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**Aspects Regarding the Legality of Search Warrants Obtained Based on the
Recordings Conducted with the Logistics of the Romanian Intelligence
Service**

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Abstract: The search warrants that were obtained based on the recordings taped with the logistics of the Romanian Intelligence Service are struck by nullity. This statement comes in the context in which the interception authorizations were enforced by a non-competent criminal investigation bodies, an aspect which is struck by nullity. Taking into account that the search warrants were granted exclusively on the basis of audio recordings obtained with the logistics and support of the Romanian Intelligence Service, the derivative proofs are to be excluded if they were obtained indirectly from illegal evidence. According to the Romanian Criminal Procedure Code, the recordings are to be conducted by the public attorney or the criminal investigation body. The Romanian Intelligence Service is an institution without judiciary attributions, with a secret identity. According to the Romanian Constitutional Court's Decision number 22/2018, if the surveillance recordings are obtained with the support of the Romanian Intelligence Service, this evidence is to be physically eliminated from the case's files in order to effectively guarantee the presumption of innocence and the right to a fair trial.

Keywords: search warrant; non-competent criminal investigation body; interceptions; technical surveillance; the legality of evidence

The Premise Situation

In a case² that is in the preliminary chamber stage, the defense invoked the absolute nullity of the interception warrants and the exclusion of the evidence obtained through technical surveillance.

The purpose of the preliminary chamber is to verify the legality of the criminal investigation documents and the evidence obtained based on them.

From the analysis of the criminal investigation documents, it was found that the communication recordings were obtained through means of technical surveillance measures.

The interception of communications was conducted in cooperation with the Romanian Intelligence Service. The Romanian National Office of Anticorruption's prosecutors collaborated with specialized Romanian Intelligence Service agents that used their own logistics.

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² Case no. 3813/99/2018/a1 of Iasi Tribunal.

At the time of the interceptions, between 2011 and 2012, the law did not expressly prohibit this collaboration with the Romanian Intelligence Service.

During 2016, the Romanian Constitutional Court¹ intervened and prohibited the use of Romanian Intelligence Service's agents in technical surveillances through Decision no. 51/2016, which found article no. 142 paragraph 1 from the Romanian Criminal Procedure Code is unconstitutional.

Article 142 paragraph 1 of the Romanian Criminal Procedure Code stipulates that the prosecutor implements the technical supervision or may order that it will be carried out by the criminal investigation body or by specialized workers within the police or by other specialized state bodies.

The Constitutional Court decided that the acts performed by the bodies provided in Art. No. 142 paragraph 1, second thesis of the Romanian Criminal Procedure Code, represents the probative procedures which is the basis of the minute of the technical supervision activity that is a means of proof.

For these reasons, the bodies that can participate in criminal investigations are only the criminal investigation bodies. These criminal investigation bodies are listed in Art. No. 55 paragraph 1 of the Romanian Criminal Procedure Code, namely the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies.

Continuing its analysis, the Court finds that the legislator has included, in the contents of article no. 142 paragraph 1 of the Romanian Criminal Procedure Code, the notion of other specialized state bodies in addition to the prosecutor, the criminal investigation body and the specialized workers within the police.

These specialized state bodies are neither explicitly nor indirectly defined in the Romanian Criminal Procedure Code. Also, the criticized norm does not stipulate the specific activities that such bodies may perform in a criminal investigation, provided that in Romania numerous specialized bodies in various fields operate according to special regulations.

In view of these arguments, the Romanian Constitutional Court ruled that the phrase “or other specialized bodies of the state” appears to be lacking in finality, accuracy and predictability.

Basically, by Decision no. 51/2016, the Romanian Constitutional Court prohibited the collaboration of the prosecutors of the Romanian Prosecutor's Offices with the specialized bodies of the State, with reference to the Romanian Intelligence Service.

The Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service collaborated in the criminal investigation files based on protocol no. 00750/003064 from 04th February 2009 and protocol no. 09472/03656 of 8th December 2016.

During 2019, the Constitutional Court ruled as illegal, also through admitting an exception of unconstitutionality, the protocols no. 00750/003064 from 4th February 2009 and protocol no. 09472/03656 of 8th December 2016, concluded between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service.

It is noted that the Public Ministry has concluded two successive “collaboration protocols” with the Romanian Intelligence Service, an aspect that is contrary to Art. No. 61 paragraph 1 of the Constitution, because, through their content, they added to the law.

¹ Romanian Constitutional Court, Decision nr. 51/2016.

The Court notes that the phrase “joint operational teams” implies that representatives of some state bodies could participate actively and directly in the criminal investigation, without having the quality of special criminal investigation bodies.

The technical support provided by the Romanian Intelligence Service exceeds the legal framework established by the norms of the Romanian Criminal Procedure Code. The Romanian Constitutional Court, in this phase of its analysis, finds that the main issue brought to judgment concerns the fact that the Public Ministry has assumed the role of legislator, thus adding to the law, through the contents of the collaboration protocols.

The Constitutional Court notes that, starting with 2009, the normative premises were created for the Romanian Intelligence Service to exercise criminal investigation attributions in any field.

Or, this aspect leads to the violation of Art. No. 1 paragraph 4 regarding the separation and balance of powers in the state and Art. No. 61 paragraph 1 of the Constitution on the role of the Parliament as the sole legislative authority of the country.

These provisions disregard the competence of the Parliament, diminish the role of the prosecutor in the criminal process and increase the power of the secret services in criminal investigations.

For these reasons, by Decision no. 26 published in the Romanian Official Gazette on 12th March 2019, the Constitutional Court declared that the collaboration protocols between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service are illegal.

For this reason, all acts performed by officers within the Romanian Intelligence Service who have performed interception and recording of communications are illegal and are sanctioned from an evidentiary point of view with absolute nullity given their material non-competence.

The Defense's Claims

The authorizations were executed by a materially and functional non-competent body, which is sanctioned with the absolute nullity of the authorizations and with the exclusion of the evidence obtained in this manner.

In violation of art. 912 para. 1 of the previous Romanian Criminal Procedure Code, the interceptions were carried out by the Romanian Intelligence Service and not by the prosecutor or the criminal investigation bodies.

The interceptions were carried out by a body unauthorized by law, and the defense invoked the provisions regarding the absolute nullity of the judicial documents. The evidence was obtained by disregarding the material competence of the criminal investigation bodies provided by art. 197 paragraph 2 thesis I of the Romanian Criminal Procedure Code previously in force at the time of obtaining the evidence (art. 281 paragraph 1 letter b of the Romanian Criminal Procedure Code).

In the context of the Romanian Constitutional Decision no. 51/2016, the records obtained by the prosecutors, with the collaboration of the Romanian Intelligence Service and with the use their logistics, have become illegal and must be excluded from the case's evidence which is analyzed in the preliminary chamber.

The Illegality of These Protocols and the Consequences of their Illegal Conclusion

The power conferred to the agents of the Romanian Intelligence Service, which operated in mixed teams with the prosecutors through the Protocols of collaboration concluded between the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service, is in close connection to the prosecutor's competence.

These protocols give the agents within the Romanian Intelligence Service the status of official procedural subjects (judicial bodies), defined by art. 130 of the Romanian Criminal Procedure Code, an aspect which is contrary to the provisions of the Criminal Procedure Code and the Constitution.

The natural consequence brought by the powers conferred by the Protocol to the agents of the Romanian Intelligence Service is that of the absolute nullity of the evidence obtained (information resulting from the exploitation of special means of surveillance and research).

The recordings obtained through interceptions made with the support of the Romanian Intelligence Service were provided by a body without judicial attributions, and with a secret identity (the law protects the identity of the staff of the Romanian Intelligence Service).

A proof cannot be obtained illegally unless the means of proof and/or the procedure of obtaining this proof are also illegal, which brings the illegality of the the authorization or administration of the evidence.

The activities fulfilled after the act that was declared null are also struck by nullity when there is a direct connection between them and the act declared void (Art. No. 280 paragraph 2 of the Romanian Criminal Procedure Code).

The nullity, regardless of whether it is absolute or relative, determines the lack of legal effects of the voided act from the moment of its performance, and not from the moment that the Court declares its nullity.

Consequently, the evidence obtained by the organized joint teams according to art. 3 letter g) of the Protocol is struck by nullity, according to art. 102 para.3 of the Romanian Criminal Procedure Code.

The nullity of the act through which the evidence was administered, ordered or authorized determines the exclusion of the evidence.

According to the Decision of the Constitutional Court no. 22 from 18th January 2018, the evidence thus obtained will be physically removed from the contents of the case's file, in order to effectively guarantee the presumption of innocence of the defendant and the right to a fair trial.

In the case presented, the evidence obtained through special methods of surveillance, which were used in order for the judge of rights and freedom to grant home search permits, were not obtained only by law but also under the Protocol of Cooperation between the The Public Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service from 4th February 2009, declassified on 29th March 2018.

Relevant Case Law in Supporting the Defense's Claims

The case law of the Bucharest Tribunal¹ ruled that the evidence administered by noncompetent judicial bodies are struck by nullity according to art. 102 para. (3) of the Criminal Procedure Code, which brings the exclusion of such illegal evidence.

Relevant in is also the case law of Bucharest Military Court of Appeal² which concluded that:

For the good development of the activity of the judicial bodies, it is necessary to firmly respect their competence; the breach of the legal norms regarding the competence according to the matter and the quality of the person produces an anomaly which consists in the disorder of the mechanism through which justice is administered.

It is presumed, therefore, that the crime for which the defendant was brought in front of the Court was included in the phrase other serious crimes, according to the documents in the case file. According to the report of the Military Prosecutor's Office attached to the Cluj Military Tribunal of February 18, 2015 it is ordered that: Interceptions and recordings on magnetic tape or any other optical support of telephone conversations and video or audio recordings, as well as their playback will be performed by the Romanian Intelligence Service Bihor County Directorate and the Oradea Special Operations Service. As such, the Romanian Intelligence Service also interfered in the criminal investigation activity. The subsequent specification of the military prosecutor according to which no employees of the Romanian Intelligence Service were involved - cannot be received, being inaccurate.

Conclusions

Regarding the technical staff called to assist in the interception, the previous legal provisions as well as the Romanian Criminal Procedure Code in force from 2014 prohibits them from acquiring the attributions of a criminal investigation body.

The activity of conducting the interception is exclusively within the competence of the prosecutor or of the criminal investigation body, the specialized workers within the police or specialized bodies of the state, which have been expressly delegated by the prosecutor.

The issues highlighted in case law prior to the Romanian Constitutional Court's Decision no. 51/2016, are related to the way in which the bodies specialized in collecting and processing information understood to proceed in the selection of information relevant to establishing the existence or non-existence of a crime.

These aspects are detached from the files still pending before courts in different procedural phases such as the case analyzed by us where the documents in which the results of the interceptions and the recordings of conversations were transcribed. Such documents were illegally assimilated to the reports of transcription and certification of registrations within the meaning of art. 143 of the Romanian Criminal Procedure Code which can be conducted only by competent criminal investigation bodies.

The process of obtaining informations in the field of state security was confused with the notion of obtaining evidence in criminal proceedings and certification of records becomes a formal activity performed by the prosecutor who kept the full contents of the "rendering note". The prosecutor does not

¹ Bucharest Tribunal, the Decision of the preliminary chamber dated 09th November 2017 in case no. 47203/3/2016.

² Bucharest Military Court of Appeal, Decision no. 35/12th July 2018 pronounced in case no. 1/81/2018.

have the opportunity to verify possible forms of manipulation of records received from the secret services.

The conclusion that must be found in all criminal cases that are further pending in courts in which the interceptions and recordings were conducted by Romanian Intelligence Service officers is that the evidence obtained through the interceptions carried out by these officers based on the protocols contracted with the Prosecutor's Office attached to the High Court of Cassation and Justice are struck by absolute nullity.

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