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METODE SPECIALE DE SUPRAVEGHERE. PRESPECTIVA DREPTULUI NAȚIONAL ȘI A JURISPRUDENȚEI CEDO

(REZUMAT)

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CONTENTS OF THE DOCTORAL THESIS

Faced with the complexity of contemporary society and the accelerated evolution of technology, the field of criminal procedural law and the protection of individual rights is becoming a fascinating field of research. In this dynamic reality, the Romanian legislation regulating special surveillance methods in criminal investigations becomes a central point of analysis and reflection. The main objective of this paper is to analyze the legislative framework and judicial practice in the field of special methods of surveillance, in order to identify ways to improve the legislation and the way it is applied in judicial practice, with the aim of maintaining a balance between the general interest of society, the overlap of judicial truth with objective truth in criminal cases, on the one hand, and the interference in the right to privacy of the person under surveillance, on the other hand. The technical systems which are used to carry out criminal activities, as well as those by means of which the special surveillance methods are carried out, are constantly evolving technically, so that the legislation governing the special surveillance methods must also evolve in parallel in order to make criminal investigations more effective.

This PhD dissertation is a detailed and rigorous foray into the legal system governing evidentiary procedures, with a particular focus on special methods of surveillance. We aim to explore not only the existing legal framework, but also to make significant contributions to its optimization, aiming at an efficient correlation between the needs of criminal investigations and the respect of the fundamental rights of the individual. By taking a detailed approach to the relevant case law and decisions of judicial institutions, we aim to emphasize the importance of aligning legislation with international standards and the requirements of a changing society. In this context, exploring legislative solutions that strike a balance between the efficiency of criminal investigation and individual rights becomes essential. The research is not merely a theoretical analysis, but aims to provide concrete solutions to improve the legislation. The focus is on identifying legislative gaps and possible innovations that would allow efficient management of special surveillance methods while guaranteeing the protection of citizens' privacy.

Through this proactive approach, the doctoral thesis makes a significant contribution to the development and evolution of the legal system in the field of criminal investigations, having a positive impact on the efficiency and fairness of the process of using special surveillance methods in the Romanian legal context.

The research focuses on the originality of the detailed approach to the system of free appraisal of evidence adopted in the Romanian Code of Criminal Procedure, covering procedures, classifications and functions of evidence in criminal proceedings. The detailed analysis of the legislation reveals the originality in the adoption of a liberal system, giving flexibility to the judiciary. The investigation of the history of special methods of supervision in Romania,

legislative improvements and variable aspects of the legislation make distinctive contributions. The relevance of the research is enhanced by the impact on the understanding and evaluation of the Code of Criminal Procedure, and the balanced approach to the procedural and substantive conditions of the use of special methods of supervision in criminal proceedings provides significant contributions to the field of criminal procedural law and human rights.

The thesis proposes legislative improvements in view of the difficulty in striking a balance between the collective interest in ensuring the truth in criminal cases, which may involve the use of intrusive evidentiary procedures, and respect for the right to privacy. In this context, rapid technological developments are addressed, focusing on the current impossibility to intercept communications protected by *end-to-end encryption* technology. The proposals aim at adapting the law to the new technological realities, as well as guaranteeing effective mechanisms to defend the right to privacy in the digital age. Through scientific research, the thesis identifies the practical difficulties of investigative bodies in investigating complex cases, highlighting the need to update legislation to keep pace with technological developments and to allow the efficient use of investigative tools. It also underlines the importance of effective protection of individual rights and proposes improved defense mechanisms.

The methodology of the research involved several methods, since the proposed objectives required the accumulation of detailed knowledge on supervision measures, realized through in-depth documentation, for an objective comparison of the legislation in this field, as well as the relevant doctrine.

- The historical method: analyzing the evolution and transformations in

Probation and special methods of supervision in Romania. Exploring the background of these concepts and highlighting significant changes in legislation and judicial practice over time. Reference to the legal tradition and the evolution of the concept of the right to privacy in order to substantiate intervention in this area.

- Comparative method: analysis and evaluation of practices and developments in

Romania in the context of international standards and other jurisdictions. Identify similarities and differences in the approach to probation and special supervision methods globally. Using comparisons to gain a deeper understanding of international influences on the Romanian legal system.

- The documentary method: The use of detailed documentation of the law and the permitting process to ensure transparency and correct understanding of legal provisions.

II. Structure of the doctoral thesis

The scientific paper consists of nine chapters, which in turn are structured into several subchapters, sections and subsections, the aim being to achieve the research objectives.

In the first chapter *"**introductory considerations**" there was a* presentation of the method of taking evidence in criminal proceedings, the history of the evidentiary procedure of special methods of surveillance in Romania, the motivation for the choice of the topic and the objectives of the research. The general objective proposed for this paper is: To comprehensively investigate and evaluate the system adopted in the Romanian Code of Criminal Procedure regarding the special methods of supervision in Romania with a focus on probation and the authorization of special methods of supervision in criminal proceedings.

In order to achieve this objective, the following sub-objectives have been formulated:

1. Review of the liberal system adopted in the new procedural code

Romanian criminal law on probation, focusing on procedures, classifications and functions of evidence in criminal proceedings.

2. Analysis of conditions and criteria for the authorization of special methods

supervision in criminal investigations, with a focus on the concepts of proportionality and subsidiarity.

3. Analysis of the authorization process for special methods of

oversight in the Romanian legal system and exploring the roles and responsibilities of the prosecutor and the judge of rights and freedoms in this context, as well as the structure and procedures involved in proposing and approving such measures

4. Analysis and assessment of the effectiveness of legal guarantees in the Enforcement of special methods of supervision in criminal proceedings.

5. Analyzing and providing a detailed overview of the measures

used by intelligence bodies to protect national security in Romania.

6. Analysis of the regulation of specific collection activities

information in the context of interference with the right to privacy, as well as how to approve and use such information in the criminal process, in accordance with Romanian law and European standards on fundamental rights.

The second chapter**, "The relationship between special surveillance methods and fundamental rights"**, aims to highlight the existing safeguards against arbitrariness and unjustified or disproportionate interference with the right to privacy in the field of special surveillance methods regulated by criminal procedural law. Establishing the truth in criminal proceedings is the duty of the prosecuting authorities, but it is also a right of the injured parties, since it is only

by establishing the truth in criminal proceedings that the perpetrator, who has caused harm to the injured parties by committing the crime, can be held criminally liable. Ascertaining the truth in criminal proceedings is not only an obligation of the authorities, but also a right of the injured parties. However, restrictions imposed by special surveillance methods must comply with legal requirements and be justified in a democratic society.

The protection of the right to privacy is regulated both at national level, by the Romanian Constitution, and at international level, by the European Convention on Human Rights. These documents impose clear limits for restricting the right to privacy, emphasizing the necessity and proportionality of the measures. The ECHR has outlined minimum criteria for the use of special surveillance methods, emphasizing transparency, necessity, proportionality and the protection of individual rights in the application of these measures. The balance between the purpose of the investigation and respect for fundamental rights is essential in the responsible use of special surveillance methods in criminal proceedings. To protect rights in the criminal process, a clear and predictable legislative framework is crucial. The Ct.E.D.O. has emphasized that interception and surveillance require precise regulation and adequate control to prevent abuse. Legislation must provide clarity and accessibility and the rules must be sufficiently detailed. The C.E.E.D.O. initially criticized the Romanian law for failing to meet the standards. Problems such as lack of precision in authorizations and poor control were highlighted. The C.E.E.D.O. insisted on the need for independent and effective control to prevent abuses. The requirements for the quality of the law in supervision measures are high and the Romanian Criminal Procedure Code regulates these safeguards to avoid abuses by imposing precise conditions for their authorization.

The Constitutional Court emphasizes that supervisory measures must have a clear basis in national law and respect the principle of "laid down by law". Legislation must provide clarity and predictability and public accessibility of the law is essential. The decision of the Constitutional Court (No. 55 of 04.02.2020) emphasizes the need for clarity and predictability of the rules on the use of recordings in criminal proceedings. Legislative intervention is suggested in order to create a clear and predictable legal framework to ensure that the legality of such recordings in criminal proceedings is scrutinized.

It is crucial to strike a balance between the protection of individual rights and the need for effective use of evidence in national security investigations. Legislative changes should provide a clear and explicit procedure for challenging the legality of interceptions, ensuring respect for fundamental rights and a fair criminal trial.

In Romania, the criminal process involves judicial control of technical surveillance, protecting the right to privacy. Informing the persons under surveillance is essential for an effective remedy.

Romanian law protects the right to privacy through criminal sanctions for various violations, such as unauthorized interception or disclosure of professional secrets. Civil sanctions complement the legal protection by providing the possibility for affected individuals to take legal action to redress the damage caused by a breach of the right to privacy. It is important that the conditions for processing personal data are respected to avoid liability for infringements. There are also procedural remedies, such as nullity and exclusion of evidence, for failure to comply with the legal framework governing special surveillance methods.

In the third chapter ***"Conditions for the authorization of special methods of surveillance in criminal proceedings"*** a presentation has been made of each of the conditions that must be met for the authorization of special methods of surveillance in criminal proceedings. The use of special surveillance methods in criminal proceedings must comply with procedural and substantive conditions. These include the existence of an appropriate procedural framework, the commencement of criminal proceedings *in rem* and authorization by the judge of rights and freedoms. The option to limit the use of these methods to the prosecution phase is considered justified.

With regard to the substantive conditions, it is important to have a reasonable suspicion that a serious crime has been committed or prepared to be committed. This suspicion must be assessed in the light of the specific circumstances of each case and the authorization must be made objectively, avoiding the risk of arbitrariness. Although there is a relative presumption that the use of special methods is necessary for serious crimes, the actual necessity must be assessed on a case-by-case basis. Reasonable suspicion, regulated for serious crimes, serves as a barrier against abuse by the State. Problems arise in the case of a change of legal classification after the authorization of technical surveillance, generating debates in doctrine and case law. One view states that subsequent changes do not affect legality, given the initial standard of reasonable suspicion. Other views argue that these changes may undermine the protection of privacy provided for in the legislation.

The necessity of technical surveillance implies compliance with the requirements of the European Court of Human Rights, requiring relevance, sufficiency and proportionality. National legislation must provide clear rules and the assessment must balance individual rights and the need for law enforcement in a democratic society. Detailed analysis of each case remains crucial to ensure compliance with the principles of the rule of law.

The key condition for authorizing special surveillance is proportionality. This requires a balanced assessment of the interference with privacy against the State's interest in combating crime. For example, in the case of petty theft, extensive surveillance may be considered excessive. Proportionality is assessed in the specific circumstances of each case. For example, technical tracking may involve less intrusiveness than video surveillance of private conversations.

Subsidiarity is another essential condition, indicating that special methods must be used in subsidiarity to ordinary evidentiary procedures. They should intervene only when other means cannot obtain the necessary evidence, thus protecting the right to privacy.

The fourth chapter aims to set out the ***"procedure for granting special methods of supervision"***. The role of the prosecutor is to propose the authorization of special surveillance methods and the judge of rights and freedoms decides on these proposals. The prosecutor's proposal must contain essential information, including details of the surveillance measures and a description of the evidence supporting reasonable suspicion. The structure of the prosecutor's report includes the case history, the analysis of the facts and the evidence, and the operative part contains the specific requests to the judge. The criminal investigation bodies may also make proposals, but these must be considered by the prosecutor in advance. The relevance of the stage of the investigation is given by the need to start *in rem* prosecution. In conclusion, the authorization process is about respecting individual rights and requires a careful approach to conditions and evidence. The judge of rights and freedoms, designated for his independence in the criminal process, examines the prosecutor's proposals for the approval of these methods. Authorization is required when individual rights are affected, and the judge must decide on the same day, given the urgency of such measures.

The prosecutor submits the request in a hearing in chambers, and the judge considers the reasons and issues a judgment. If approved, a closure and a technical surveillance warrant is issued, covering the essential information. If the proposal is rejected, only a reasoned decision is issued and a new application can only be made if new facts come to light. The injured party may also request such measures in respect of his or her own conversations, even if the subject matter of the case is not an offense listed in Article 139 paragraph 2 of the Code of Criminal Procedure. The reasoned request is addressed to the public prosecutor, who, if he considers that the conditions laid down by law are met, formulates a proposal to the judge of rights and freedoms. The legislator has not provided for an appeal against the decision of the judge of rights and freedoms ruling on the proposal to grant special methods of supervision.

The judge of rights and freedoms decides in chambers, without the parties being summoned and with the mandatory participation of the prosecutor. The

proposal for an extension may concern all or only certain methods of supervision. In order to justify the continuation of the measure, in addition to the original conditions for imposing supervision, there must be serious grounds justifying the extension of the measure in time. An extension cannot be ordered if the previous measure has already expired. The legislator has restricted the possibility of prolongation of supervision measures which have expired by eliminating the option of prolongation after their expiry.

The public prosecutor may, in exceptional circumstances, authorize special methods of surveillance, a responsibility that usually belongs to the judge of rights and freedoms. In urgent cases, the prosecutor may issue authorizations for such surveillance for a limited period of 48 hours. This procedure has been challenged by some who consider it unconstitutional, arguing that the prosecutor should refrain from authorizing measures that affect the fundamental rights of the individual, a role reserved exclusively for the judge. Despite the criticism, supporters of this approach emphasize the procedural differences and point out that the prosecutor can act in urgent situations, imposing restrictions for a limited duration. Moreover, at the stage of criminal prosecution, the prosecutor already has the power to order restrictive measures such as detention or precautionary measures. As regards constitutional review, the Constitutional Court rejected criticism that the prosecutor does not provide sufficient safeguards against arbitrariness in authorizing such measures. The legislation provides detailed reasons for issuing authorization orders, time limits and the obligation of the prosecutor to inform the judge of rights and freedoms for confirmation. Even at the European level, in a specific case before the Ct.E.D.O., where the prosecutor's authorization for the supervision of a doctor was challenged, the court concluded that the procedure of authorization by the prosecutor respects the right to a fair trial and is consistent with a predictable legal framework.

In the context of the authorization of special surveillance methods, Romanian legislation sets out conditions and procedures similar to those regulated by the legislation of other countries, such as Italy and the United Kingdom. The authorization can be carried out by the prosecutor in emergency situations and the procedures provide for subsequent judicial review. Urgency is essential and is justified by circumstances that may affect the investigation, such as significant delays or loss of evidence. The term urgency is associated with an interval of several hours.

The public prosecutor may authorize the methods of surveillance by a reasoned order for a maximum of 48 hours. A judicial review within 24 hours of the expiry of the measure ordered by the public prosecutor is required to confirm the surveillance measure. The public prosecutor is obliged to make a proposal to confirm the measure, submitting relevant information and the summary report. The

judge may reject or confirm the measure, ensuring the protection of individual rights. Confirmation does not confer an absolute presumption of the legality of the evidence. In criminal proceedings, it is specified that special surveillance methods may be approved for a maximum of 30 days, with the possibility of extension. The total duration must not exceed 6 months, except for environmental surveillance in private premises, which is limited to 120 days. The special surveillance methods must comply with requirements such as the nature of the offenses, the categories of persons, the time limit, the procedure for the use of the data and precautions when communicating the data.

Legal persons are generally excluded from technical surveillance, with the exception of the measure to obtain financial transaction data, which can also be ordered against a legal entity. The document mentions the need to individualize in the authorization acts the subjects by known criteria and highlights the differences between special surveillance and surveillance methods.

The fifth chapter sets out the procedure for **"execution of special supervision methods".** Enforcement is a phase, subsequent to the granting of a warrant for special supervision methods, which entails the administration of the evidentiary process in order to obtain the evidentiary material that will form the basis for establishing the truth in criminal proceedings. This phase requires a clear and predictable legislative framework.

The enforcement procedure of special surveillance methods must provide safeguards against arbitrariness of state bodies, so it is necessary that the legal norms provide for clear rules, the judicial bodies in charge of carrying out the enforcement procedure, as well as the precautions to be taken in the communication of data between the various state bodies, together with the circumstances under which intercepted data can or must be erased or destroyed.

In criminal proceedings, only the judicial authorities are empowered to draw up criminal prosecution documents, and specialized workers must meet the conditions for a judicial police opinion in order to be competent to carry out special surveillance methods. In practice, the Special Operations Directorate of the Romanian Police, composed of specialized police officers, plays an important role in the effective execution of technical surveillance warrants. The legislator designates specialized police workers as persons who can be delegated by the prosecutor with the execution of the technical surveillance warrant, focusing on technical aspects. The need for these workers to also be criminal investigation bodies is not considered mandatory according to doctrinal opinion and judicial practice. On the other hand, workers from the Department of Intelligence and Internal Protection are not categorized as specialized police workers and do not participate in the execution of technical surveillance warrants in criminal proceedings. The 2014 Criminal Procedure Code expanded the categories of

persons who may conduct technical surveillance to include "specialized police workers" and "specialized state bodies". The ambiguity of the term "specialized state bodies" has led to the invalidity of some acts implementing technical surveillance warrants. The protocols between the Public Ministry and the Romanian Intelligence Service have been criticized, generating divergent interpretations in judicial practice. The Constitutional Court found a constitutional conflict concerning these protocols, and their impact on evidence obtained through technical surveillance has been a subject of intense debate.

The phrase "or by other specialized state bodies" in the Code of Criminal Procedure was declared unconstitutional as regards the execution of the technical surveillance warrant. The ambiguity of the term has created uncertainty as to which entities are empowered, affecting the principle of clarity and predictability in the narrow field of technical surveillance. The recommendation is to adopt clear and specific language in the laws on technical supervision to avoid diverging interpretations and to ensure respect for fundamental rights.

The secret protocol between the Public Prosecutor's Office of the High Court of Cassation and Justice and the Romanian Intelligence Service (SRI), concluded in 2009, added to the legislation, detailing the procedures for cooperation and execution of technical surveillance warrants. The Constitutional Court found a constitutional conflict arising from the conclusion of a 2009 protocol between the Public Ministry, the Parliament and the High Court. The protocols were considered administrative acts and the 2009 protocol affected legislative policy and legal certainty. The Court ruled that evidence obtained from the execution of technical surveillance protocols by the Romanian Intelligence Service is null and void. The decision contributed to clarifying judicial practice on the exclusion of evidence derived from such warrants.

The National Center for Interception of Communications, created in 2002, collects and processes information for national security and manages the infrastructure that allows the interception of telephone conversations. Access to the systems is via protocols and checks confirm that interception is automated. The system allows access by four authorities and data is protected by law. Legislative intervention is necessary to clarify the status of staff and to protect personal data. The center's staff provides technical support but does not directly participate in the implementation of surveillance measures. Government Emergency Ordinance 6/2016 introduced amendments to the legislation on technical surveillance, seeking to grant the Romanian Intelligence Service the status of a special criminal investigation body. At the same time, the National Center for Interception of Communications (C.N.I.C.) was created. However, a 2016 Constitutional Court decision emphasized the ambiguities and vagueness in the law, insisting on the need for a clear and precise regulatory framework for technical surveillance.

Divergent interpretations of the decision have sparked debates on the legality of evidence obtained through technical surveillance.

The process of selecting the relevant conversations for technical surveillance is essential for drafting the legal documentation, complying with case law and limiting interference with privacy. Specific procedures, such as classification of information and retention of relevant data, are mentioned in the context of compliance with legal rules and fundamental rights.

The legal procedures for drawing up the minutes in the case of technical surveillance involve only the prosecutor or criminal investigation body, ensuring verification of the legality of the warrant and noting the relevant results of the surveillance activities. The play-back record, which is essential in the case of interception, does not include all conversations, but is selective in order to avoid excessive intrusion into privacy caused by the full play-back of conversations and to ensure a fair trial. The screening procedure in the current legislation is a legislative development designed to protect the right to privacy. Contrary to the opinion of some authors, this selection is not considered a retrograde step, but a necessary measure in the context of respect for fundamental rights. The certification of the transcript by the prosecutor is essential to confirm the accuracy of the transcript and its validity, ensuring that the rights of the parties are respected. The absence of certification entails relative nullity, but it does not validate the minutes in the event of failure to comply with legal provisions, such as the correct execution of the warrant for technical surveillance.

The Code of Criminal Procedure imposes a separate procedure for the preservation of data from special surveillance methods, activated after the final decision of dismissal or court judgment. The procedure also applies in the case of other judicial decisions of the bodies. The doctrinal opinion points out an inconsistency and a legislative vacuum, arguing that archiving in court would be more efficient and the preservation procedure should be standardized in cases of dismissal and discontinuance of prosecution.

The law permits the use of data from special surveillance methods in other cases, provided that strict legal criteria are met, including the lawfulness of the authorization and execution of the surveillance, as well as the relevance and usefulness of the evidence. The prosecutor has the power to order the use of the data in other cases, and failure to comply with the conditions may lead to the evidence being suppressed. Specific procedures must be followed to ensure the correct and lawful application of special surveillance methods. The introduction of Article 142^1 in the Criminal Procedure Code creates the possibility of electronic signature of technical surveillance data, providing flexibility for authorized persons. The qualified certificate provided by the S.T.S. ensures the integrity of the information. Informing the person under surveillance and the right to appeal

are essential safeguards, and compliance with deadlines and procedures contributes to the protection of fundamental rights and fairness of the criminal trial.

In the sixth chapter, the scientific paper deals with the **"content of special surveillance methods"** and analyzes the actions that circumscribe the content of each special surveillance method.

In this chapter the focus has been on a highly relevant aspect of these investigations, namely the interception of communications. Both legislative and technical aspects have been addressed, including the challenges associated with end-to-end encryption, which makes it impossible to intercept communications through such applications. In this chapter, an analysis of criminal procedural legislation was carried out, concluding that there is both a legislative and technical impossibility to intercept communications using end-to-end encryption. European states have adopted new methods of intercepting communications through mobile applications such as Whatsapp, Telegram and Facebook Messenger, while regulating the corresponding legal procedures. These methods involve the use of so-called "Trojan horse" software, which can be installed discreetly on mobile devices including phones, tablets, laptops and even smart TVs. These programs have functionalities such as activating the microphone to record sounds, intercepting data traffic before encryption, activating the camera to record video and recording typing. According to Article 138(2) of the Criminal Procedure Code, interception of communications refers to the interception, access, monitoring, collection or recording of communications made by telephone, computer system or any other means of communication. An analysis of these legal provisions shows that it is permissible to intercept communications via mobile applications such as Whatsapp, Telegram, Facebook Messenger, but it is not permissible to intervene on the computer system running these applications in order to install a Trojan horse program.

The significant differences between interception and obtaining traffic and location data are clearly highlighted. While interception focuses on the content of conversations in real time, traffic and location data retrieval focuses on information such as call numbers, date and duration of the call, without involving access to the actual content of the conversations.

The seventh chapter deals with ***'particularities of special surveillance methods'***, including provocation, technical surveillance in the use of undercover investigators, the probative value of evidence obtained from technical surveillance and technical surveillance of the lawyer-client relationship. With regard to provocation of evidence in the field of technical surveillance, it was held that while provocation to commit an offense is an element of unfairness, which may lead to violation of the right to a fair trial and exclusion of evidence, provocation of evidence has a distinct content and is not, in principle, incompatible with the fairness of the proceedings, since it only aims at proving the criminal activity,

which took place before. In the area of special methods of surveillance, provocation entails a third party being compelled by State authorities to conduct telephone or ambient conversations with the person under surveillance in order to obtain recordings which show whether or not criminal activity has taken place. In order to ensure that provocation in the area of technical surveillance methods is lawful and does not lead to impermissible impairment of the right to a fair trial, several conditions must be met. First, there must be legal authorization of the special surveillance methods by the judicial authorities. Conversations or communications of the parties or other persons may be recorded without authorization, if they actively participate and if the persons making the recording are not instigated by state bodies.

In Romanian law, the protection of the lawyer-client relationship in the case of technical surveillance is based on the extensive case law of the European Court of Human Rights and is regulated at national level by Article 139(4) of the Code of Criminal Procedure. The main objective of this additional protection is to ensure the right to a fair trial. The lack of adequate protection of lawyer-client communication may affect the ability of the accused person to express himself or herself freely and has the potential to limit legal advice on factual situations. It is essential to protect lawyer-client privilege by ensuring open and confidential communication between lawyer and client.

The legal protection applies exclusively to the lawyer-client relationship, regardless of how the lawyer was appointed.

As regards technical supervision, Romanian law does not provide additional protection for persons with special status, but focuses on the specific lawyer-client relationship. Under Romanian law, there are no special provisions for the protection of parliamentarians, magistrates or other special categories in the case of technical surveillance. However, certain protections in relation to technical surveillance are provided only in accordance with international agreements to which Romania is a party, to persons enjoying diplomatic immunity.

In the eighth chapter, we set out to highlight how ***"international cooperation in the field of technical surveillance"*** is achieved. Developments in communications technology make it possible to intercept telephone conversations, authorized by the judicial authorities of one State, even when the subject of the measure is travelling in the territory of another State, without requiring technical assistance from that State. If the measure of technical surveillance of the interception of a person is ordered on the territory of a Member State as an investigative measure and that person is traveling on the territory of Romania and the interception can be carried out without the need for technical assistance from the national authorities, the obligation to notify arises. In Romania, the Public Prosecutor's Office of the High Court of Cassation and Justice is the authority designated to receive notifications when the person subject to the interception of

telephone conversations authorized by a judicial authority of another State is present on Romanian territory. After receipt, an examination is carried out to verify whether the measure would have been authorized in a similar case pending before the national judicial authorities. Even if the measure has been authorized in another State in accordance with the law, a new examination is carried out to verify that the legal conditions have been met. If the measure would not have been authorized in a similar case in Romania, the Public Prosecutor's Office notifies the issuing State that the interception may no longer be carried out and that the material already intercepted on Romanian territory may not be used, or may be used only under certain conditions. The designation of the Prosecutor's Office of the High Court of Cassation and Justice as the competent authority is considered unwise because the prosecutors in this unit are not sufficiently autonomous from political power.

This chapter has highlighted the use of international letters rogatory for cooperation in criminal matters between States not subject to Directive 2014/41/EU. This form of cooperation also covers technical assistance for interception of telephone conversations, even if not specifically mentioned. Letters rogatory may be addressed to the Romanian authorities when technical support for the interception of communications is required. These requests must provide details about the authorization of the interception measure, including duration and technical aspects, and, if the subject of the interception is in Romania, include a description of the facts for assessing the legality of the measure. On the other hand, the Romanian authorities may request technical assistance from other states for the interception of conversations of persons outside Romanian territory. Cooperation is based on the exchange of information and mutual assistance between judicial authorities.

The ninth chapter aims to set out how ***"surveillance of persons in the field of national security*** is carried out***." The*** main objective of this section of the doctoral dissertation is to *analyze and provide a detailed insight into the measures used by intelligence agencies to protect national security in Romania* . In doing so, it aims to understand the framework in which these measures may affect the fundamental rights of individuals and how these activities are regulated under national legislation.

A first research method is documentary analysis: Examination of existing legislation relating to national security and the activities of intelligence agencies to identify existing regulations and procedures. Comparison of legislation in other countries relating to national security and the restriction of fundamental rights has also been used to identify good practices and lessons learned.

Protecting the national security of the state is a desideratum of every state, and in order to achieve it, intelligence agencies must have at their disposal a wide range of measures to uncover threats to Romania's national security. In order to be

effective, these measures, which are mainly aimed at gathering intelligence, often involve restricting the fundamental rights of individuals. Intelligence gathering is a sensitive activity, which is carried out clandestinely, in order not to reveal the identity of the sources and to allow the removal of threats to national security.

Specific intelligence-gathering activities may be carried out only when there is a threat to national security and the measures are necessary to uncover, prevent or combat risks to national security. The notion of threat to national security is not left to the free interpretation of the state institutions, but the legislator has defined in Art. 3 of Law 51/1991 all the situations in which a threat to national security is deemed to exist. The process of authorizing specific intelligence gathering activities that may affect the fundamental rights and freedoms of citizens in criminal proceedings in Romania is rigorous and well defined. It involves multiple steps which ensure the participation of judicial bodies in the authorization process, thus guaranteeing an additional level of protection of individual rights. The procedure is clearly regulated by Law 51/1991 on Romania's national security, providing a predictable and accessible legislative framework.

Intelligence agencies, such as the Foreign Intelligence Service, the Romanian Intelligence Service, the Protection and Security Service, the General Intelligence Directorate of the Ministry of National Defence and the General Directorate of Internal Protection of the Ministry of Internal Affairs, are responsible for initiating requests for authorization. The prosecutors appointed by the Prosecutor General examine the legality and merits of these applications within a limited time limit and the Prosecutor General decides on the authorization proposal.

Subsequently, the President of the High Court of Cassation and Justice is responsible for reviewing and authorizing the request for authorization, ensuring that the fundamental rights of the data subjects are protected. The procedure provides for continuous judicial oversight of specific intelligence gathering activities, ensuring effective judicial supervision.

The use of the recordings resulting from these activities in criminal proceedings is subject to strict conditions, and failure to comply with them can lead to sanctions, including the invalidity of the authorizing or enforcement acts. The High Court of Cassation and Justice has the power to settle appeals on the legality of the recordings, ensuring an effective mechanism of judicial review.

Overall, the system strikes a balance between the need to collect information to protect national security on the one hand and respect for the fundamental rights of citizens on the other. The procedure is designed to prevent arbitrariness and to ensure transparency and accountability in the use of these specific measures.

III. Conclusions and proposals de lege ferenda

The Romanian legislation regulating evidentiary procedures - special methods of surveillance, is a clear and predictable law, in the autonomous sense given by the jurisprudence of the European Court of Human Rights[1] The legislation is sufficiently detailed, it provides that evidentiary procedures can be authorized only in a procedural framework, the conditions to be met for their authorization, the manner of implementation, conservation, archiving and destruction of materials resulting from special methods of surveillance. Chapter IV of Title VI, "Special surveillance or investigation methods" of the Criminal Procedure Code contains quality legal provisions, which describe in detail the conditions for authorization of special surveillance methods, their content, as well as the manner of their execution. Since the entry into force of the Criminal Procedure Code[2] , the Constitutional Court has sanctioned the legislation regulating special methods of surveillance three times and has issued a decision finding a constitutional conflict. The last update of the legislation in this area took place with the adoption of Law 201 of 2023, published in the Official Gazette No. 618 of July 6, 2023, which brought the legislation in line with the Constitutional Court Decisions 244/2017 and 55/2020. This update regulated the procedure for the use of recordings obtained from activities, as well as an appeal against technical surveillance measures. The legislator's intervention is to be appreciated, even though it occurred more than 3 years after the Constitutional Court's decision. Updating the legislation makes it possible to better respect the rights of persons under surveillance and provides effective mechanisms for remedying breaches of the legal provisions and excluding material resulting from special surveillance methods authorized or carried out without complying with the legal provisions.

In the process of enacting legal provisions governing special surveillance methods, the legislator has to balance on the one hand the state's interest in using efficient and effective tools for investigating crime and on the other the need to ensure effective protection of the right to privacy. The balancing process is difficult, since increasing the effectiveness of special surveillance methods implicitly entails greater interference with the right to privacy, and regulating additional safeguards for additional protection of the right to privacy implies more difficult authorization of special surveillance methods. However, as a result of the scientific research, we are formulating some proposals for improving the legislation, which are aimed at both improving the effectiveness of special

[1] Case Klass and others v. Germany, judgment of September 6, 1978.
[2] Law 135/2010, published in the Official Gazette no. 486 of July 15, 2010, in force since 01.02.2014.

surveillance methods and obtaining evidence that can contribute to uncovering the truth, and at establishing new mechanisms for the protection of the right to privacy.

As a result of scientific research, we have identified the difficulties faced by investigative bodies in investigating complex cases, due to the impossibility of intercepting conversations that are carried out through applications installed on computer systems using *end-to-end encryption* technology.

Telecommunications technology has evolved rapidly. The classic telephone line is a thing of the past, at the heart of this technological evolution is the smartphone: the mobile phone, which has exceptional computing power and has become a kind of personal computer. In the light of technological developments, the mechanisms for intercepting communications carried via these mobile phones must undergo a correlative evolution. At present, communications carried via *end-to-end encryption* applications installed on smartphones, laptops, personal computers, smartwatches, etc. cannot be intercepted by state authorities. The impossibility of intercepting them is due to both legislative loopholes and lack of technical means.

The special method of surveillance provided for in Article 138 paragraph 1 letter a of the Criminal Procedure Code - interception of conversations and communications, apparently allows the interception of any communications by any means of communication. This category would include communications via telephone, computer system, smartphone, laptop, smartwatch, smart-tv, etc. However, in order to intercept communications via applications that use *end-to-end encryption*, it is necessary to install a Trojan malware on the computer system in question. That prior action of installing Trojan malware does not fall within the scope of 'interception of communications or of any type of communication', which involves only the interception, access, monitoring, collection or recording of communications made by means of a means of communication. Accordingly, since the technical surveillance measure does not allow the prior action of installing Trojan malware, it cannot be used to intercept communications carried by means of *end-to-end encryption* applications installed on computer systems.

Technically, it is possible to intercept such communications by remotely installing a Trojan virus malware on the device clandestinely, for example by sending an email, sms, or application updates. These Trojan malware that provide access to the computer system's microphone and camera, and secretly record video and audio, are called computer eavesdroppers or intrusive agents.

Through the comparative research method we have identified in the Italian legislation, the special surveillance method *"computerized data capture", an* evidentiary procedure that can be used only in the case of serious crimes and which is an investigative tool that helps to obtain evidentiary material that reflects the truth. In terms of content, the computer trap allows the camera, microphone and

screen of a computer system to be accessed and activated in order to access and record both remote conversations that are carried out through the computer system and communications that take place between persons present in the environment. This particular method of surveillance is effective in obtaining evidential material, but it entails a marked interference with the right to privacy, since it is also used to obtain video or audio recordings of conversations or activities taking place in the privacy of private premises. In our view, the legislature has a difficult task if it chooses to regulate such a special method of effective surveillance in order to ascertain the truth, since at the same time as regulating the surveillance measure, safeguards must be provided to prevent arbitrary interference with privacy and to maintain a balance between the interests of the investigating bodies in ascertaining the truth in a criminal case and the interference with the privacy of the person under surveillance by authorizing this special method of surveillance in criminal proceedings.

Following the scientific research, we conclude that a new special method of surveillance similar to the *"computerized data capture"* needs to be legislatively regulated in Romania in order to be used in the criminal process to ascertain the truth of conversations carried out through mobile applications that use *end to end encryption, given that* a considerable part of communications are carried out through such applications, such as Telegram, Whatsapp, Facebook Messenger, Signal, Viber, Skype, etc.

From the content point of view, such a special surveillance method could make and capture video or audio recordings by accessing the microphone and camera of the computer system. This type of surveillance could be made technically possible by remotely installing a Trojan-type virus[3] , which accesses the computer system's camera and microphone in the background, makes audio and video recordings and sends them to the bodies which execute the technical surveillance warrant. The special surveillance method could obtain video and audio recordings of the conversations and actions of the person under surveillance, both in public and in private places, even when the computer system *(mobile phone, tablet, laptop, personal computer, smartwatch, etc.)* is not used by the person under surveillance, it being sufficient for it to be in the proximity of the person under surveillance. Such a special method of surveillance, allowing remote access to the microphone and camera of the computer system in order to make video and audio recordings, would imply a greater interference with the right to

[3] A Trojan virus is a virus that is downloaded to a computer system as a legitimate program. The virus contains malicious code that allows access to the software running on that computer system - definition taken from https://www.fortinet.com/resources/cyberglossary/trojan-horse-virus#:~:text=What%20Is%20%20a%20Trojan%20Horse%20Virus%3F,system%20access%20with%20their%20software. https://www.fortinet.com/resources/cyberglossary/trojan-horse-virus#:~:text=What%20Is%20a%20Trojan%20Horse%20Virus%3F,system%20access%20with%20their%20software., accessed on 15.11.2023

privacy than the special methods of surveillance currently regulated by the Code of Criminal Procedure.

We consider that this new special method of surveillance should be regulated separately from the other methods set out in Article 138 of the Criminal Procedure Code, since the conditions for authorizing this new, more intrusive method of surveillance should be stricter than those that must be met for authorizing the special methods of surveillance set out in Article 138 para. 1 lit. a-d of the Criminal Procedure Code. We propose the introduction of a new Article 138, index 1 of the Code of Criminal Procedure with the title "Computer Data Capture" with the following content:

Art. 138[1] The computerized captor

(1) In addition to the methods regulated in Article 138 paragraph 1 letter a-d, the computerized data capture constitutes a special surveillance method.

(2) Computer sensor means the insertion of a computer sensor in an electronic device that allows access to computer data processed by the device and the making of copies, as well as access to the microphone, camera and screen of the device for the purposes of monitoring, collecting or recording communications made, as well as for the purposes of observing or recording conversations in the environment, movements or activities of persons.

(3) The data captor shall be authorized by the judge of rights and liberties for up to 30 days, when there is a reasonable suspicion of preparation or commission of an offense against national security provided for by the Criminal Code and special laws, as well as in the case of drug trafficking offenses, offenses against the regime on doping substances, illegal operations with precursors or other products that may have psychoactive effects, offenses related to the non-compliance with the regime on arms, ammunition, nuclear materials, of explosive materials and restricted explosives precursors, trafficking in and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of coins, stamps or other valuables, counterfeiting of electronic payment instruments, tax evasion, in the case of corruption offenses and offenses assimilated to corruption offenses, offenses against the financial interests of the European Union or other offenses for which the law provides for imprisonment of 7 years or more and the conditions set out in Art. 139 para. 1 lit. b and c.

(4) The measure of surveillance of the data captor may be extended, for duly substantiated reasons, by the judge of rights and freedoms, on a reasoned application by the public prosecutor, if the conditions laid down in Article 139 are met, each extension not exceeding 30 days.

(5) *The total duration of the data capture measure, with respect to the same person and the same act, may not exceed 120 days in the same case.*

The measure of surveillance of the data captor is carried out by technical means, so it should fall into the category of technical surveillance measures. In order to broaden the scope of technical surveillance measures and to ensure that the measure of the data capture has a uniform authorization procedure, like the other technical surveillance measures, it is necessary to amend Article 138 paragraph 13 of the Code of Criminal Procedure, which we propose to amend as follows *(1) lit. a) - d) or that provided for in Article 138, index 1.*

As regards the conditions of authorization of the measure, our proposal is that this special method of surveillance, which implies the most severe interference in the right to privacy, should be authorized only when there is a suspicion of a crime of an increased seriousness specifically nominated by the legislator, or with a sentence limit of 7 years or more, not in the case of all offences provided in the list provided in Article 139 paragraph 2 of the Criminal Procedure Code.

We also consider that this special surveillance method should have a shorter total duration of authorization than the other special surveillance methods, given its more intrusive nature. We consider that it would be appropriate to limit the total duration of the computerized surveillance to 120 days, in the same way as the measure of video surveillance by audio and video photography in private premises, the total duration of which may not exceed 120 days in the same case, with regard to the same person and the same criminal act. This solution would be appropriate as there is a certain similarity between the two measures, in that they both involve a greater intrusion into private life, as they can capture conversations and activities taking place in the privacy of private premises.

Any process of streamlining special methods of surveillance must be counterbalanced by the establishment of safeguards against arbitrary interference, as well as ways to challenge breaches of the legal provisions governing the safeguards established by law to protect fundamental freedoms. The list of offences for which this special method of supervision could be authorized should be restricted We consider that this special method of supervision should be used only in exceptional cases, when there is a reasonable suspicion of the commission of a very serious crime, with a maximum sentence of 7 years or more, and not in the case of all the offences referred to in Article 139, paragraph 2 of the Criminal Procedure Code or for which the law provides for a sentence of 5 years or more. We emphasize that this special method of surveillance - *the computerized data capture* - would be a valuable tool for the investigative bodies, which could prove serious and complex criminal activities that undermine the smooth functioning of society and would satisfy the purpose of the criminal proceedings to hold criminally liable persons guilty of committing crimes and at the same time guarantee the right to a fair trial of the injured parties.

We have also identified in our scientific research a number of ways to improve the safeguards against arbitrariness of state bodies by regulating an adversarial island in the selection procedure. Special methods of surveillance lead to the obtaining of evidence that includes aspects relating to the most intimate manifestations of privacy. Although I cannot control the aspects captured by special surveillance methods, I believe that in the process of selecting the relevant material to be submitted to the case file, the judicial bodies must carry out a real and serious examination. At present, the selection process involves selecting the data relating to the act for which the initiation of criminal proceedings or the identification or location of persons has been ordered and materializing them in the content of a report attached to the case file, as well as archiving at the prosecution service's premises, in special places with confidentiality guarantees, data which do not relate to the act which is the subject of the case or which do not contribute to the identification or location of persons. This process falls within the exclusive competence of the judicial bodies implementing the special surveillance methods. The special surveillance methods are characterized by confidentiality only during the authorization and execution phase, in order to obtain reliable evidence capable of leading to the truth. After the execution phase of the special surveillance methods has been completed, the confidential nature of the surveillance shall cease and the persons under surveillance shall be informed about the surveillance measures. After the supervised person has been informed, we consider that it would be appropriate to regulate an adversarial island in the selection procedure, as the involvement of the supervised person in the selection process would lead to a real selection being made and only the relevant material being submitted to the case file. Making a genuine selection of the relevant material and filing all other data at the prosecution service's premises would blur the interference with the right to privacy.

We propose that once the selection process has been carried out, the main actor in the implementation of the special supervision methods - the prosecutor - should send the selection report to the person under supervision. Following the notification, the supervised person would be able to consult all the materials resulting from the execution of the special methods of supervision and challenge the manner of their selection before the judge of rights and freedoms. An adversarial procedure will be conducted before the judge of rights and freedoms, with the participation of the public prosecutor and the supervised person, on the basis of which the judge of rights and freedoms will decide which materials will be archived and which will be attached to the case file.

In the light of the above, I propose to introduce a new Article 143^1 in the Code of Criminal Procedure, with the following content:

Art.143^1 The process for selecting relevant materials

(1) Following the selection of the relevant materials, the criminal prosecution authorities shall draw up a report to be sent to the person under supervision.
(2) Within 5 days from the receipt of the selection report, the supervised person may request to consult all the materials resulting from the technical surveillance activity conducted against him/her.
(3) The supervised person may lodge a complaint against the manner in which the selection was made and request the inclusion of other materials in the category of relevant materials, or the exclusion from this category of materials containing data that are not related to the fact that is the subject of the case, or do not lead to the location or identification of persons.
(4) The time limit for filing a complaint is 10 days and runs, as the case may be:

- *a) from the expiry of the deadline for making a request to consult the material resulting from the technical surveillance activity, if no such request has been made;*
- *b) from the time limit set by the prosecutor for consulting all material resulting from the surveillance activity*

(5) The complaint shall be addressed to the judge of rights and freedoms of the court which, according to the law, would have jurisdiction to hear the case at first instance.
(6) The erroneous complaint shall be sent administratively to the competent court and shall be considered valid if it has been lodged within the time limit with the non-competent judicial body.
(7) The complaint shall be resolved in the council chamber within 3 days of its registration, with the participation of the prosecutor and with the summoning of the petitioner.
(8) The judge of rights and freedoms shall verify how the selection of materials was carried out, on the basis of the works and material from the prosecution file and any other evidence.
(9) The judge of rights and freedoms shall decide in chambers, in a reasoned judgment, which shall not be subject to appeal, and may order the following remedies:
a) reject the complaint as inadmissible if it is lodged in violation of para. (1), as untimely if lodged in breach of paragraph. (4) or as unfounded;
b) admits the complaint and finds that all or part of the contested materials are not related to the subject matter of the case or do not contribute to the location or identification of persons. If the complaint is upheld, the judge shall order the archiving of the materials at the public prosecutor's office, in special places, with confidentiality guaranteed.

In our opinion, if an adversarial procedure is established for the selection of relevant materials resulting from technical surveillance activities to be kept in the

case file, there will be an additional guarantee that the case file will not contain materials that concern only aspects of the private life of the person, without being relevant to the outcome of the case. In the legislation of other States, there is this island of adversariality in the process of selecting the resulting materials. For example, Italian criminal procedural law[4] provides for a three-step selection of material resulting from technical surveillance. The first step involves a selection of materials by the judicial police, who assess which intercepted telephone conversations will be transcribed, even partially, into the minutes. The purpose of this pre-selection by the police is to protect the right to privacy, since it is more difficult to maintain the confidentiality of all conversations if they are to be recorded in the minutes, as paper can circulate faster and more easily than a recording. The second step is a selection by the Public Prosecutor's Office, which decides which materials are relevant to the case. The Public Prosecutor's Office can take full ownership of how the selection is made by the judicial police, or it can request the transcription of other relevant conversations or the archiving of material comprising conversations that have been transcribed by the judicial police and are not related to the subject matter of the case. The third step is a selection made by the judge with the participation of defense counsel. Upon completion of the second step, the Public Prosecutor's Office submits to the defense lawyers documents attesting how the selection was carried out. They shall immediately have the right to examine the materials resulting from the technical surveillance. Within 10 days, the defense counsel shall have the right to make a request to the judge to include or exclude material irrelevant to the resolution of the case. The judge sets a time-limit in chambers, in which the public prosecutor and the defense counsel participate, and decides by final judgment.

Finally, we emphasize that a regulation by the Romanian legislator of an adversarial procedure in the process of selection of materials relevant for the resolution of the case resulting from a technical surveillance activity would constitute an additional guarantee for the effective protection of the right to privacy.

Another conclusion that can be drawn from the scientific research is that in certain situations, in the field of special methods of supervision, the role of the judge of rights and freedoms needs to be strengthened. For example, following the termination of the supervision measure, either by expiry of the time limit[5] , or by an order of termination by the prosecutor before the expiry of the time limit[6] , when the grounds which justified the measure no longer exist, the prosecutor is obliged to inform the judge of rights and freedoms. Following the information, the judge

[4] Teresa Bene in *L interception of communications*, op.cit., p.145
[5] Art. 143 para. 5 of C:proc.pen.
[6] Art. 142 para. 4 of C.proc.pen.

of rights and freedoms cannot order any measure, under the current rules, his role is only decorative. The judge of rights and freedoms exercises the function of laying down the fundamental rights and freedoms of persons at the stage of criminal proceedings, so he cannot be assigned a function that is ineffective. It is ineffective to inform the judge of rights and freedoms, without this judicial actor being able to order any measure to censure any possible infringement of fundamental rights or freedoms. We consider that the legislature should intervene, either to repeal the articles of the law which stipulate that the public prosecutor must inform the judge of rights and freedoms in the above-mentioned situations, which is superfluous in the absence of rules governing the measures that may be ordered by the judge of rights and freedoms, or to regulate the measures that may be ordered by the judge of rights and freedoms following the information. A similar situation also arises when conversations between the person under surveillance and the lawyer are monitored and the prosecutor orders the destruction of the evidence obtained and informs the judge of rights and freedoms. In this situation, the judge of rights and freedoms can still order a measure, i.e. he has the possibility to assess whether the lawyer has been informed.

We consider that in these situations it would be ideal for the judge of rights and freedoms to have the possibility to initiate a procedure, in which the supervised person also participates, to verify the legality of the materials resulting from the implementation of the special supervision methods, without the need for the supervision measure or the materials resulting from its implementation to be challenged by the supervised person.

Another guarantee to avoid arbitrariness in the field of special surveillance methods would be to regulate by law the status of the National Center for Interception of Communications. This institution was created by a decision of the Supreme Council for National Defense[7] in 2002. The only mention in a normative act about the National Center for Interception of Communications is in the Emergency Ordinance no. 6 of March 11, 2016,[8] which designates it as an authority within the Romanian Intelligence Service with the role of providing access to the technical systems of the prosecution authorities for the purpose of carrying out the interception of communications, or any type of remote communication.

The content of this article concludes that the National Center for Interception of Communications, a structure within the Romanian Intelligence

[7] *PROTOCOL on the cooperation between the Romanian Intelligence Service and the Public Ministry for the establishment of concrete conditions of access to the technical systems of the National Center for Interception of Communications*, available at https://www.mpublic.ro/sites/default/files/PDF/PROTOCOALE/protocol_privind_cooperarea_intre_sri_si_ministerul_public_privind_conditiile_de_acces_la_centrul_national_de_interceptare_a_comunicatiilor.pdf, accessed on December 4, 2023.

[8] Art. IV of G.O. 6/2016, published in the Official Gazette no. 190 of March 14, 2016

Service, is the authority that manages and owns the technical systems for intercepting telephone communications or any type of remote communication. Given the important role of this structure in the implementation phase of special surveillance methods, we consider that it would be necessary to regulate the status and the organization of this structure by primary legislation. If the status and the transparent organization of the National Center for Interception of Communications were to be strengthened by law, any interference in the implementation of special surveillance methods could be avoided. We consider that the National Center for Interception of Communications must enjoy autonomy in relation to any other state institution, but at the same time it is necessary to regulate by law a scheme for regular control of this institution, to be exercised by the judiciary.

An additional guarantee in the field of special surveillance methods could be to inform the public about the phenomenon of surveillance by means of special surveillance methods in criminal cases. From our point of view, it would be appropriate for Romania's Prosecutor General to present an annual public report presenting statistical data on the special surveillance methods authorized during the course of a year. This information should not cover the content of the interceptions authorized in cases pending before the judiciary, but only the total number of authorizations of special surveillance methods during a year.

We consider that a model for legislation in this area would be the Criminal Procedure Code of Canada which provides in section 195(3)(b) that a report shall be prepared annually containing a general assessment of the importance of private communications for the investigation, detection, prevention and prosecution of offences in Canada. The annual reports on the use of electronic surveillance are available online at[9] . They include several sections, namely introduction, statistics on the number of authorizations for electronic surveillance, the period of authorization, the offences specified in the authorizations, the type of interception methods authorized, the information provided to persons under surveillance, and the number of cases involving the unlawful interception of persons.

As a result of scientific research, we have observed in the field of special methods of surveillance and an omission of the legislator to regulate the preservation of materials resulting from technical surveillance, when a decision is made to drop the prosecution. Article 146 of the Code of Criminal Procedure regulates the preservation of materials resulting from technical surveillance when the prosecutor has ordered the case to be dismissed, or when the court has handed down a judgment of conviction, waiver of punishment or deferment of punishment, acquittal or termination of criminal proceedings. Even though very few situations

[9] https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2022-nnl-rprt-lctrnc-srvllnc/index-en.aspx, link accessed on 04.12.2023

can be identified in which the special supervision methods are used and subsequently a decision is taken to discontinue the prosecution, we consider that the legislator should regulate a way of archiving the material resulting from the special supervision methods. In the case of waiver of criminal prosecution, the special surveillance methods are used when the case concerns a serious crime mentioned by the legislator in the list provided for in Article 139 paragraph 2 of the Criminal Procedure Code or in the case of crimes for which the penalty is imprisonment for 5 years or more, so it is difficult to imagine that there will be no public interest in the prosecution of the crime, which is a condition for ordering a solution of waiver of criminal prosecution. However, given that waiver of prosecution can be ordered in the case of offenses for which the law provides for imprisonment of up to 7 years, in theory this solution can be ordered even in cases where special methods of supervision have been used.

Consequently, we propose to amend Article 146 paragraph 1 of the Criminal Procedure Code, for which we propose the following content:

Article 146 Preservation of material resulting from technical surveillance

(1) If a decision to dismiss the case, against which no complaint has been lodged within the time limit provided for in Article 340 or the complaint has been rejected, or a decision to discontinue the prosecution confirmed by the judge of the pre-trial chamber, has been issued, the prosecutor shall immediately notify the judge of rights and freedoms.

(2) The judge of rights and freedoms shall order the preservation of the material support or of the certified copy thereof, by archiving it at the seat of the court in special places, in a sealed envelope, ensuring confidentiality.

In our opinion, this form of Article 146 of the Code of Criminal Procedure would be more comprehensive, as it would also regulate the preservation of materials resulting from technical surveillance in the event that the prosecutor orders a decision to discontinue the prosecution. This form of Article 146 of the Code of Criminal Procedure would be a clear and predictable law, as it would provide for a procedure for the preservation of material resulting from technical surveillance, irrespective of the outcome of the case. The absence of a procedure for the preservation of material resulting from the implementation of special surveillance methods may lead to an infringement of the right to privacy of the person under surveillance. In the event of a decision to discontinue the criminal prosecution, we consider that the procedure of preservation of the resulting materials should be followed after the confirmation of the decision to discontinue the prosecution by the pre-trial judge.

With regard to the legislation governing specific intelligence-gathering activities that are similar or even identical in content to special surveillance methods, we consider that the legislation needs to be updated. One of the

conditions that must be met for the authorization of specific intelligence gathering activities involving the restriction of the exercise of fundamental rights or freedoms is the *existence of data or information showing the existence of a threat to national security*. Even if this condition is not explicitly provided for by Article 14, paragraph 1 of Law 51/1991[10] on Romania's national security, it follows from the interpretation of Article 15 of the above-mentioned normative act, which provides that the proposal for authorization of specific activities must include *"data or information from which the existence of a threat to national security is established, by presenting the facts and circumstances on which the proposal is based".*

We consider that this wording of the legislator can be interpreted restrictively by the judicial bodies and the proposals made by the intelligence bodies can be rejected, since at an early stage, the data and information held do not clearly indicate the existence of a threat to national security, but only reasonable grounds or reasonable suspicion of a threat to national security. Moreover, one of the reasons for authorizing specific intelligence-gathering activities is precisely to establish whether there is a threat to national security, so that if intelligence bodies already had data and information showing that such a threat existed, it would be superfluous to make a proposal to authorize specific intelligence-gathering activities.

We propose to amend Article 15 paragraph 1 lit. c of Law 51/1991 on Romania's national security, in the following form: *"c) data or information from which **a reasonable suspicion may arise as** to the existence of a threat to national security , by presenting the facts and circumstances on which the proposal is based;"*

We consider that when formulating proposals for authorization of specific activities, which have a similar content to special surveillance methods, it is necessary for the law to require only the existence of a reasonable suspicion of the threat to national security for which authorization of the measures is sought. At the time the proposal is made, intelligence research on the threat to national security is, in principle, at an early stage, so that not all the circumstances relating to that threat can be known in detail, and the mandatory requirement that there must be data or information from which a threat to national security can be inferred may be excessive. Considering the similar, even identical content of the specific activities of intelligence gathering, which imply the restriction of fundamental rights and freedoms, with the special methods of surveillance, for the authorization of which it is necessary to have a reasonable suspicion of the preparation or commission of a crime against national security, or as mentioned in Article 139

[10] Article 14 of Law 51/1991 regulates the conditions that must be met for the authorization of specific information-gathering activities that entail the restriction of the exercise of fundamental rights or freedoms

paragraph 2 of the Criminal Procedure Code, we consider that *mutatis mutandis* for the authorization of specific activities it is necessary to have only a reasonable suspicion of the existence of a threat to national security.

In the fight against the threats to Romania's national security, it is necessary that the intelligence bodies benefit from efficient tools to know and combat these threats, so that the procedure and conditions for authorizing specific intelligence gathering activities that imply the restriction of rights or freedoms must be regulated by a predictable and accessible legal framework. The unjustified rejection of proposals to authorize specific intelligence-gathering activities, which entail restrictions on the exercise of rights and freedoms that are so necessary to combat threats to national security, can be very damaging.

Finally, we can conclude that, in principle, the legislative framework enshrined in the Code of Criminal Procedure is in line with the case law of the European Court of Human Rights and provides sufficient safeguards to ensure that the right to privacy of the persons under surveillance is not unduly infringed. At the same time, we consider that this legal framework needs to be constantly updated, since the ways in which criminal activity is carried out are constantly evolving and the technical means by which these surveillance activities are carried out are constantly evolving.

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