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THE QUESTION OF EXCLUDING EVIDENCE OBTAINED IN CRIMINAL PROCEEDINGS AS A RESULT OF ENFORCING NATIONAL SECURITY WARRANTS BY THE ROMANIAN INTELLIGENCE SERVICE (SRI)

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Abstract: *Starting with 2016, the Constitutional Court of Romania issued a series of decisions whereby it repeatedly established that the interference of intelligence services in a criminal prosecution is not allowed, so that the evidence obtained with the help of these structures cannot be used in criminal proceedings, being affected by absolute nullity. This article summarizes the most relevant decisions of the constitutional court in this matter, as well as the recent practice of the High Court of Cassation and Justice, which we hope will signal other courts to ensure unitary jurisprudence at the national level.*

Keywords: *national security warrants, absolute nullity, exclusion of evidence, SRI*

1. Introduction

For a long time, the evidence resulting from the enforcement of national security warrants by SRI intelligence officers has been the basis of evidence in complex criminal cases. Despite the numerous criticisms made by the defence, these pieces of evidence, which were practically produced as a result of the gathering of information, were considered to be legal by the courts of law, thus being able to substantiate convictions.

Following the delivery of a series of decisions by the constitutional court, which outlined that the "collaboration" between the intelligence services and criminal investigation bodies does not meet the requirements of the fundamental law, the reason for which the evidence thus obtained cannot be used in criminal proceedings, a divergent jurisprudence has been created at the national level. Hence, two opinions had emerged in judicial practice, either in terms of keeping the evidence on file or excluding it.

This article wants to point out a decision from the recent practice of the High Court of Cassation and Justice which accepted the solution which we consider to be correct, in

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terms of acknowledging the absolute nullity of the evidence obtained by SRI based on national security warrants. We hope that the occurrence of this decision will put an end to the jurisprudential disagreements regarding the solution to be adopted concerning the means of evidence obtained by SRI based on national security warrants, in terms of acknowledging their absolute nullity, with the subsequent impossibility to use it as evidence in criminal proceedings.

2. The Views Expressed in Jurisprudence on the Exclusion of Evidence Obtained in Criminal Proceedings as a Result of Enforcing National Security Warrants by SRI

Decision no. 91/2018 of the Constitutional Court of Romania admitted the exception of unconstitutionality raised in the case and established that the phrase "*gravely harm the fundamental rights and freedoms of Romanian citizens*" included in art. 3 letter f) of Law no. 51/1991 on the national security of Romania is unconstitutional.

In this decision, the constitutional court acknowledged the following: "*27. The Court acknowledges that, as regards recordings made, a distinction can be made between recordings made as a result of enforcing a technical supervision warrant under the Criminal Procedure Code and recordings resulting from information-gathering activities that restrict the exercise of certain fundamental human rights or freedoms, authorized according to Law no. 51/1991, within the extra-criminal proceedings. (…)*

33. Thus, the Court finds that the corroborated analysis of the aforementioned provisions showed that the provisions of Law no. 51/1991 refer to data and information in the field of national security, establishing the possibility of transmitting them to the criminal investigation body if there are indications related to preparing or committing an act provided by the criminal law, without any provision regulated in the normative act attributing the quality of means of evidence to these data and information. Moreover, the Court finds that the regulation subject-matter of Law no. 51/1991 is that of knowing, preventing and removing internal or external threats that may harm national security and not the regulation of elements that may constitute evidence or means of evidence in criminal proceedings, these being provided by Title IV - Evidence, means of evidence and evidentiary hearing procedures - of the Criminal Procedure Code.

34. Hence, the Court acknowledges that the provisions of the Criminal Procedure Code are those that establish the elements considered evidence in art. 97 par. (1) and those that expressly list the means of evidence in par. (2) letters a)—e) of the same article, namely: statements of the suspect or defendant; statements of the aggrieved party; statements of the plaintiffs or parties with civil liability; statements of the witnesses; documents, expert or fact-finding reports, minutes, pictures, physical means of evidence. In terms of means of evidence, the provisions of art. 97 par. (2) letter f) of the Criminal Procedure Code stipulate that "evidence is obtained in criminal proceedings by any other means of evidence that is not prohibited by law". Also, in terms of recordings, the Court finds that art. 139 par. (3) of the Criminal Procedure Code qualifies as means of evidence the recordings made by the parties or by other persons when they concern their conversations or communications with third parties, as well as any other recordings unless prohibited by law.

35. Therefore, the required conclusion is that the provisions of the law on national security do not provide the quality of evidence/means of evidence to data and information resulting from activities specific to the gathering of information that restrict the exercise of fundamental human rights or freedoms, authorized by Law no. 51/1991. Only the provisions of art. 139 par. (3) of the Criminal Procedure Code could provide the quality of means of evidence to the recordings resulting from activities specific to the gathering of information, authorized according to Law no. 51/1991, and not the provisions of art. 11 letter d) of Law no. 51/1991."

The same issues were reiterated by the constitutional court in Decision no. 26/2019 of the Constitutional Court of Romania, which found the existence of a legal constitutional conflict between the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice and the other courts of law, on the other hand, generated by the conclusion of Protocol no. 00750 of February 4, 2009, between the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service, as well as the improper parliamentary control over the activity of the Romanian Intelligence Service.

Also, the Constitutional Court of Romania indicated in this decision the procedural remedy to be applied by the courts if the case file contains evidence produced by SRI, with the violation of the provisions on the subject-matter jurisdiction of criminal investigation bodies, establishing that they are affected by absolute nullity and must be physically excluded from the file.

For supporting the above, the following passages from Decision no. 26/2019 of the Constitutional Court of Romania are relevant: "*191. Furthermore, the Court established by Decision no. 91 of February 28, 2018, par. 35 that "the provisions of the law on national security do not provide the quality of evidence/means of evidence to data and information resulting from activities specific to the gathering of information that restrict the exercise of fundamental human rights or freedoms, authorized by Law no. 51/1991. Only the provisions of art. 139 par. (3) of the Criminal Procedure Code could provide the quality of means of evidence to the recordings resulting from activities specific to the gathering of information, authorized according to Law no. 51/1991, and not the provisions of art. 11 letter d) of Law no. 51/1991", which means that, compared to the provisions of the analysed protocol, given that the Romanian Intelligence Service was not a special criminal investigation body, any recordings resulting from activities specific to the gathering of information cannot be used as means of evidence. (…)*

194. The Court points out that Decisions no. 51 of February 16, 2016, and no. 302 of May 4, 2017, provided the courts with sufficient means to remedy the state of unconstitutionality created during the criminal investigation so that the anachronism created by the protocol mentioned - used as law by the criminal investigation bodies - could be eliminated by the courts as the decisions of the Constitutional Court were published. This decision only strengthens the results of the already consolidated jurisprudence of the Constitutional Court and points out again to the obligation of the courts to comply with the decisions of the Constitutional Court and the law in force, after the publication of the two decisions, which means that, taking into account art. 147 par.

(4) of the Constitution regarding the future enforcement of this decision, they must verify in pending cases the extent of the violation of the provisions on subject-matter jurisdiction and the quality of the criminal investigation body and to take the appropriate legal measures.

The same constitutional obligation is incumbent on the Public Ministry based on eadem ratio. (…)

205. (…) Therefore, in exercising its attribution, the Court uses a two-stage procedure, namely the analysis of the existence of the legal constitutional conflict and the conduct to be followed by the public authorities involved in the conflict, in case of an affirmative answer" [Decision no. 838 of May 27, 2009, or Decision no. 358 of May 30, 2018, par. 120].

208. The Court emphasizes that the evidence produced by bodies other than the judicial ones violates the subject-matter jurisdiction of the criminal investigation bodies, which entails the application of the sanction provided by art. 281 par. (1) letter b) of the Criminal Procedure Code, respectively the absolute nullity of the acts by which it was produced.

Also, the same sanction is imposed regarding the acts by which a piece of evidence was produced by the criminal investigation bodies, without taking into account the quality of the person.

209. Also, "the physical elimination of the means of evidence from the criminal case files, upon excluding the related evidence by declaring it null and void, according to the provisions of art. 102 par. (3) of the Criminal Procedure Code, an exclusion that implies the attribution of a double dimension to the notion of "exclusion of evidence" - respectively the legal dimension and that of physical elimination - is likely to effectively guarantee the fundamental rights invoked above, while ensuring a higher level of clarity, accuracy and predictability for the criticized text.

Therefore, the Court acknowledges that only under these conditions can the exclusion of evidence achieve its purpose, namely of protecting both the judge and the parties from forming judicial reasoning and delivering solutions directly or indirectly influenced by potential information or conclusions following the empirical examination or re-examination of the evidence declared null and void by the judge" [Decision no. 22 of January 18, 2018, par. 27]. (…)

211. Therefore, considering art. 197 par. (2) of the Criminal Procedure Code of 1968 and art. 281 of the Criminal Procedure Code, the latter text corroborated with Decision no. 302 of the Constitutional Court of May 4, 2017, which found that the legal solution included in the provisions of art. 281 par. (1) letter b) of the Criminal Procedure Code, which does not classify the violation of the provisions on subject-matter jurisdiction and the quality of the criminal investigation body in the category of absolute nullities, is unconstitutional, the High Court of Cassation and Justice and the other courts, as well as the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice and subordinate units should verify in pending cases the extent of the violation of the provisions on subject-matter jurisdiction and the quality of the criminal investigation body and take the appropriate legal measures."

It should be recalled that the decisions of the constitutional court are binding both in terms of the operative part and their considerations. Also, as it results from the previous passages, the Constitutional Court of Romania insisted on the fact that the data and information obtained by SRI within the operative activities, by enforcing a national security warrant in this case, cannot constitute evidence in the criminal proceedings.

Also, the constitutional court indicated the procedural remedy in question, namely acknowledging the absolute nullity of the resulting means of evidence - the reproduction minutes drawn up by the criminal investigation bodies after listening to the recordings of telephone conversations provided by SRI, e-mails, Yahoo Messenger calls, etc. - and their physical exclusion from the case file, according to the provisions of art. 102 par. 3 of the Criminal procedure code in conjunction with Decision no. 22/2018 of the Constitutional Court of Romania.

In other words, the enforcement of national security warrants by SRI intelligence officers is an illegal interference of intelligence services in the criminal prosecution, to be sanctioned by the court with absolute nullity and the exclusion from the case file of the evidence obtained disregarding the provisions on the subject-matter jurisdiction of the criminal investigation bodies.

Thus, we consider that the circumstance in which the transcription notes of the intercepted conversations bear the stamp of the competent prosecutor's office and the signature of the case prosecutor is irrelevant since the enforcement of the warrants - the actual obtaining of telephone conversations - was carried out by an incompetent body, namely by SRI intelligence officers, a context in which subsequent evidence is affected by absolute nullity.

We consider that no possible claim can be supported, meaning that the means of evidence, respectively the reproduction minutes of the telephone conversations were drawn up by the criminal investigation bodies, which listened, selected and reproduced the relevant conversations in question, while SRI's activity was limited to providing "technical support", respectively exclusively aimed at the interception and recording of telephone calls, which would not represent specific criminal investigation activities.

We state this because this involvement of SRI in the criminal investigation activity, more precisely in the stage of obtaining evidence using the evidentiary procedure of interception and recording of telephone conversations, affects the legality of the resulting means of evidence and determines their nullity, as acknowledged in the practice of the Supreme Court (Court resolution no. 31/C of September 27, 2018 of the High Court of Cassation and Justice).

Although there had already been several decisions of the Constitutional Court that acknowledged the unconstitutionality of some legal provisions relevant to the evidence obtained as a result of enforcing national security warrants by SRI (Decision no. 91/2018, Decision no. 802/2018, Decision no. 26/2019, etc.), there were courts that kept the reproduction minutes of telephone conversations intercepted as means of evidence, arguing that these decisions are assimilated to criminal procedure rules which shall only take effect for the future.

In other words, given that the evidence in question was produced at a time when the rules enjoyed the presumption of constitutionality, these courts considered that they

did not fall within the decisions of the above-mentioned Constitutional Court, so they could be kept and taken into account in the deliberations.

It is not irrelevant that the Constitutional Court of Romania admitted the exception of unconstitutionality on February 4, 2020, by Decision no. 55/2020 and found that the provisions of art. 139 par. (3) final thesis of the Criminal Procedure Code were constitutional insofar as they did not concern the recordings resulting from the specific gathering of information that restricted the exercise of fundamental human rights or freedoms, carried out in compliance with the legal provisions and authorized according to Law no. 51/1991.

We consider this an additional argument supporting the thesis according to which the information obtained in the SRI information files cannot be used as evidence in the criminal proceedings, requiring its exclusion from the case file.

Concerning the exclusion of the means of evidence resulting from the enforcement of security warrants by the Romanian Intelligence Service, the current judicial practice of the High Court of Cassation and Justice, respectively the Decision in the criminal case no. 382/A delivered on December 17, 2020, in file no. 345/64/2016, acknowledged the following: *"The analysis of the requests for removing the means of evidence resulting from the interception of communications carried out based on national security warrants issued under Law no. 51/1991 relies on the considerations of Decision no. 91/2018 of the Constitutional Court, according to which "the legal provisions on national security do not provide the quality of evidence/means of evidence to data and information resulting from activities specific to the gathering of information that restrict the exercise of fundamental human rights or freedoms, authorized according to Law no. 51/1991.*

Only the provisions of art. 139 par. 3 of the Criminal Procedure Code could provide the quality of means of evidence to the recordings resulting from activities specific to the gathering of information, authorized according to Law no. 51/1991 and not the provisions of art. 11 let. d of Law no. 51/1991".

Referring to these considerations, the court of the first instance acknowledged that, since the provisions of art. 139 par. 3 of the Criminal Procedure Code were in force and have not been declared unconstitutional, they were the basis for keeping the recordings based on national security warrants as means of evidence in criminal proceedings.

The High Court acknowledged that, following the settlement of the case in the first instance court (27.06.2019), Decision no. 55/2020 of the Constitutional Court admitted the exception of unconstitutionality and found that the provisions of art. 139 par. 3 final thesis of the Criminal procedure code were constitutional insofar as they did not concern the recordings resulting from the activities specific to the gathering of information that restricted the exercise of fundamental human rights or freedoms, carried out in compliance with legal provisions, authorized according to Law no. 51/1991.

Consequently, considering Decisions no. 91/2018 and no. 55/2020 of the Constitutional Court, there is no current legal basis for the use of recordings based on national security warrants as means of evidence in criminal proceedings, including if the activities specific to the gathering of information were *"carried out in compliance with the legal provisions" and were "authorized according to Law no. 51/1991".* Since the decisions of the Constitutional Court are binding from the date of their publication in the

Official Gazette, they produce effects even in pending cases, so that the recordings based on national security warrants can no longer be used as means of evidence in the case herein, according to the will of the Constitutional Court.

The exclusion of recordings resulting from the enforcement of national security warrants is the direct effect of Decision no. 55/2020 of the Constitutional Court, which did not leave it to the court to make judgments on the legality of their issuance but imposed their exclusion from the means of evidence that can be used in criminal proceedings, considering ineffective the provisions of art. 97 par. 2 let. f of the Criminal procedure code, according to which evidence can be obtained "by any other means of evidence that is not prohibited by law" in the criminal proceedings.

Hence, the exclusion of these recordings is not the consequence of finding any nullity (which would not be possible, as long as this is a sanction applied to documents prepared by the judicial bodies in criminal proceedings), but the direct effect of the decision no. 55/2020 of the Constitutional Court, which is the equivalent of law, according to art. 97 par. 2 letter f of the Criminal procedure code.

Therefore, although the court of the first instance and the defendants had access, in compliance with the legislation on the protection of classified information, including to the court resolutions that were the basis for issuing these warrants and some of them were issued based on art. 3 letter l of Law no. 51/1991 which was not declared unconstitutional, the intervention of the Decision no. 55/2020 of the Constitutional Court after the date of delivering the appealed decision which declared unconstitutional the provisions of art. 139 par. 3 of the Criminal procedure code, imposes the exclusion of recorded conversations obtained based on national security warrants, as a direct effect of this decision, the court being unable to censor them in terms of legality and thereby use them as evidence in the criminal proceedings.

Under these conditions, the High Court shall no longer analyse the criticism of the Public Ministry regarding the acknowledgment by the first instance court of the reduced evidentiary value of the interceptions carried out based on national security warrants."

3. Conclusions

Immediately after delivering the decisions of the Constitutional Court concerning the ability of the means of evidence resulting from the enforcement of national security warrants by the intelligence officers within SRI to constitute evidence in criminal proceedings, the practice of the courts was non-unitary, with the tendency to identify reasons for keeping them in the case file.

However, it seems that the current jurisprudence has embraced the point of view which we consider to be correct, namely finding that these means of evidence are absolutely null and void, with the consequence of excluding them from the case file. We hope that this question of law shall be finally clarified along with the latest decision of the High Court of Cassation and Justice, meaning that the means of evidence obtained by SRI based on national security warrants cannot constitute evidence in criminal proceedings.

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