. France*, the Court developed the minimum guarantees that should be provided for in the State legislation to avoid abuses of power, such as: the nature of the offences giving rise to the need for interception; the determination of the categories of persons liable to have their telephone conversations recorded; a limitation on the duration of the recording of telephone conversations; the mandatory procedure for the examination, use and storage of the data obtained; the precautions to be taken in the event of other parties being informed; the circumstances in which the recordings may or must be erased or destroyed;
- *case Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* – para. 84 – the concept of national security must provide substantial guarantees against arbitrary and discriminatory surveillance, not only at the stage of its authorization, but also when it is actually carried out. The Court criticized the lack of verification by an official body or entity (external to the services carrying out the surveillance measures) related to the implementation of such

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measures, so as to ensure independence and compliance with the principles of the rule of law;

- *case Iordachi and Others v. Moldova* – the Court sanctioned the apparent lack of regulations that should specify, with an appropriate degree of precision, the manner of examination of information obtained as a result of the surveillance or the procedures for preserving its integrity and confidentiality, as well as the procedures for its destruction;
- *cases Dumitru Popescu v. Romania* and *Stana v. Romania* – the issue of surveillance warrants in corruption cases represents a measure that has no legal basis and violates the Article 8 of the European Convention on Human Rights. The Court also found that the system for issuing national security warrants in corruption cases *lacks adequate guarantees* in view of the impossibility for the persons concerned to challenge the interceptions;
- *the European Union Agency for Fundamental Rights* pointed out in the material "Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU" that an *organizational separation between secret services and law enforcement authorities is usually considered as a guarantee against the concentration of powers in one service and the risk of arbitrary use of information obtained in secrecy*;
- according to the *Recommendation 1402 (1999) adopted by the Parliamentary Assembly of the Council of Europe on 26 April 1999*, *"Services with internal security powers should not be authorized to carry out law enforcement activities such as criminal investigation, arrest or detention. Because of the high risk of abuse of these powers and in order to avoid duplication of traditional police activities, these prerogatives should be vested exclusively in other law enforcement bodies."*

The European Court of Human Rights ascertained that the right to be notified of the conduct of surveillance of a person is inextricably linked to the right to an effective judicial remedy against the measure, if it is found to be abusive.[30] It would be inconceivable to conceive the possibility of a challenge in the absence of notification of the supervision measure even if the person did not have the right to challenge the measure *a posteriori*. Going further, the case-law of the Court of Justice has recognized the need to provide in national law for an effective *a posteriori* remedy related to the technical supervision measures, recalling the findings in case

[30] *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06.

Roman Zakharov v. Russia on the conditioning of the possibility to exercise an effective information remedy of the supervised person.[31] This effective remedy must not be one in order to obtain damages, but must concern the legality of the measure and open up the actual possibility for the person under supervision to obtain the cancellation of the measures taken against this one.[32]

Also, the European Court of Human Rights, in its constant case law, has emphasized that it is not sufficient for the prosecutor to request the authorization of technical surveillance, showing, without further specification, that the criminal investigation cannot be carried out using other evidentiary procedures, or that in the absence of technical surveillance it would be much more difficult, it being necessary to detail the reasons why other less intrusive evidentiary procedures would not be effective.[33]

Also, as regards the technical surveillance of the conversations had by the lawyer with his client, the Court[34] emphasized that such interception affects professional secrecy, which is the basis of the relationship of trust which must exist between the two persons, even if it is not the lawyer but his client who has been the subject of the technical surveillance warrant. Also in this case, the lawyer is entitled to file a complaint related to the breach of his right to respect private life and correspondence because of the interception of his conversations, because when a person's conversations are recorded and used in a criminal case, that person must have *effective control* in order to challenge those interceptions.[35] The lack of an actual possibility for the lawyer to refer the technical surveillance measure to judicial review (since it had not been the direct subject of the

[31] *Case of İrfan Güzel v. Turkey* [2017-02-07]. Judgement of the European Court of Human Rights, 2017, Application No. 35285/08, para. 98.

[32] *Case of Xavier Da Silveira v. France* [2010-01-21]. Judgement of the European Court of Human Rights, 2010, Application No. 43757/05, para. 48.

[33] *Case of Dragojević v. Croatia* [2015-01-15]. Judgement of the European Court of Human Rights, 2015, Application No. 68955/11 in UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 814. ISBN 978-606-18-1322-3.

[34] *Case of Pruteanu v. Romania* [2015-02-03]. Judgement of the European Court of Human Rights, 2015, Application No. 30181/05 in UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 817. ISBN 978-606-18-1322-3.

[35] OHM, P. The Surveillance Regulation Toolkit: Thinking beyond Probable Cause. In: D. GRAY and S. E. HENDERSON, eds. *The Cambridge Handbook of Surveillance Law* [online]. 1st ed. Cambridge: Cambridge University Press, 2017, p. 493 [cit. 2024-10-14]. ISBN 978-1-316-48112-7. Available at: https://doi.org/10.1017/9781316481127.022.

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measure and the lawyer had not been ordered to be prosecuted) led to the conclusion that the interference was, in the circumstances of the case, disproportionate to the aim pursued and that the person did not benefit from effective control, as required by the rule of law, capable of limiting the interference to what is necessary in a democratic society.

Conclusions

The normative mechanisms that ensure balance and protection in the event of interference with individual rights and freedoms are an eloquent indicator of the relationship between the State and citizen and of the degree of development and maturity of a procedural system. The tendency to expand the special surveillance methods may affect the traditional balance between effective and fair justice, a balance that is not only the society's choice but is also required for effectiveness' sake.[36]

Regardless of the nature of its seriousness and actuality, not even a global or national threat can justify the abolition of the minimum set of guarantees for the effective protection of the right to privacy.

A clear and predictable regulatory context represents the primary condition for the use of special surveillance methods, so that any individual can assess, in real terms, the degree of interference to which this one may be subjected.

The fundamental principles of the rule of law impose a real monopoly by judicial bodies as regards the use of technical surveillance in order to gather the evidence necessary to hold offenders criminally liable.

Under the pretext of the need to protect national security, the establishment of a secret system of technical surveillance of the population can undermine or even destroy democracy through measures which, in theory, would be put in place to protect it.[37]

The inherent restriction of the fundamental rights of the individual which the use of technical surveillance entails must not be exacerbated by the possibility of replacing ordinary methods with special methods

[36] See THOMAS-TAILLANDIER, D. *Contribution à l'étude des procédures pénales dérogatoires* [Contribution to the Study of Exceptional Criminal Proceedings]. 1e éd. Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2014, p. 55. Laboratoire de droit privé & de sciences criminelles. ISBN 978-2-7314-0932-1.

[37] *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 232.

governed by legislation which is inconsistent, difficult to access and lacking predictability.[38]

Even if it is not incompatible *de plano* with the European standards of protection of the right to privacy and the right to a fair trial, the possibility of using special surveillance cannot be a pretext for transferring specific powers from investigative bodies to authorities that usually carry out secret activities in the field of national security.

Moreover, this type of technical surveillance carried out by extrajudicial bodies (secret services) must not be turned into a form of circumvention of procedural protection mechanisms and procedural guarantees established with regard to obtaining evidence in criminal proceedings.

It is inconceivable that an administrative authority should be allowed to use special techniques excessively or automatically and abusively.

Obtaining data or information in an extrajudicial framework, in advance, by justifying the removal of a risk to national security, followed by their subsequent use in criminal cases concerning common law offences, is an indication of procedural abnormality.

The establishment of an effective, subsequent, legality and proportionality control of the special surveillance measures *ex officio* or upon the request of the person under surveillance is *a sine qua non* condition for accepting the use of such data or information in subsequent criminal proceedings.

This control becomes illusory if the documentary basis of the special surveillance measures consists of classified documents specific to the development of secret services activity.

Updating the normative framework with the European requirements and standards, implementation in the active legislative background of the mandatory rulings of the constitutional and the European courts is a positive obligation of the State in order to prevent any forms of excess and arbitrariness.

[38] GRĂDINARU, S. *Supravegherea tehnică în Noul Cod de procedură penală* [Technical Supervision in the New Criminal Procedure Code]. 1-a ed. București: C. H. Beck, 2014, p. 97. ISBN 978-606-18-0389-7.

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