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Meeting: 1419th meeting (December 2021) (DH)

Communication from the authorities on the general measures (08/11/2021) concerning the case of BUCUR AND TOMA v. Romania (Application No. 40238/02).

Information made available under Rule 8.2a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Communication des autorités sur les mesures générales (08/11/2021) relative à l'affaire BUCUR ET TOMA c. Roumanie (requête n° 40238/02) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

8 November 2021

Information Note on the question of general measures in the case of

Bucur and Toma v. Romania

(Application no. 40238/02, judgment of 8 January 2013, final on 8 April 2013)

I. Introductory summary of the case

This case originates in the public disclosure by the first applicant – employee of the Romanian Intelligence Service (the “SRI”) at the material time (1996) – of information on illegal telephone tapping made by the SRI and the content of some of the intercepted communications. These included telephone communications of the first applicant, a journalist, and his daughter, the third applicant. These actions entailed the first applicant’s conviction, in last instance by the Supreme Court of Justice on 13 May 2002, to a suspended sentence of two years’ imprisonment for having unlawfully collected and disclosed classified information.

The European Court found that the interference with the first applicant’s freedom of expression resulting from his conviction for having blown the whistle on irregularities in the SRI’s activity was not necessary in a democratic society: the impugned information, disclosed in good faith, was undoubtedly of public interest, the applicant had reasonable grounds to believe in their authenticity and he had no other mean under the domestic law to disclose them, having regard in particular to the deficiencies in the system the State had instituted to control SRI’s activities (violation of Article 10).

The European Court further found that this conviction had been inflicted following unfair proceedings, due to the domestic courts’ omission to examine and address crucial arguments for the defense as regards the pre-eminence of the interest of the public to have knowledge of the alleged illegal tapping over that of preserving the confidentiality of the information at issue (violation of Article 6§1).

Confronted to the Romanian authorities’ refusal to provide the entire criminal investigation file concerning the first applicant without a satisfactory explanation, the European Court also considered that the Respondent State had failed to comply with its obligation to provide it with all the necessary facilities allowing it to establish the facts (violation of Article 38§1 a)).

As regards the second and third applicants, the European Court reiterated its previous findings as regards the lack of safeguards in Romanian legislation in the field of secret surveillance measures, in particular as regards the storing of personal data by the SRI, and the absence of a remedy in domestic law to challenge the storing of such data by the SRI (violations of Articles 8 and 13).

II. General measures

As it results from the last examination by the Committee of Ministers of the status of execution in the present case, the issues that remain to be addresses in the field of general measures concern the legal framework regulating secret surveillance measures justified on considerations of national security, where the Committee considered that additional measures were required to ensure that this framework fully complies with the requirements of Articles 8 and 13 resulting from the European Court's relevant case law.

The SRI informs that the use of special methods of surveillance or investigation (*metode special de supraveghere sau cercetare*) falls in two distinct categories:

1. The investigation of activities than constitute criminal offences (*infracțiuni de drept comun*);
 2. The documentation of activities or acts that belong to the sphere of threats against the national security (as defined by art. 3 of Law no. 51/1991) or to the sphere of preventing and combatting terrorism;
1. The SRI stresses that, under the current legal framework applicable to the investigation of criminal offences, the role that it plays is a one limited to the provision of technical support to the prosecution organs.

As such, Law no. 14/1992 on the organisation and functioning of the SRI mentions, at art. 8 (2), the creation of a National Centre for Intercepting Communications (NCIC) which, at the request of prosecution organs, provides them with direct (*nemijlocit*) and independent access to technical systems in order to carry out the technical surveillance regulated by art. 138 (1) letter a) of the Code of Criminal Procedure (CPP).

Furthermore, the control over the way in which the NCIC implements the technical surveillance is carried out in accordance with art. 30¹ of Law no. 304/2004 on the organisation of the judiciary.

With regards to the examination, use and retention of data gathered as a result of secret surveillance activities and on the circumstances and procedures to be followed to destroy them, the following regime is applicable:

Hypothesis	Means of conserving data collected following surveillance activities	Length of time for keeping data collected following surveillance activities	Deadline for destroying data collected following surveillance activities	Legal basis
The data collected do not concern a criminal act, do not contribute to the identification or location of persons, the data are not used in other criminal cases	Data is archived at the prosecutor's office in special spaces ensuring confidentiality	One year after the moment when the case receives a final solution	One year after the moment when the case receives a final solution	Art. 142 CPP

Hypothesis	Means of conserving data collected following surveillance activities	Length of time for keeping data collected following surveillance activities	Deadline for destroying data collected following surveillance activities	Legal basis
A court has issued a final solution of condemnation, a solution of renouncing to apply a punishment or to defer the application of a punishment, a solution of acquittal or of ending the criminal action	Data is archived together with the case file at the court of justice in special spaces ensuring confidentiality	No express time is provided; a corroborated interpretation of existing legislation shows that data should be kept permanently	No express time is provided	Annex 6 of Law no. 16/1996 regulating the National Archives, corroborated with art. 146 CPP
The prosecutor decided against sending the case to court (<i>netrimitere în judecată</i>)	Data is archived at the prosecutor's office	Until the criminal responsibility for the act investigated becomes time-barred (<i>prescris</i>)	After the criminal responsibility for the act becomes time-barred. The destruction is registered in a minute (<i>proces-verbal</i>)	It results from interpreting the provisions of criminal law

2. With regards to data gathered as a result of secret surveillance activities circumscribed to threats to the national security, the following provisions are applicable:

Article 45 of Law no. 14/1992 stipulates that the internal documents of any kind of the SRI are classified as state secret, are kept in their own archive and cannot be consulted except with the approval of the director, in accordance with the law. The documents, data and information of the SRI may become public only after a period of 40 years from archiving.

Article 17 of Law no. 182/2002 on the protection of classified information stipulates that documents that are classified as state secret includes information that represents or refers to:

- f) the intelligence activity carried out by the public authorities established by law for the defense of the country and national security;
- g) the means, methods, technique and work equipment, as well as specific sources of information, used by the public authorities in carrying out intelligence activities;

Furthermore, according to Government decision no. 585/2002, respectively article 3, the notion of classified document encompasses any material medium containing classified information, in original or copy, such as:

- a) paper - handwritten, typed or printed documents, sketches, maps, photographs, drawings, indigo, listing;
- b) magnetic tapes, audio-video tapes, microfilms;
- c) computer system storage media: floppy disks, compact discs, hard disks, PROM and EPROM memories;
- d) portable processing devices – electronic agendas, laptops - where the hard disk is used to store information;

Article 12 of Government Decision no. 585/2002 approving the national standards of protection for classified information stipulates:

(1) The terms for the classification of state secret information shall be established by the issuer, depending on their importance and the consequences that would occur as a result of their unauthorized disclosure or dissemination.

(2) The terms for the classification of state secret information, by levels of secrecy, unless they require longer protection, are up to:

- 100 years for information classified as top secret of particular importance;
- 50 years for information classified as top secret information;
- 30 years for information classified as secret information.

The SRI stresses that surveillance activities related to threats against national security follow the regime applicable to the examination, use, conservation and destruction of classified documents, as regulated by law.

In a synthetic manner, the regime presents itself as follows:

Hypothesis	Means of conserving data collected following surveillance activities	Length of time for keeping data collected following surveillance activities	Deadline for destroying data collected following surveillance activities	Legal basis
Data resulting from surveillance activities ordered for achieving national security objectives	As provided by art. 93 et. al. of Government Decision no. 585/2002	100 years for information classified as top secret of particular importance 50 years for top secret information 30 years for secret information	As provided by art. 40 et al of Government Decision no. 585/2002	Law no. 182/2002, Government Decision no. 585/2002 and regulations adopted by each competent authority in the implementation of abovementioned laws

In addition, according to SRI, in light of the abovementioned framework, the information gathered in the context of ensuring national security is:

- used exclusively for this purpose, and the actual length of time during which they are kept is determined by their usefulness for carrying out the attributions and competences of the SRI;
- accessed according to a strict and exclusive “need to know” principle, and, in order to ensure the respect of this principle, period audits are carried out by specific means; furthermore, access to archived data is done in accordance with existing laws and internal regulations and only with the approval of the head of the SRI;

- destroyed when such a measure does not affect national security and when the information is no longer of interest for the activity of the SRI and when, after the realisation of the activities provided by the law, it is found that said information is not correct, there is no danger to national security or the suspicions are not confirmed.

3. Informing persons whose rights and freedoms have been infringed in the course of specific intelligence-gathering activities

According to article 7 (4) of Law no. 182/2002, access to classified information that is classified as state secret, respectively secret, is guaranteed, for the following categories of persons:

- a) The President of Romania;
- b) the Prime Minister;
- c) ministers;
- d) deputies;
- e) senators;
- f) judges;
- g) prosecutors;
- h) assistant magistrates of the High Court of Cassation and Justice, who, in accordance with the specific attributions, are entitled to have access to the classified information without fulfilling the procedures (...)

Similarly, article 10 of Law no. 51/1991 stipulates that intelligence activities based on national security are classified as state secret and information in the field of national security may be communicated to a) the President of the Senate, the President of the Chamber of Deputies, as well as the standing committees for defense, public order and national security of the two chambers of Parliament; b) ministers and heads of departments in ministries, when the information concerns issues related to the fields of activity they coordinate or are responsible for; c) the prefects, the mayor of Bucharest, as well as the leaders of the county councils, respectively of the General Council of the Municipality of Bucharest, for issues concerning the competence of the respective bodies; d) criminal investigation bodies, when the information concerns the commission of a crime.

Article 21 (2) and (3) of Law no. 51/1991 provides the following additional rules and establishes the cases when the persons targeted by surveillance activities in the defense of national security can be notified of the fact that they have been under surveillance, as well as the exceptions to this possibility:

(2) If the data and information resulting from the authorized activities are not sufficient for notifying the criminal investigation bodies nor do they justify further intelligence activities regarding that specific person, the head of the state body with attributions in the field of national security requests the notification of the person whose rights or freedoms have been affected by the authorized activities, with regards to the activities carried out and the periods in which they were carried out.

(3) The notification provided in par. (2) shall not be made if:

- a) it could endanger the work done by the state bodies with attribution in the field of national security, by disclosing some of their sources, including the security and information services of other states;*
- b) could affect the protection of national security;*
- c) could infringe on the rights and freedoms of third parties;*
- d) could lead to the disclosure of the methods and means, including concrete investigation techniques, used in the respective case by the state bodies with attributions in the field of national security.*

4. Legal remedies for persons who consider themselves to have been wronged by surveillance measures carried out for reasons related to national security

Law no. 51/1991, respectively article 22, provides that everyone who considers his/her fundamental rights or freedoms to have been infringed owing to specific intelligence-gathering activities can refer the matter to: parliamentary committees charged with supervising those activities, to national courts on the basis of the Protection of Personal Data Act, to national courts according to the Civil code, judicial bodies, according to the Criminal procedure code, and lastly, other commissions or judicial bodies, according to the procedures regulated by special laws.

Moreover, art. 20 of Law no. 182/2002 regulates the possibility of every individual or legal person to contest the decisions of authorities imposing the classification of information, with regard to the classification of said information, the length of time during which they were classified and the level of classification applied. These contestations are to be solved by administrative courts, on the basis of the provisions of Law no. 554/2004 on the administrative litigation.

Recently, the High Court of Cassation and Justice (the HCCJ) adopted decision no. 8/2020 within the procedure of appeal in the interest of the law (*recurs în interesul legii*), published in the Official Gazette no. 580/2 July 2020, which dealt with the interplay between legitimate public and private interests.

Said decision stated that, in order to ensure a unitary interpretation of art. 1 (1), 2 (1) letters a), r) and s) and art. 8 (1¹) and (1²) of Law no. 554/2004, it is necessary to take into account, when exerting the control over the legality of administrative acts, at the request of associations, as socially interested organisms, that the invocation of the legitimate public interest must be subsidiary to the invocation of a legitimate private interest, as this interest flows from the direct connection between the administrative act subjected to the legality control and the direct goal and objectives of the association, according to its statute.

On a final note, the Government would like to highlight the fact that, at the moment, a new legislative bill for the general protection of whistle-blowers is under consideration – co-initiated by the Ministry of Justice and the National Authority for Integrity¹.

This legislative bill intends to transpose in the national law the provisions of the EU Directive no. 2019/1937 on the protection of persons who report breaches of EU law.

In April 2021, the legislative bill was posted on-line on the website of the Ministry of Justice as part of the legislative transparency procedure.

III. Conclusions

The Government respectfully ask the Committee to take note, when examining the case of *Bucur and Toma v. Romania*, of the information provided above by the national authorities on the execution of the general measures required in the present case.

¹ The text of the bill, as well as the reasons for its elaboration, are available in Romanian at this link: <https://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public/>