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Considerations Regarding the Exclusion of Derived Evidence in the Pre-Trial Chamber Procedure

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Abstract: The immediate consequence of a void legal act is its lack of legal effect. Throughout the present thesis we intend to table the situation in which the substance of an evidence declared null by the court would be reflected within the content of the act authorizing the producing of another evidentiary procedure. In the situation where it can be ascertained the existence of a direct connection between the evidence produced in violation of one or many legal provisions and a subsequent proof, the natural and common sense remedy would be the annulment of the derived evidence. Having as starting point a practical case, we will be able to notice the reluctance of the Pre-trial Chamber judges in ordering the exclusion of the derived evidence, sometimes even in defiance of the recent decisions of the European Court of Human Rights. The relevance of the existing essay consists in the analysis of the recent jurisprudence of the national courts in matter of nullity of evidence, being of interest both to magistrates and to lawyers and litigants.

Keywords: derived evidence; pre-trial chamber procedure; nullity of evidence

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1. Introduction

Finding of the absolute nullity of the documents deriving from the technical surveillance automatically determines the annulment of the authorization conclusions of the residential searches and of the search authorizations issued based on it.

In a case pending before the Iasi Courthouse (file no. 3813/99/2018/a1), by the conclusion of the judge of the preliminary chamber dated 18-th of December 2020, it was ordered the exclusion of the results of the acts of execution of the technical surveillance measures and the legal exclusion, from the probative material, of all the minutes recording the technical supervision activities, as well as the material exclusion, by removing from the case file, all the means of evidence and supports that contain the result of the technical supervision measures.

1. The considerations underlying this solution were the following: *“Even if the claims of the criminal investigation body, as well as those of the Romanian Intelligence Service consider and emphasize the involvement of the intelligence service exclusively at the level of “technical support”, this activity has the legal nature of a procedural act by which the legally issued processual act was executed by the competent court and has as a consequence the occurrence of an alleged injury regarding the exercise of the fundamental rights of the persons concerned, so that the sanction of absolute nullity becomes*

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incidental.”

2. The defense argued that all evidence obtained from acts of enforcement of technical surveillance measures should be excluded.

According to art. 102 para. 4 Criminal Procedure Code: *Derived evidence is excluded if it was obtained directly from unlawfully obtained evidence and could not have been obtained otherwise.*

There is an indissoluble link between the acts of execution of the technical surveillance measures and the conclusion authorizing the house searches and of the search authorizations issued based on it.

The conclusions approving the searches were based on the interceptions carried out unlawfully by the Romanian Intelligence Service and the minutes rendering the calls.

The minutes rendering the calls were sanctioned by the judge of the preliminary chamber with absolute nullity.

At the same time, according to art. 280 para. 2 Criminal Procedure Code provisions, *Acts performed after the act that has been declared null and void are in turn struck by nullity, when there is a direct link between them and the act declared null and void.*

Since the criminal investigation bodies administered a test in violation of the principle of legality and loyalty, and from this means of evidence resulted data or information that led to the subsequent administration of another means of proof, it is necessary to apply the sanction of nullity also regarding the evidence that represents “fruits of the poisoned tree.”

In the case analyzed in the present paper, between the acts of implementation of the technical surveillance measures and the conclusion authorizing the home searches and of the search authorizations issued based on it, there is an indissoluble link.

The conclusion authorizing the home searches was issued based only on the minutes rendering the intercepted telephone conversations (evidence that was declared absolutely null).

Reading sheet 1 of the criminal conclusion no. 18/PD of 4-th of April 2012 of the Iasi Courthouse, pronounced in the file no. 3408/99/2012, we can observe the fact that the National Anticorruption Directorate was in possession of the wiretapping made by the Romanian Intelligence Service prior to the request for approval of the house search warrant: “In the reasoning of the request it was shown that data were obtained according to which the defendants in exchange for obtaining unjustified material advantages, support the interests of some private companies operating in the medical field (...).

In order to remove any doubt regarding the determining character of the wiretapping unlawfully carried out by the Romanian Intelligence Service, we further reproduce the content of paragraph 8 of sheet no. 7 of the criminal judgement no. 18 / PD of 04.04.2012 of the Iasi Courthouse, in file no. 3408/99/2012: In the present case, based on the means of evidence taken so far, respectively the minutes rendering the authorized intercepted telephone conversations and, especially the minutes drawn up by the criminal investigation bodies which constitute means of proof according to art. 90 of the Criminal Procedure Code, the court notes that there are sufficient indications that deeds incriminated by the norms of Romanian criminal law have been committed and that in order to find out the truth and clarify the case in all aspects (identifying all facts and perpetrators and establishing their guilt or innocence) it is necessary to administer other means of proof, evidence that could be discovered following home searches of the buildings where the persons involved actually live or where they reside (...)

Simultaneously, this was also the reasoning of the judge of rights and freedoms regarding the issuance of the house search warrant by the conclusion authorizing the home search, where in sheet 7, paragraph

8 the following are specified: In the present case, based on the evidence taken until this moment, respectively the minutes rendering the authorized intercepted telephone conversations and, especially the minutes drawn up by the criminal investigation bodies which constitute means of proof according to art. 90 of the Criminal Procedure Code, the court notes that there are sufficient indications that deeds incriminated by the norms of Romanian criminal law have been committed and that in order to find out the truth and clarify the case in all aspects (identifying all facts and perpetrators and establishing their guilt or innocence) it is necessary to administer other means of proof, evidence that could be discovered following home searches of the buildings where the persons involved actually live or where they reside (...)

As it has already been established by the judge of the preliminary chamber, the minutes rendering the wiretapping in the present case are null and void, which entails the nullity of the conclusion authorizing the home searches and search permits issued based on it.

Lacking the information obtained through technical surveillance, the home searches would not have taken place, the only information that the National Anticorruption Directorate had at its disposal being based on the wiretapping carried out by the Romanian Intelligence Service.

Evidence gathered through special methods of surveillance and investigation, which were used to obtain house search permits, was obtained not only under the law but also under the Protocol of Cooperation between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Service of Information from 4-th of February 2009, declassified on 29-th of March 2018.

Enlightening in this context is Judgement no. 35 from 12-th of July 2018 of the Bucharest Military Court of Appeal in file no. 1/81/2018, in which the following was stated:

The natural consequence deduced from the competencies conferred to the employees within Romanian Intelligence Service by art. 3 letter g) of the Protocol - is that of the absolute nullity of the obtained evidence (information resulting from the exploitation of special means of surveillance and research); these evidences were provided by a body without judicial attributions, with secret identity (the special law protects the identity of the staff within the Romanian Intelligence Service).

A proof cannot be gathered unlawfully unless the means of proof and / or the evidentiary procedure by which it is obtained have unlawful character, this implying the unlawfulness of the order of the authorization or taking of the evidence.

The acts performed after the act that was declared null and void are struck by nullity when there is a direct connection between them and the act declared null and void (art. 280 paragraph 2 of the Criminal Procedure Code).

The finding of nullity, regardless of whether it is absolute or relative, determines the lack of legal effects of the affected act starting from the moment of its of its execution, and not from the one in which the nullity was ascertained.

The nullity of the act by which the taking of an evidence was ordered or authorized or by which it was taken determines the exclusion of the evidence.

At the same time, according to the Constitutional Court's Decision no. 22 dated 18-th of January 2018 (Official Journal no. 188 of 26-th of January 2018), the evidence thus obtained will be physically removed from the content of the file, in order to guarantee the effective presumption of innocence of the defendant and his right to a fair trial.

In the case analyzed throughout this essay, the evidence obtained through the carried out wiretapping

are the only ones that were used to obtain home search authorizations.

Considering the indissoluble link between the minutes rendering the conversations (obtained following the enforcement of the technical surveillance measures) and the search authorizations, under art. 102 para. 4 of the Criminal Procedure Code reported to art. 280 para. 2 of the Criminal Procedure Code, it was necessary to ascertain the absolute nullity of the conclusion authorizing the home searches and of the search authorizations issued on its basis, with the consequence of excluding all the means of evidence obtained following the searches.

2. The Opinion of the Court

The judge of the preliminary chamber held that there was no argument to conclude that in the present the home searches case were evidence derived from those obtained as a result of the enforcement of the technical surveillance measures - measures which did not provide any relevant information in the indictment.

The information and data obtained during the home and computer searches were, for the most part, in the possession of the criminal investigation body, since the very beginning of the investigations, aspect also supported by the content of the report of ex officio notification which refers to the contracts and additional documents taken over during the home searches.

From the content of the minutes rendering the legally intercepted telephone conversations, there is no relevant information for carrying out the probative procedure of the searches, so that the connection between the technical surveillance measures and the searches is a purely marginal one. The data and information obtained by conducting home searches could inevitably also be obtained from independent sources, so that the violation of the right to a fair trial in this regard cannot be accepted.

Even if the acts of enforcing the authorizations of the technical surveillance measures were sanctioned with absolute nullity, on the grounds of their fulfillment with the violation of the norms of jurisdiction *ratione materiae* and *ratione personae* and with the consequence of exercising impermissible interferences in the exercise of the right to a fair procedure and the right to privacy, the application of the sanction of absolute nullity in relation to the rest of the criminal prosecution acts is not justified, as long as it cannot be established that they represent the consequence of technical surveillance measures, irrelevant in the context of initial accusations and subsequent clarification.

Through the submitted requests and exceptions, the defendants demanded to be ascertained by the court, that most of the evidence was unlawfully taken, prior to the notification of the accusations in criminal matters, even before the beginning of the criminal investigation, the ascertainment of the nullity of the prosecutor's acts of disposal, the exclusion of the evidence and the restitution of the case to the prosecutor in order to restore the criminal investigation.

The fact that the Romanian Intelligence Service provided the criminal investigation body with information that formed the basis of the ex officio notification does not represent, in the opinion of the preliminary chamber judge, a cause of absolute nullity of the criminal investigation and none of relative nullity; these data and information, most probably also documents, were transmitted, as previously mentioned, based on the legal provisions and on the obligation incumbent on all services and bodies specialized in collecting and processing information to make available to the National Anticorruption Directorate, immediately, any information held in connection with the commission of corruption offenses; non-compliance with this legal provision attracts legal liability according to the law (art. 14 paragraph 5 of GEO no. 43/2002).

The transmission of data and information, including documents, does not represent an act of judicial investigation carried out by a criminal investigation body and lacking jurisdiction, nor the consequence of the collaboration based on the Cooperation Protocol concluded at a given moment between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service, but the execution of a legal obligation by a state institution, in the conditions in which what it reports consists precisely in the suspicion of committing serious corruption acts in connection with the procurement procedures carried out also by a legal entity with state capital.

The judge of the preliminary chamber, analyzing the content of the conclusions approving the probative procedure of the home searches, ruled that the plea of nullity of the conclusion authorizing the home and computer searches could not be accepted, on the grounds that it was based on unlawfully drawn up documents and on paperwork obtained outside the procedural framework. There is no argument to conclude that the searches carried out at the homes of the persons concerned and at their workplaces represent evidence derived from those obtained as a result of the implementation of the technical surveillance measures (which did not provide any relevant information for the prosecution) and, for the reasons set out above, the unlawfulness of the criminal prosecution acts criticized by the defendant was not found (Iasi Courthouse, Conclusion of the judge of the preliminary chamber dated 18-th of December 2020).

3. Specialized Literature

According to the jurisprudence, the declaration or finding of the nullity of a procedural or procedural act attracts its lack of legal effects. The act is considered null from the moment it was performed in violation of the law, and not from the moment its nullity was declared (Theodoru & Chis, 2020).

Opinions in the literature converge on the opinion of excluding evidence derived from evidence deemed illegal: *“if the prosecuting authorities have administered evidence in violation of the principles of legality and loyalty, without prejudice to the rights guaranteed by the European Convention, and from these means evidence resulted in facts or circumstances that led directly and necessarily to the legal administration of other means of proof (the administration of the illegal means being a sine qua non condition for the administration of the legal means of proof), the latter will be excluded, the courts not being able to base its decision on these derived evidence”* (Udroiu, 2018, pp. 985-986).

It was appreciated in the literature that the evidence obtained after the exclusion of some evidence being in turn excluded if there is a causal link sine qua non between the evidence and the subsequent evidence could not be obtained otherwise (Theodoru & Chis, 2020, p. 389).

Illegal evidence obtained other than through torture excludes and attracts the exclusion of evidence derived from them, if the latter could not be obtained otherwise than through illegal evidence (Micu, Slavoiu & Paun, 2019, p. 132).

Considering the sanctioning with absolute nullity of the minutes of the telephone conversations, the effects in time of the nullity of a procedural act, as well as the fact that the only indications based on which the home searches were approved no longer existed at the time of invoking the nullity, the criminal conclusions authorizing the searches are struck by nullity because they were issued without any “solid indications” that the searches would lead to the discovery and gathering of evidence.

The judge who authorized the searches in the case under discussion justified the need for approval based on the minutes of the conversations submitted by the National Anticorruption Directorate.

4. Jurisprudence in Support of the Solution of Excluding Derived Evidence and Restitution of the Case to the Prosecutor's Office

In connection with the exclusion of derived evidence, by Decision no. 35 / 12.07.2018 of the Bucharest Military Court of Appeal pronounced in file no. 1/81/2018 in which it was retained that:

The natural consequence deduced from the competencies conferred to the employees of the Romanian Intelligence Service by art. 3 letter g) of the Protocol - is that of the absolute nullity of the obtained evidence (information resulting from the exploitation of special means of surveillance and research); these evidences were provided by a body without judicial attributions, with a secret identity (the special 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 evidentiary procedure by which it is obtained are / are illegal / illegal, this implying the illegality of the disposition of the authorization or administration of the evidence.

The acts fulfilled after the act that was declared null and void are struck by nullity when there is a direct connection between them and the act declared null and void (art. 280 par. 2 C.pr.pen.).

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

“The nullity of the act by which the administration of a sample was ordered or authorized or by which it was administered determines the exclusion of the evidence.”

At the same time, according to the Decision of the Constitutional Court no. 22 / 18.01.2018 (Official Gazette no. 188 of 26.02.2018), the evidence thus obtained will be physically removed from the content of the file, in order to effectively guarantee the presumption of innocence of the defendant and the right to a its fair trial.

Suceava Tribunal, by Conclusion no. 289 of 20.07.2020 decided that: In the explanatory memorandum related to the draft Code of Criminal Procedure, regarding the exclusion of derived evidence, it was noted that: the exclusion of derived evidence is applicable only if between illegally administered evidence and derived evidence subsequently administered, there is a necessary causal link, and the judicial authorities have mainly and directly used the data and information obtained from the illegal evidence without any other alternative source and without any possibility of their being discovered in the future for legal administration derived test medium (sbl.ns.)

There is no evidence that the courts were aware of these alleged illegalities in the documents in question, prior to their identification, from the time of the home search.

From the documents carried out in question, but also from the considerations of the conclusion by which the house search was ordered, it does not result that the criminal investigation bodies had at least a minimum of indications regarding these facts and that the collection of documents overlapped with the existence of existing lines of investigation which, in any case, would have led to the start of the verification of these documents.

Neither before the judge of the preliminary chamber of the court of first instance nor before this panel, the representatives of the Public Ministry showed that there were such concrete indications that would have led to the identification of the documents, regardless of their collection during the home search. Although the burden of proof is on the prosecuting authority.

For all these reasons, all the other evidence administered in the file 29 / P / 2017 will be excluded, as

being derived from the evidence taken following the home search carried out based on the home search warrant no. 17 from 19.12.2016.

Relevant in this respect is also the case *Modestu v. Greece*: *The Court noted that the search warrant was drafted in general terms. The prosecutor did not include any information on the investigation in question and the items to be confiscated, thus giving the investigating officer broad powers. Where national law does not provide for prior judicial review of the legality and necessity of a measure under investigation, the Court emphasized that other safeguards must be implemented, in particular as regards the execution of the search warrant, so that to compensate for any shortcomings in the issuance and content of the mandate.*

In the present case, the Court stated that the Greek legislation did not provide for such a prior check.

The Court noted that, in addition to the lack of prior judicial review, the imprecise nature of the warrant, and the fact that the applicant was not physically present during the search, there was no immediate a posteriori judicial review.

The ECHR considered that the national authorities had not complied with their obligation to provide “relevant and sufficient” reasons to justify the issuance of the search warrant.

The Court concluded that the search was not reasonably proportionate to the legitimate objectives pursued, taking into account the interest of a democratic society in ensuring respect for the home. There has therefore been a violation of Article 8 of the Convention.

5. Conclusions

The conclusions approving the searches were based on the recordings made illegally by the Romanian Intelligence Service, as well as the minutes of the calls.

The acts of execution of the technical supervision measures were sanctioned with absolute nullity following the conclusion of the preliminary chamber judge dated 18.12.2020: *pursuant to disp. art. 345 para. 1 and 2 of the Code of Criminal Procedure, admits the exception of the absolute nullity of the acts of execution of the approved technical supervision measures and, as the case may be, prolonged regarding the defendants (...) orders the legal exclusion, from the evidentiary material, of all the minutes of recording the technical supervision activities mentioned above and the material exclusion by removing from the case file all the means of evidence and supports that contain the result of the technical supervision measures listed above.*

According to disp. art. 102 para. 2, 3 and 4 of the Criminal Procedure Code, evidence obtained illegally cannot be used in criminal proceedings.

The nullity of the act by which the administration of an evidence was ordered or authorized or by which it was administered determines the exclusion of the evidence.

Derived samples are excluded if they were obtained directly from the illegally obtained samples and could not be obtained otherwise.

The exclusion of the derived evidence finds its applicability only if there is a necessary causal link between the illegally administered evidence and the subsequently administered derived evidence, and the judicial bodies have mainly and directly used the data and information obtained from the illegal evidence, without any other alternative source. And there is no definite possibility that they will be discovered in the future, in order to legally administer the derivative evidence.

There is a necessary causal link between the acts of enforcement of technical supervision measures and the conclusions of the approval of home searches, the National Anticorruption Directorate using the information obtained from technical surveillance to motivate the need to obtain search permits.

In the absence of the records and data resulting from the technical supervision, the court would not have authorized the searches in the present case.

The consequence of sanctioning with absolute nullity the conclusions approving the search is the annulment of the minutes of conducting the home searches.

Taking into account the annulment of all acts of technical supervision, the effects over time of the nullity of a procedural act, the criminal decisions approving home searches are struck by nullity pursuant to art. 102 para. 2 and 4 C.pr.pen.

Considering the fact that the court's motivation is based exclusively on the data provided by the National Anticorruption Directorate, the fact that the technical surveillance acts were annulled, and the sanction of nullity produces retroactive effects, the decisions approving the home searches are unmotivated.

Appreciating the fact that the conclusions approving the aforementioned searches are legal in terms of validity and motivation of the court, is equivalent to recognizing the legal effects of an act declared null and void.

Consequently, the removal of the minutes for the return of telephone conversations removes the very motivation of the court that was the basis for approving the home searches.

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