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Telephone tapping in Polish criminal procedur

Abstract. The issues analyzed in this article are legal regulations in Poland concerning telephone tapping. The aim of this article is to indicate how the legal regulations concerning such surveillance in certain countries are formed, what the bases of ordering surveillance are, and what the time, period, and possibilities of using materials obtained through the use of surveillance in a criminal proceeding are. Surveillance and recording of telephone conversations, commonly known as tapping, constitutes one of the most controversial sources of obtaining evidence in a criminal proceeding. Such activities conducted by authorities raise vivid reactions, discussions and suspicion associated with secretiveness of tapping. As a result, domestic law needs to determine sufficiently enough the scope of such an application, granted to an appropriate authority as well as the method of its conduct, taking into consideration the justified purpose of the adopted means so as to provide an individual with proper protection.

Key words: telephone tapping, criminal procedure, right to privacy, evidence in a criminal procedure.

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Telefonsarunu noklausīšanās Polijas kriminālprocesā

Anotācija. Raksts ir veltīts telefonsarunu noklausīšanas tiesiskā regulējuma analīzei Polijas kriminālprocesuālajā likumdošanā. Rakstā ir parādīts kā citās valstīs formējās likumdošanas normas par šādu novērošanas (izsekošanas) veidu. Ir apskatīts jautājums par to, kāds pamatojums var būt šādas izsekošanas formas pielietošanai, kā arī jautājums par šīs novērošanas metodes pielietošanas laikā iegūto materiālu turpmāko izmantošanu, proti, vai šie materiāli var tikt izmantoti kā krimināltiesiskas izmeklēšanas laikā iegūtie pierādījumi un kāds var būt to izmantošanas laiks un/vai periods.

Telefonsarunu atsekošana un ierakstīšana ir operatīvā darbība kura plaši pazīstama kā «noklausīšanas». Šī metode ir viena no visstrīdīgākajiem pierādījumu iegūšanas metodēm kriminālprocesa ietvaros. Noklausīšanas pasākumi, kurus veic attiecīgie orgāni, izraisa daudz diskusiju, kas galvenokārt ir saistīts ar noklausīšanas pasākumu noslēpumainību.

Nemot vērā iepriekšminēto, pēc autora domām likumdošanā ir nepieciešams pietiekoši skaidri noteikt attiecīgajiem orgāniem piešķirtā pilnvarojuma apjomu noklausīšanas darbību veikšanai, kā arī to pamatojumu un metodiku.

Atslēgas vārdi: telefonsarunu noklausīšanas, kriminālprocess, tiesības uz privātās dzīves neaizskaramību, pierādījumi kriminālprocesā.

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Прослушивание телефонных переговоров в уголовном процессе Польши

Аннотация. В статье проанализированы вопросы правового регулирования прослушивания телефонных переговоров в уголовно-процессуальном законодательстве Польши. Цель данной статьи – показать, каким образом формируются законодательные нормы относительно такой формы наблюдения (слежения) в некоторых странах; что служит основой для применения такой формы слежения; какими являются время, период и возможность использования материалов, полученных с помощью такой формы слежения в качестве доказательств в рамках уголовного расследования. Мероприятия по отслеживанию телефонных разговоров и их записи, широко известные как прослушивание, являются одним из наиболее спорных методов получения доказательств в уголовном процессе. Такие мероприятия, проводимые органами, вызывают много дискуссий и даже подозрений, что связано с секретностью мероприятий прослушивания. Поэтому, в законодательстве необходимо достаточно точно определить объем предоставляемых соответствующим органам полномочий, а также способы поведения мероприятий прослушивания.

Ключевые слова: прослушивание телефонных переговоров, уголовный процесс, право на частную жизнь, доказательства в уголовном процессе.

The Polish Code of Criminal Procedure of 1997 [1] (hereinafter referred to as CCP) includes a separate – 26th chapter related to telephone tapping. It covers surveillance and recording of telephone conversations (Art. 237 of CCP), as well as surveillance and recording by technical means of the content of information transmissions other than telephone conversations (Art. 241 of the CCP). It does not straightforwardly formulate the basis of ordering surveillance and recording of conversations. Only in Art. 237 § 1 of the CCP the purpose of applying telephone tapping is specified. Surveillance and recording of the content of telephone conversations may be ordered in order to detect and obtain evidence for the pending proceedings or to prevent a new offence from being committed. This means that the application of surveillance is possible for both evidential and preventive purposes. As far as the phrase «to detect and obtain evidence for the pending proceedings» does not raise any reservations, the phrase concerning the purpose of ordering surveillance as «to prevent a new offence from being committed» might raise some doubts. The aforementioned phenomenon was taken note of

by K. Dudka [2, 67]. As she points out, the used phrase is not clear enough and we do not know whether it relates to committing an offence by a perpetrator or whether the action or its perpetrator must stay in an objective or subjective relation with the offence being the subject of a criminal proceeding. It should be acknowledged that due to regulations related to the out-of-procedure tappings conducted as a part of preliminary investigation activities by the police and other services on the bases of specific acts, in terms of a procedural tapping there are situations when such objective or subjective relation does not exist [3, 201-205; 4, 216-226].

In accordance with Art. 237 § 4 of the CCP, the surveillance and recording of the content of telephone conversations shall be permitted with regard to:

- a suspected person,
- the accused in the wide sense, meaning also the suspected person,
- the injured person,
- or other person whom the accused or the suspect may contact (these may concern family members, close acquaintances at

work or the place of residence), as far as there are data indicating the possibility of contacting those people and

- other people who might be connected with the perpetrator or with a threatening offence when there are data indicating such a connection, i.e. neighbors of the victim of the person subject to abduction or ransom extortion [Compare: 5, 518].

As it can be observed, the list of people whom the surveillance and recording of telephone conversations may be applied to is practically unlimited [6, 782].

The provisions of the law in force provide a number of conditions which have to be fulfilled in order for the surveillance and recording of telephone conversations to be ordered. The conditions for the tapping to be legally allowed constitute some actual and legal states required by the Act.

The conditions of the application of procedural telephone tapping are the following:

- initiation of a criminal proceeding,
- the offence belonging to the catalogue determined in Art. 237 § 3 of the CCP,
- the right of action,
- prosecutor's motion,
- issuing a decision in the form of a ruling.

Surveillance and recoding of telephone conversations as presented in the CCP are allowed after the initiation of proceedings; the initiation of a proceeding in the ad rem phase is enough [Compare: 6, 1294-1295]. Therefore, it is possible to apply a procedural tapping in cases not amenable to delay (Art. 308 of the CCP).

The permissibility of applying a procedural tapping is subjectively limited. Under Art. 237 § 3 of the CCP, surveillance and recoding of telephone conversations are allowed only when proceedings are pending or when there exists a justified concern about the possibility of a new offence to be committed regarding offences specified in this regulation.

The enumerative listing of offences in § 3 results in the fact that the organ issuing an order while evaluating the admissibility of ordering surveillance and recording of telephone conversations first needs to examine the legal qualification of the offence. This will constitute a legal qualification admitted in the proceeding concerning issuing preliminary proceedings if the

purpose of ordering surveillance is to detect and obtain evidence for the pending proceedings of crimes specified in Art. 237 § 3 of the CCP. However, when the purpose of ordering surveillance and recording of telephone conversations is to prevent a new offence from being committed, the organ issuing the order shall examine whether there are circumstances indicating if there exists a fear of committing an offence from catalogue specified in § 3. These circumstances shall be indicated in a proceeding, since in the case of an appeal against such a verdict, the organ examining the means of appeal examines the legality of surveillance, therefore the legal admissibility of an action.

The court issues a decision on the subject of the motion within 5 days at a sitting without the participation of the parties. It is an exception to the rule laid down in Art. 96 § 2 of the CCP allowing parties and non-parties to participate in the sitting: if it is relevant for the protection of their rights and interests, they may appear at the sitting in person. The information about the date of the sitting on the subject of ordering surveillance and recording of telephone conversations is not given to any parties. In matters of pressing concern, the surveillance and recording of telephone conversations may be ordered by the prosecutor, who is obliged to apply to the court for approval of the order within 3 days.

While examining the prosecutor's motion concerning the approval of the decision to order surveillance and recording of telephone conversations, the court shall verify whether the conditions set in Art. 237 § 1 – 3 of the CCP have been met. In case it is stated there was no indication for the need to obtain evidence in this way or for the need to prevent the commission of the offence referred to in § 3, the Court shall not approve the prosecutor's decision. Refusing to approve telephone conversation surveillance, the court orders the destruction of all recordings in the same ruling (Art. 237 § 2 of the CCP). Art. 240 of the CCP stipulates for the prosecutor's appeal against this decision. The appeal, as a rule, does not withhold the execution of the order under appeal. In order to eliminate the possibility of definitive elimination of recordings, prior to the consideration of the prosecutor's appeal by the court of appeals, the law requires the suspension of the execution of the order under appeal.

The period for conducting the surveillance and recording of telephone conversations is specified in Art. 238 § 1 of the CCP. The basic period for the application of procedural tapping is 3 months. The court at the same time does not have to order tapping for 3 full months when issuing the first decision, it may be for one or two months. In particularly justified cases this period may be extended for further 3 months. The overall period must not, however, exceed 6 months. The duration of surveillance and recording of telephone conversations application is added up for every person subject to tapping. It is possible, therefore, to divide the total time of the tapping into phases, where the total period of these phases does not exceed 6 months. Determination of the duration of procedural tapping is dependent on the needs and circumstances related to an individual case. However, after using up the period of 6 months for a particular person, it is not permissible to continue conducting tapping, even when it is justified and purposeful. Each time, the decision to extend the period of the surveillance of telephone conversations is made by the same court, which is competent to issue the order on the use of tapping. Issuing such order, the court shall always examine whether there are still grounds specified in Art. 237 § 1 through 3 of the CCP, and what is more, there must be additional condition, namely the presence of «a particularly justified case». Such a particularly justified case will undoubtedly be the application of tapping in cases of large gravity or a situation when the results of the tapping achieved so far justify the assumption that continuation of its use will bring even better results. Therefore, the prosecutor shall state in the application the circumstances which justify the extension of tapping or form the basis of the necessity to extend the tapping [7, 531].

The Code of Criminal Procedure requires the tapping to be terminated:

- 1) immediately after the reasons listed in Art. 237 § 1 – 3 have ceased to exist,
- 2) with the expiration of the period for which it was introduced.

Art. 238 of the CCP in § 2, 3 and 4 describes the situations in which the destruction of the contents of telephone conversations not necessary for the proceeding may take place.

One such case is related to the situation when the telephone conversation surveillance has not brought any evidence associated with the pending proceeding or the offence, justifying a request for ex post facto consent. In such a situation the decision to destroy recordings is issued by the court upon the prosecutor's motion. In this respect, the participation of the parties in the court sitting is not assumed (§ 2).

Another case is related to the situation, when after the closure of a preliminary proceeding, the prosecutor requests for the destruction of the part of recordings which has no relevance for the criminal proceeding, in which the surveillance and recording of telephone conversations has been ordered. The court shall decide on the subject of the application at the sitting, which the parties may participate in. The legislator grants the right to put forward a motion, in addition to the prosecutor, also to the parties of the pre-trial proceedings, and to the person who the surveillance was applied to. Undoubtedly, the right to privacy justifies the creation of the instrument of protection of this right also for the people being tapped, who do not challenge the legitimacy and legality of the proceeding on the surveillance and recording of conversations.

Materials obtained during surveillance and recording of telephone conversations, if obtained in accordance with the regulations of the CCP, might be used as evidence in a criminal proceeding concerning offences specified in Art. 237 § 3 of the CCP.

Article 237a allows the prosecutor to apply for an ex post facto consent in case where the recorded conversations indicate a possibility of committing a crime by a person subjected to the surveillance but an offence other than that subject to surveillance or committed by another person who was not mentioned in this decision. The prosecutor's motion concerning the ex post facto consent by court might be submitted during the period of surveillance but not later than within 2 months of its being completed. Using this evidence in criminal proceedings is therefore dependent on the consent issued by the court (the so called ex post facto consent).

Due to the fact that ordering telephone tapping is reasonable only when the fact of its being applied remains a secret, the introduction of

the possibility to adjourn the announcement of such a decision has become a necessity. Such a solution was adopted in Art. 239 of the CCP. Otherwise, in the majority of cases, informing the persons, whom the tapping concerns, about them being under surveillance would shatter all the chances of obtaining positive results. On the whole, delivering the decision concerning ordering surveillance promptly after its being ordered is legitimate and would not influence its results as related to the injured party, in case where they consented to the surveillance and making contact by the offender is being awaited (e.g. in kidnaps for ransom). The regulation discusses the possibility of adjourning the announcement of a decision,

which means that the organ ordering the decision needs to give every single decision on this subject after careful consideration. The announcement of the order to conduct surveillance and recording of telephone conversations to a person to whom it concerns might be adjourned for a period necessary to promote the proper conduct of the case. In preliminary proceedings it may be adjourned not further than beyond the valid conclusion of the case.

As far as procedural surveillance is concerned, the legal regulations in the Polish criminal-procedural act within the scope discussed above meet the standards set in the jurisdiction of the European Court of Human Rights.

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