THEME

APPLICATION OF EVIDENCE-SEEKING TOOLS IN CONFLICT WITH THE CRIME THAT AFFECTS NATIONAL SECURITY

INSTITUTIONS OF INTELLIGENCE COOPERATION AND INFORMATION ANALYSIS OBTAINED BY THEM

Based on the name the legislator has put in, the "evidence-seeking tools," they really are regulatory instruments of investigative activity in the function of the evidence. The importance of evidence as an element of conviction on the existence or not of the criminal fact, respectively the individualization of authorship against it, has directed the lawmaker to discipline at acceptable limits instruments for searching, finding and obtaining evidence, as well as their presentation in front of the Court from the prosecution body.

Inspections, checks, seizures, and tapping are included in the evidence-seeking tools, the application of which during the preliminary investigation phase enables the prosecuting body the direct or indirect benefit of the evidence, which is subject to review and evaluation during the Court hearing where it takes the actual character of the evidence as above.

Given that the means of providing the evidence are not evidence, but procedural instruments to take evidence, they represent the legal action carried out by the prosecution body, in the dynamics of the investigation of the case.

Evidence obtained in contravention of prohibitions provided by law may not be used (Article 151, point 4 of the Code of Criminal Procedure), such claim, except that of relative invalidity (Article 129 and the Code of Criminal Procedure).

Applying each of the forms mentioned above at the investigative practice requires a high sense of responsibility and a satisfactory professional level.

Articles 35, 36, 37 and 41 of the Constitution, in its entirety, protects the right of privacy in personal data security, the confidentiality of communication or the inviolability of non-control of the apartment.

Considering these constitutional guarantees, it is easy to distinguish that the four evidence-seeking tools tend to limit or violate both the right to privacy and the right to

property, which has made the legislature to be very cautious in the discipline of these instruments aiming guaranteed standards.

In this regard, the legislator has disciplined these instruments by Article 189 to 226 of the Criminal Procedure Code, guaranteeing respect for constitutional rights by law enforcement authorities. In the Republic of Albania, the experience of implementing the communications legislation is adapted in respect to family and private life.

The principle of proportionality balances the right between the general interest in prosecuting a case and protecting the fundamental rights of the individual. In respect to this principle, in each case, it is considered and evaluated whether the measure taken or the measure required by the court to approve is proportionate to the objective intended to be achieved by tapping, as an evidence-seeking tools, guaranteeing human rights and freedoms.

Exactly, based on an assessment that basically has the relationship between the violation of the right of privacy on the one hand and the need for the prosecution of the criminal offense, the legislator has exhaustively defined the criminal offenses for which the offense can be applied as a method of obtaining evidence. It is therefore clear that, in all cases where freedom or constitutional law and privacy, the right to respect private and family life, become subject to a potential violation by a state authority, regardless of the legitimate reasons, they must be done by procedural instruments defined by law, otherwise the outcomes in contravention to these provision would be invalid or useless.

In this context, we are in the conditions when the interceptions means, as means of obtaining evidence, have a dualistic nature, not just as means of investigation, but also as instruments that guarantee the respect of the constitutional rights of the parties, since their own conception by the legislator is made in that way that the interference or violation of a right through the means that violate the freedoms of the citizens to be as little as possible, but also in relation to the assessment of the need to intervene in this right and to the extent of this interference .

The prosecution body can not violate the Constitutional right for an effective access to the court, the investigated subject, denying him the right to appeal, provided by Article 223 paragraph 4 of the Criminal Procedure Code, which sanctions the obligation of the prosecution body to notify the interested party, its representative or the defense attorney of the procedural acts that have authorized the interceptions, but also the results of the

interceptions, which is a right that lies essentially in the accusatory system and in the principle of the active role of the defendants in the process. This is a solution that Albanian legislation, in the spirit of the European Convention on Human Rights, makes the obligation to guarantee the effectiveness of the defense at the stage of the interceptions, to place the investigative actions of the prosecutor not only under the judicial control but also to be controlled by the subject that this right has been violated. At this point, it is clear that this access, guaranteed to the subject under investigation would not undermine the investigation, but would guarantee him the right to object the validity of evidence.

Interceptions in the European Convention and Court on Human Rights perspective

It is necessary to quote some of the most important Articles of the European Convention on Human Rights affected by interceptions. Article 8/2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In our Criminal Code, Article 121 is provided as a criminal offense intruding into someone's privacy.

On the other hand, the principle of proportionality defines the boundaries of interference in the private life of the individual, justifying this interference by guaranteeing a higher interest which, based on a reasonable doubt based on evidence, is in danger. Intervention and violation of this constitutional right in this case is authorized by the Court, which through its decision gives authority to the Prosecution Office to intervene. In this context, court authorization, except for the nature of the intervention, provides also its duration, performance, equipment and technology, avoiding any possible abuse.

Exceptionally, the Code of Criminal Procedure provides that, in a special case, where due to the legal procedures for obtaining the authorization may lose the effect the mean of obtaining evidence by the interceptions, then it may be necessary for the interceptions to proceed with the order of the prosecutor.

In this case, the Court, within 48 hours, should not evaluate the validity of the decision for the prosecutor's interceptions based on the results of the interceptions, but focusing on the circumstances that motivate the need for immediate intervention for the unpaid interceptions. The absence of these motives, irrespective of the outcome and the results of the process, should make it unrecognizable.

Disrespecting the legal requirements make intercepts invalid, pursuant to Article 151, paragraph 4 of the Criminal Procedure Code, as they are a result of absolutely invalid acts from the perspective of Article 128 / b of the Criminal Procedure Code. The Prosecution Office's powers in the exercise of criminal prosecution recognize the limitations deriving from the constitutional guarantees incorporated in the criminal procedural law.

Base on the existing legislation since 2005 in the General Prosecution office a centralized Centralized Electronic Communication Structure has been created and executed, which covers the needs in the preliminary investigations conducted in all District Prosecution Offices and in the Prosecution Office for Serious Crimes where an interception is applied as an evidence-seeking tool.

The effectivity of the application as an evidence-seeking tool is obvious. Due to the dynamic follow-up by the judicial police officers, co-ordination with their field counterparts has been achieved every year in arresting in flagrance of more than 400 people suspected of various criminal offenses. Transmitting in time of information obtained during interception has created premises for expanding investigations and especially in proactive investigations. ***There are few cases where on the data obtained during the interception beyond the subject of the criminal proceeding, it has been possible to register separately the criminal proceedings mainly for the criminal offense of corruption by both, the judge and the prosecutor as well as other public functionaries. The positive effects resulted mainly on the phenomenon of trafficking in narcotic drugs finalized with the destruction of some structured criminal groups.***

The way of building and functioning in a centralized state of the Electronic communication process structure has created its own difficulties in practice for a number of reasons, but this has been forced by the legislation. The General Prosecution office has suggested that in 2012 the Assembly of Albania the amendment of the legal provisions that made it difficult to open the way for the decentralization of criminal procedural

interception, but no understanding was found. Decentralization and at the same time the establishment of these interception offices at the Districts Prosecution Offices in our assessment would have an impact on increasing the effectiveness of court decisions as they would be directly carried out under the prosecutor's guard by the field investigation officers. The data obtained by intercepting would be taken from them in real time.

Increasing intercepting capacities as their instrumental sophistication is a necessity. It is needed immediately the strategic and periodic investments to achieve the rapid development of technology. This investment should focus on both types of interceptions that are used as evidence-seeking, active and passive interceptions, more focused on the active one. Examples of active interceptions are downloading through electronic devices, tracking social networks, which are currently the preferred way of communicating between elements of criminal networks. As above, the focus should be focused mainly on offenses that seriously threaten national security.

The National Security of the Republic of Albania represents the entirety of state means and instruments that ensure the protection of citizens, society and the Albanian state from the threats and external and internal dangers.

We are aware of terrorism as a general threat to world peace and security. The phenomenon of national and international terrorism represents one of the most difficult challenges for today and the future.

The geostrategic position of Albania creates conditions for the country to be targeted as a transit point, not only for trafficking and illegal activities, but also for the spread of terrorism, especially on a fundamentalist basis.

Our priorities in the fight against terrorism have been to strike in all its appearance forms. To fulfill this engagement, we have focused on increasing effectiveness through increasing the quality of investigation and strengthening inter-institutional cooperation with specialized agencies in this field, as well as orienting towards a severe punishment policy for these criminal offenses.

International terrorist organizations, separately and in cooperation with each other, have become today the main national and international problem and challenge of all law enforcement structures, international police agencies, state structures and society as a whole. Today, they are really a threat to the systems and democratic values of any

country. The war in Syria had its impact in Albania as well. This impact has been transmitted to Albania through subjects of Albanian nationality, where some of them have lived and been educated in Middle East countries.

In the current situation, the most widespread phenomenon in Albania and other countries in the region has been the organization and participation in combat operations in Syria. The influence of religious faith in this activity has been decisive, as most of the Albanian nationals went to Syria and were convinced to carry out actions for the benefit of mankind, actions influenced by propaganda.

This phenomenon has been adapted to the changes made to the Criminal Code by Law No. 98/2014, which added respectively to the offenses "Participation in combat operations in a foreign country", "Organization for participation in combat operations in a foreign state" and "Call for participation in violent combat actions in a foreign country". From the investigations conducted by the Prosecution Office of Serious Crimes in Tirana resulted the implication in this criminal activity in the role of the organizer for the recruitment of persons and their dispatching to the fighting jihad in Syria, a large number of people.

During the investigation of these criminal proceedings there was an efficient cooperation with state police structures and state intelligence services. Within this cooperation, successful application of special investigation methods authorized by the Prosecution Office and the Court has been enabled, among which we distinguish interception as an evidence-seeking tool.

The fight against corruption has been and remains one of the priorities of the Prosecution Office. Based on the analysis of the indicators of the fight against corruption, it is evident an increasing tendency. The persons investigated, tried and convicted for this group of offenses have been public officials of different levels, from simple, local elected officials to senior officials in central institutions. We have considered and continue to consider as a priority the fight against corruption within the ranks of the prosecution and the judiciary.

The existence and the dangers of corruption, describe the best, the hidden and dangerous nature of it. While ordinary serious crime is noticeable, the symptoms of corruption crime are often covered by "shadow" and silence. Such a quality makes this crime very dangerous and startling. Ignorance and even more the negligence of the moment not only affect the construction of the wrong plans but make the fight against this crime to be paid

too "expensive" in the future. It extends its metastases not only in the economic aspect, but also in the political dimension. The relations between organized crime and corruption maximize the risks to destabilize the situation in the country.

Under these conditions, disclosure of corruption-related offenses requires the adoption of new investigative methods to make it possible to examine financial operations, to oversee transactions, suspicious businesses and organization management schemes, to examine computerized data, the efficient application of evidence-seeking tools, the involvement of the secret police, broader cooperation with banking authorities, and the qualification of specialized investigative staff to follow these operations.

Special attention is needed to detect and punish the phenomenon of corruption carried out by powerful or governmental people. When the number of corrupt officials is high, then the state "building" serves to the criminal activity. It is important to emphasize that politicians are those who, after taking over the power, are not only direct subjects of these offenses but also cover their conduct by various means, including adaptation of the legislation in favor, up to pressure by using their power. Unfortunately, many facts impose the view that state policy, by tolerating and not fighting corruption, becomes a corrupt system and this kind of crime not only "legalizes", but also protects it with the mechanisms of power created and envisaged for preventing and combating corruption. It has to be emphasized the fact that for a period of about 15 years (1998-2012) the circle of these subjects (ministers, MPs) have used the immunity guaranteed by the Constitution before the changes. Under the Article 73, paragraph 2 of the Constitution, the MP may not to be prosecuted without the authorization of the Assembly. Article 103, paragraph 3 provide also this guarantee to the Ministers. Members of the Council of Ministers shall enjoy the immunity of the deputy.

Such a situation has slowed down the reform process, making it a serious obstacle to their continued success. This is why many analysts call corruption "cancer that feeds itself". Corruption is carried out and "lives" through officials, government representatives, political parties, institutions and governmental and non-governmental bodies, and the ten principles set out in the Comprehensive Commission of the EU Anti-Corruption Policy should be materialized and implemented.

COOPERATION WITH INTELLIGENCE INSTITUTIONS AND INFORMATION ANALYSIS GAINED FROM THEM.

Legitimate collection and the coordination of intelligence from law enforcement agencies and national security agencies obtained from human and technical resources is fundamental to potential monitoring and capturing of the terrorist and more. The availability of such intelligence through information technology systems can prevent terrorists from attacking devices, such as the source of weapons and explosives, plans and communications, funding and propaganda, the reduction or elimination of access to chemical, biological, radiological materials and nuclear.

There is space for intensifying cooperation and interaction with profiled agencies such as SHISH, AIU, State Police Criminal Investigation Department, in particular anti-terrorism service at this department, for which the primary task remains the identification in time of forms and methods used by terrorists, or certain terrorist-anarchist groups, to have them as a reference in their preventative work.

In order to increase the effectiveness of the detection, prevention and impact of this dangerous criminal activity with serious consequences, in addition to the increase and intensification of cooperation with domestic and partner agencies, it is asked the application of contemporary standards for more efficient treatment of the received information by these agencies. I think that modalities are needed to be developed to increase the role of the Prosecution Office, mainly in the treatment of data obtained by interception, aiming proactive investigations. The intensification of the fight against crime must necessarily be accompanied with changes in the field of legislation, especially on the interaction of the Prosecution Pffice with other law enforcement agencies inside and outside the country, as well as the modernization of techniques for handling and processing information, obviously in compliance with the guarantees provided by the Constitution and those sanctioned in the ECHR.

Intelligence agencies, with the aim to absorb information for detecting and preventing criminal activity according to the object defined in their organic laws, other legitimate sources have the ability to receive information through electronic communications, conducted according to law no. 9157, or as we call it otherwise "Preventive Interception", whose results cannot persist as evidence.

Preventive interception is attributable only to the informative institutions and the General Prosecutor until the amendments made to the law by the end of April 2017 was the sole supervisor and decision maker in the implementation of this procedure. The legal

changes mentioned above consist mainly in the transfer of the decision-making authority, to allow preventive interception, to the General Prosecutor, to the President of the Court of Special Appeals, or to the Vice-President, in his absence.

At the discussion phase about the changes that came to law no. 9157 in April 2017, we submitted proposals to the Law Commission but were not evaluated positively.

In our view, the involvement of the court in the approval of the interception authorization is necessary in the criminal procedural process, while in preventive interception, in order to guarantee effectiveness and response in time to the danger of national security or other serious crimes, presents problems.

The involvement of the Court of Special Appeals in reviewing (approving or refusing) the requests of the informative institutions is inadequate even for the performance of their function as a judge in justice, due to the influence it may have on the information obtained during the examination of these requests, ***creating as de facto the incompatibility conditions in the Articles 15, 16 and 17 of the Criminal Procedure Code.***

The experience so far shows that a lot of data gained during preventive interception, lose their value because they are useless, also because intelligence service employees do not have the attributes of judicial police. Faced with this situation, given the authority given by the law to the General Prosecutor, aiming to efficiently handle this information in a timely manner, it is suggested case by case to transmit information enabling the launch of proactive investigations and this has well-functioned. This is the reason of the reservations that we have also expressed against the wording of Article 15, point 2 of the amendments made to this law, according to which "the leader of Special Prosecution Office, the General Prosecutor or the leader of the Prosecution Office at the First Instance Court according to their competences have the right to recognized, by the head of the state institution that has requested the interception, the results of the interception, upon its completion, unless the head of the respective state institution considers that the results of the interception should also be known before its end."

Assessing interception as a delicate action, that violates human rights and freedoms, but on the other hand necessary in the fight against crime, the General Prosecutor in March 2013 officially proposed to the Albanian Parliament an addendum to the law of Preventive Interception by creating an observatory authority with a career in the field of justice, economy, information technology, with rigorous rights and obligations to exercise

periodic control over the legality of the whole preventive interception process, and this was not appreciated.

In fulfilling the constitutional function and in ever-more difficult facing with crime, the Albanian Prosecution Office should be more assisted in the infrastructure, legal and human aspect, in terms of modernization, to compliance with European standards and continuous improvement. The executive role in this regard remains legitimate and irreplaceable as the main material supporter and law-initiator. Particularly, an important role is the care of inter-institutional relations that are indispensable to the progress of our work.