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The Expertise on Data Derived from Technical Surveillance Measures

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Abstract: This paper aims to analyze the expertise on data resulting from technical surveillance, given that expertise is a legal means of proof of major importance, consisting in conducting investigations, technical analyzes, assessments and conclusions. In the practice of the courts, the expertise performed on optical media was considered necessary in order to identify the registered audio-video persons. In such situations where the faces of people surprised by the images can be observed only partially because they do not appear in the foreground, the opinion of an expert is necessary in order to confirm the identity of the defendant. At the same time, in the situation where the voices of people caught by recordings are unclear due to the quality of the sound, by performing a technical expertise on optical media containing the data, the quality of the recordings can be improved. Thus, the activities are carried out by a specialist from a certain field and are carried out by the disposition of the criminal investigation body or of the courts, having as main purpose the clarification of some facts or circumstances that form the object of a process. From this perspective, the paper is of both academic and practical importance, as the paper is addressed to both legal practitioners and litigants who have been the subject of technical surveillance. At the same time, expertise is a useful means in building a defense in criminal cases in which the evidence is based on data obtained from technical surveillance.

Keywords: technical surveillance; technical expertise; means of proof; optical supports

1. The legal framework of the technical surveillance and the possibility to expertise the results of this means of proof

The notion of interception of communications and conversations includes the intervention of authorized bodies in any kind of telephone conversations or communications or by any electronic means of communication, not subject to the publication - of the city, which involves the idea of confidentiality between those who perform it, as well as those by fax, e - mail, instant messaging services, etc. (Gradinaru, 2017, p. 16).

This means of proof proved to be vital in cases concerning corruption offenses, but also drug trafficking, pimping smuggling, etc., in which the perpetrators use conspired working methods to hinder the activity of the criminal investigation bodies in terms of gathering evidence.

For these reasons, in the files having as object crimes such as those mentioned above, the probative material consists, in an overwhelming proportion in the results of the technical surveillance.

As the evidence in the case file represents "*the judicial truth*" it is of particular importance that the judge of the case is convinced that the data stored on optical media submitted by the prosecution is a representation faithful to the factual situation surprised.

In the situation where the data stored on the optical media were truncated, the conversations captured by the recordings were not rendered faithfully in the playback minutes, images of audio-video recordings

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are not simultaneous with acoustic events, it is necessary to approve a technical expertise on these data (Gradinaru, 2021).

The possibility of expertise of data from technical surveillance is presented as an a posteriori guarantee regarding the conduct of interceptions and their transcripts, in the context in which the expertise is carried out by an independent and impartial authority. Thus, the European Court of Human Rights sanctioned the lack of independence of the authority that could have certified the reality and reliability of the records (the cases of *Hugh Jordan vs. United Kingdom*, *McKerr vs United Kingdom*, *Ogur vs Turkey*).

The possibility of performing such an expertise is also provided in art. 3 of H.G. no. 368/1998 on the establishment of the National Institute of Forensic Expertises, amended by Government Decision no. 458 of April 15, 2009 and of the Order of the Minister of Justice no. 441 / C / 1999, which allows the expertise of voice and speech, in order to analyze the authenticity of audio and audio / video recordings, respectively if the recordings contain any traces of alteration (Gradinaru, 2014, p. 124).

The verification of the reliability of the records is within the competence of the National Institute of Forensic Expertise, which acts under the authority of the Ministry of Justice and whose experts have the quality of civil servants, being completely independent of the competent authorities in carrying out interceptions or transcripts of recorded conversations.

Voice and speech expertise involves verifying the authenticity of audio and audio / video recordings and is performed only on original recordings. It shall verify that the recordings have been made simultaneously with the acoustic events and video they contain, with the technical equipment and with the method indicated by the party who produced the test.

The need to approve such expertise was also found by the European Court of Human Rights, in case *V.D. against Romania* by the Decision of February 16, 2010, according to which art. 6 of the Convention in the context in which the Romanian courts have not fulfilled the obligation to order investigative measures in order to give the applicant the opportunity to defend his case.

In the following, starting from Court case, we will exemplify reasons why it is necessary to perform a technical expertise on the data stored on optical media, representing the results of the technical surveillance.

2. Practical considerations regarding data expertise consisting of the results of technical surveillance

2.1. Cause under discussion

In a file pending before the Bacau Court of Appeal, respectively 326/32/2021 having as object corruption offenses provided by Law no. 78/2000 - bribery, the main evidence of the accusation consisted of audio-video recordings which result in the receipt of sums of money by some road agents holding the status of defendants.

2.2. Requesting a forensic technical expertise

The audio-video recordings resulting from the technical surveillance activity had a low quality of both images and sounds, being difficult to identify people caught by recordings.

Considering the importance of these samples in the probative material, the defense requested to perform a forensic technical expertise on the results of the technical surveillance having the following objectives:

- a) to set the date of audio-video recordings;*
- b) to show whether video surveillance has undergone interruptions, additions, adjustments of any kind, and, if so, the total duration of deleted or modified video recordings;*
- c) to determine whether the voices in the conversations belong to the defendants and whether they have undergone changes, additions, erasures or alterations of any kind and to verify that the records presented were made simultaneously with the temporal acoustic events they contain.*
- d) specify whether or not the equipment with which the (audio / video) records were made is approved;*
- e) to specify if interventions have been made on recorded images and sounds.*

2.3. The aspects considered by the defense in support of the need to perform technical expertise on audio-video recordings

The defense found that the file dimensions recorded in the minutes of call playback and storage of data obtained through technical surveillance, do not correspond to the dimensions of the files found on the optical supports attached to the case file.

Specifically, regarding the file found on the optical memory support type DVD-R, Verbatim brand registered under no. 1, (construction series- MAPA25PH12032125 1) created on 19.05.2016, called 1_20160422-092100_1001p0 it is mentioned that it would have the size of 609,687,494 bytes.

According to information obtained from the properties of the audio-video file (obtained by inspecting the properties of files submitted by the prosecution) the file with the same name has the size of 596.192.640 bytes.

As the authenticity of these recordings is questioned, there is a possibility that changes were made to these data after storing the audio-video recording, the file containing less technical data.

An additional element that casts doubt on the authenticity of the audio-video file also appears after accessing the files made available to the defendant. According to information obtained from the properties of the audio-video file, the defense could observe that the technical characteristics as well as the metadata files were deleted.¹

Identifying people from audio-video recordings viewed is a particularly important issue in establishing the truth in criminal cases.

In the case subject to discussion², the face of the person in respect of whom the prosecution claims to have belonged to the first of the defendants does not appear even once on the records.

Regarding the second defendant, the image of this person's profile is sequenced (either the chin, forehead, nose of this person appears, without being able to identify frames in which the face can be viewed in full).

¹ For each file stored on a computer system there is a set of metadata associated with it, which provides information about its source, its author and other important details, depending on the type of file.

² Bacău Court of Appeal, File no. 326/32/2021.

Essential in identifying people is the possibility to observe their face and profile, each component of the face being necessary to identify separately, respectively eyebrows, eyes, nose, mouth, chin, ear, hair.

As for the first defendant, this identification is impossible, compared to the fact that his face is not visible on the recordings.

With regard to the second defendant, this identification is difficult in relation to the quality of the image and the discontinuous nature of the staff who would surprise the person who claims to be the latter.

Identification of persons is made according to static elements (age, height, body constitution, etc.) and dynamic elements (gait, gesturing, voice and speech).

On the viewed recordings there is ambient noise that does not allow the identification of the phonatory features¹ of the people caught on the recordings and more than that, it is not possible to determine to which interlocutor the lines allegedly caught by the records belong.

The defense identified the existence of traces of intervention on audio-video recordings in the sense of editing the image by inexplicably changing colors. At the same time, traces of interventions on the sound of recordings were found, these not being simultaneous with acoustic events.

The transcripts of the recordings of conversations² were only assumptions of the criminal investigation bodies on the interlocutors replies, meant to cover the technical deficiencies of the recordings and to substantiate a erroneous accusation. Criminal investigation bodies have attributed remarks to interlocutors without knowing for sure who they belong to.

For example, on one of the recordings, the noise produced by the car's engine for 3-4 seconds could be distinguished before the car driver started it. This is an indication that the sound is only superimposed over the video, without being a faithful rendering of reality.

Moreover, it was found that certain replicas in the minutes of playing video audio recordings do not correspond to reality, and it cannot be distinguished what the interlocutors said.

Due to the noise produced by the police vehicle, but also due to the poor quality of the audio recording, it is not possible to hear what the offender driver said to the defendant. The remarks alleged by the judicial bodies to belong to one of the defendants could not be verified before the judge. As such, the defence pleaded towards their exclusion from the evidentiary material.

2.4. Bacau Court of Appeal Solution

Presented with the facts brought by the defense, the judge invested with the settlement of the case ordered the viewing of the recordings in the court session in order to be able to ascertain the aspects signaled by the defense.

Subsequently to the partial viewing of the audio-video recordings in the public session, the court rejected the administration of technical expertise on the optical media containing technical surveillance results.

¹ The phonatory features are determined by the three main features of the voice: the stamp, the frequency and the tone.

² Bacau Court of Appeal, File no. 326/32/2021.

2.5. Critical considerations on the solution of the Bacau Court of Appeal

We consider the judge's decision to watch audio-video recordings in court session without a priori these recordings being found to be authentic by a forensic expert.

Relevant is the fact that the purpose of watching the recordings in the session was to verify if they contain alterations of the data stored on optical media and not for direct administration of the evidence.

Regardless of the training of a judge, the latter cannot replace a forensic expert in the sense of “expertise” through his own senses the data resulting from technical surveillance.

Such a “finding” of the judge of the first instance could not be verified by the court of judicial review, the decision pronounced in these conditions leaving room for arbitration.

We consider that before the direct administration of the evidence, it was necessary to expertise the optical supports containing the audio-video recordings resulting from the technical surveillance.

For audio-video recording to be a real means of proof, it is necessary that data resulting from the use of technical surveillance measures concerning defendants cannot be altered in any way and that the original support on which they were printed for to be able to meet the requirements of ECHR case law (Gardinaru, 2019, p. 35).

An audio recording is considered authentic if it was made simultaneously with the acoustic events contained on it and does not represent a copy, if it does not contain any interventions (fabrics, insertions, word intercalations, phrases or counterfeiting elements) and if it was made with the technical equipment presented by the person who performed the registration (Gradinaru, 2019).

Identifying the people subject to technical surveillance measures proved to be difficult, this aspect being corroborated with the constant denial of the defendants that they are the persons in the recordings.

Compared to the fact that any doubt benefits the defendant, such a stalemate can be overcome only with the help of a forensic expert, to check the content of these videos to see if the people in the recording are the defendants in the case.

We specify that in the case we submit to the discussion, for a better doing of justice, the case subject to discussion was disjointed from the main case regarding other police officers that were bribed by offending drivers.

In the case that was disjointed, the Court ordered the administration of a forensic technical expertise on optical supports containing the results of the technical surveillance, having the following objectives:

- *improving the video images from April 28, 2016, between 02: 31-02: 46, in which the driver outside the police station is surprised, on the left front of the vehicle with registration number MAI 0000;*
- *identification of the driver and all his physiognomic characteristics, it will be established whether the person thus identified is one and the same as the defendant X;*
- *improving the audio recording made on that date and time interval and making a comparison between the driver's voice in the recording and the voice of defendant X, to determine whether or not that voice belongs to the latter.*

The court considered it relevant and necessary in question to carry out a forensic examination, both of the images and of the driver's voice from the registration of April 28, 2016.

Another reason why the judge in the file who was disjoint ordered the expertise was found in the fact that the original support containing the audio-video recordings “*could not be accessed by instance*”.

3. Case Law of the European Court of Human Rights in the sense of the need to administer the evidence with expertise on optical supports containing the results of technical surveillance, that is in contradiction to the solution of the Bacau Court of Appeal

Decision of the European Court of Human Rights of 10.12.2013 in Botea case against Romania – application no. 40872/04:

“... The Court considers that the records constituted, if not the only evidence, at least decisive evidence against the applicant, without which it would not have been possible to ensure his conviction, or its possibility would have been reduced.

41. Despite the importance of the records in assessing the evidence, the first instance changed its initial position on the need for a technical expertise report to establish the authenticity of the records. At the end of the procedure, it considered that the report was useless and revised its decision to present this evidence (see section. 16). In addition, the Court points out that, although INEC submitted a technical expertise report stating that there were doubts as to the authenticity of the records (see point. 19) before the judgment was given, the first instance relied on transcripts instead of reopening the procedure, in order to allow the parties to submit their observations on the report.

42. The Court points out that the internal courts have not only based their decision on records of questionable authenticity, but they did not respond to the applicant's arguments that the transcripts were not submitted to him and therefore did not know their content. In addition, the internal courts did not even listen to the audio tapes at the meetings, in the presence of the defendants, nor did they respond to the applicant's repeated complaints about the illegality of the records”.

Decision of the European Court of Human Rights of 22.09.2015 in the Nitulescu case against Romania Application no. 16184-1606:

“52. The Court further notes that the applicant complained to the domestic courts that the records of private conversations between her and her accuser, R.C.A., were obtained illegally. In addition, it claimed that the recordings used as main evidence against it were not authentic, highlighting that those audio tapes did not contain full conversations and that important parts of the conversations were missing.

53. Both lower courts considered that a technical expertise report on the (records was required to see points 21 and 29) and ordered such a report to be drawn up. Despite the importance of recordings for assessing evidence, the authenticity of audio tapes could never be established by internal courts, as neither the original tapes in the possession of the R.C.A. nor was the technical equipment used for their registration ever presented in court. Therefore, no technical expertise of the records could be performed. In the light of the above findings, the Court concludes that, overall, the proceedings in the applicant's case did not comply with the requirements of a fair trial”.

4. Conclusions

The expertise of the audio-video recordings obtained after the execution of the mandates of technical surveillance continues to represent a real interest in the judicial practice of the criminal courts.

A particularly relevant aspect is the fact that in most situations where the expertise of optical supports is ordered containing the results of technical surveillance, the conclusions of the experts are not conclusive.

The experts request in such situations the submission by the prosecution of the original support on which the results of the technical surveillance were stored.

The motivation of this request consists in the fact that the verification of the authenticity of the copies of the records resulting from the technical surveillance can be performed only by reference to the original support (Gradinaru, 2017, p. 202).

In the absence of such support, the expert cannot meet such an objective.

From this perspective, we consider that the criminal procedural law does not constitute sufficient guarantees for the defense of the rights of the intercepted persons.

According to art. 143 paragraph 1 and 2 of the Romanian Criminal Proceedings Code “ (1) The prosecutor or the criminal investigation body draws up a report for each technical surveillance activity, in which the results of the activities carried out concerning the act forming the object of the research are recorded or contribute to the identification or location of persons, the identification data of the support containing the result of the technical surveillance activities, the names of the persons to whom they relate, if known, or other identification data, and, where applicable, the date and time the surveillance activity began and the date and time it ended.

(2) A copy of the support containing the result of technical surveillance activities shall be attached to the minutes in a sealed envelope. The support or a certified copy thereof shall be kept at the seat of the prosecutor's office, in special places, in a sealed envelope and shall be made available to the court at its request. After the court is notified, the copy of the support containing the technical surveillance activities and copies of the minutes shall be kept at the court registry, in special places, in a sealed envelope, at the exclusive disposal of the judge or panel invested with the settlement of the case”.

The criminal proceedings law allows the criminal investigation bodies to keep only a certified copy of the original of the support, most likely for financial reasons. Keeping the original of the recording media due to discussion would involve keeping audio-video surveillance cameras in internal memory and the impossibility of using these devices in other files.

Such a solution that allows the judicial bodies only to keep a copy of the record holder, the data from the original support being deleted implies the finding of the authenticity of the technical surveillance results and implicitly the right to defense and to a fair trial of the defendant, as has been repeatedly stated by the European Court of Human Rights.

From a financial-administrative point of view we can understand the option of the legislator, but the essence of the criminal procedural norms aims at respecting the rights of the parties and procedural subjects, as well as establishing some obligations for the judicial bodies. Respect for these rights must take precedence over any financial reason.

For these reasons, by Ferenda law, we propose the elimination of the phrase “or a certified copy of it” from the content of article 143 paragraph 2 Romanian Criminal Proceedings Code.

Such a legislative solution would encourage national courts to more often encourage the performance of forensic technical expertise on records resulting from technical surveillance, as the expert will always be able to answer the question whether the records in the case file in the copy are authentic or not.

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