

**Babeş-Bolyai University**

**Faculty of Law**

## **DOCTORAL THESIS**

### **SPECIAL INVESTIGATIVE TECHNIQUES IN THE ROMANIAN CRIMINAL PROCEDURE CODE AND IN SPECIAL LEGISLATION**

*(table of contents and summary)*

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## **KEYWORDS**

Surveillance, special methods of surveillance and investigation, special techniques, the right to privacy; free speech; the secrecy of correspondence; the right to a fair trial; evidence administration; lawyer client privacy; interception of communications; access to a computer system; audio surveillance; video surveillance; GPS location; obtaining data on financial transactions; seizure e delivery and search of postal items; data retention; electronic communications; undercover investigators; collaborators; authorized participation; entrapment; controlled delivery;

## **SUMMARY**

The present doctoral thesis focuses on the analysis of the general regime of special investigative techniques contained in national legislation and on the detailed examination of each special technique. This pursuit is necessary in the context increasing complexity of current cases and the possibilities for offenders to evade the vigilance of the judiciary, making it necessary to use new methods to ensure the prevention of crime and the criminal prosecution of those who commit such crimes. The problem of special investigative techniques is of current importance considering their secret and intrusive nature but also because of the importance of the evidence that can be obtained.

The international context of the elaboration of the doctoral thesis is a special one because both public and private factors promote the idea of voluntary or mandatory limitation of the right to privacy. During the doctoral studies, many revelations were made about secret information gathering programs, implemented by states such as the U.S.A. and also, the use of public surveillance systems has spread. Espionage is not a novelty, it has existed since ancient times, but special investigative techniques allow finding out complete information about a person and automated personal data collection systems allow a full and complete knowledge of all people, and the information can be exploited at any moment. Also, the private entities that manage social platforms have not stopped expanding, becoming more and more involved in our private life, trying to know us in an intimate way to find out our preferences and desires, all in order to sell something or to obtain financial benefits from us. In this context, if social networks or online applications that collect personal data with our consent (informed) are free, but still collect a significant profit, we must ask ourselves what do they actually produce? The answer is that they produce information based on what we give them freely, through which our behavior can be

anticipated and controlled. In other words, the users are the product and the customers are the ones who pay for information about users.

During my doctoral studies that started in 2013, special investigation techniques underwent major changes, both as a result of the entry into force of the New Criminal Procedure Code, but also as a result of political and legal changes that changed opinions on the use of such methods. It was observed, including directly, by my private practice as a lawyer, how the mentality regarding special investigative techniques has changed in the judiciary from tacitly accepting a factual situation - the lack of real possibility to challenge the legality of using such techniques, the secrecy of the implementation and the occult pressure of the secret services in this area, to a wide acceptance of the exceptional and derogatory nature of the use of these techniques. The text of the Criminal Procedure Code is based on older principles and rules, many of them from foreign jurisprudence and that the interpretation of national rules must be based on the interpretation given to the jurisprudence of the country from where the legislative loan was made. Concepts such as reasonable suspicion, proportionality and subsidiarity, essential in the field of special investigative techniques, cannot be understood just through national law, but to understand the concepts, one needs thorough study of foreign doctrine and jurisprudence, such a task being accomplished through this thesis.

During the course of my studies, the jurisprudence of the European Court of Human Rights has seen a continuous development in the field of fundamental rights, in particular the right to privacy and its correct application in criminal proceedings. This Convention compels the national judge to look at national law with a different eye and to always give it an interpretation that gives priority to the European Convention on Human Rights when it ensures a better protection of human rights.

The jurisprudence of the Court of Justice of the European Union has influenced the Romanian law to a lesser extent during my doctoral studies, through the lower number of relevant decisions, comparable to the jurisprudence of the C.E.D.O. However, for certain special methods it meant their coming out of force by invalidating the European legislative foundation based on which Romanian law was envisioned.

Regarding the special investigative techniques themselves, since the beginning of the doctoral studies we can say that there have been multiple changes, most occurring with the entry into force of the Criminal Procedure Code, being introduced by the law implementing the Code. In this respect, we must first explain the meaning of the name of this paper "Special investigative techniques in the Criminal Procedure Code and special laws." The initial name of Chapter no. IV

of Title IV of the Criminal Procedure Code was "Special investigative Techniques" being amended with the entry into force of the Code in "Special Surveillance or Investigation Methods" this fact is not sufficient to require a change of title because the title established was considered more. Special investigative techniques include both the techniques contained in the Criminal Procedure Code and the techniques in special legislation. At the beginning of my doctoral studies, the special legislation contained a multitude of provisions on special investigative techniques, most of which were repealed by the entry into force of the Criminal Procedure Code, which led to the study being restricted to techniques provided by the Criminal Procedure Code and those in Law no. 51/1991 regarding the national security of Romania. The study was not restricted, the problem being viewed from a historical point the special investigation technique in the special legislation by reference to their correspondent in the current legislation. Considering the length of time that has passed from the beginning of the doctoral studies until their completion, I consider that the name given to this paper is appropriate in the spirit of emphasizing the multitude of changes that have taken place so far.

The structure of this paper was chosen in an attempt to minimize its fragmentation into sections and subsections, being organized into 15 titles, each of which is divided into chapters. Each title was designed to be modular, exposing in an exhaustive way the dedicated issue. The first two titles should be seen as an introduction to special investigative techniques, setting out the nature but also the guiding principles, in particular the need to defend fundamental human rights. The third title was dedicated to the evidence of the regulation of technical supervision in the Criminal Procedure Code, including all general procedural aspects, applicable both to surveillance and, by extension, to special investigative methods. Titles IV-XIV treat each of the special methods of surveillance or investigation separately and Title XV deals with the special techniques provided by Law no. 51/1991. In the case of the titles regarding the individual analysis of each special surveillance or investigative technique, a unitary research methodology was used, consisting in stating the usefulness of each method, its history, as well as the current form, determining the particularities in authorization and implementation, execution and analysis, in some places, of particular situations.

In view of the above, I present the thesis of this paper as follows: Special investigative techniques are essential procedures in modern criminal proceedings, becoming more prevalent and specialized in the context of poor national regulation that is not adapted to their specificity and it does not offer sufficient guarantees to prevent abuse by state bodies against individuals.

Next, we will proceed to a brief presentation of the structure of the paper, the issues addressed, and the conclusions reached after the research.

**Title I - Preliminary aspects** - This title was dedicated to clarifying the notion of special investigative technique, as well as revealing its main features as well as discovering its usefulness in modern criminal proceedings. Their importance was treated in relation to the evidence that can be obtained, the crimes in which they can be used but also the tendency to use them excessively, both in the public and private spheres.

**Conclusions:**

Special investigative techniques are a category of evidentiary proceedings and investigative measures derogating from the rules on the administration of evidence, being recognized internationally as a tool in the fight against serious crime. Such techniques must be provided for by law in a clear and predictable manner not only for the special value of the evidence they can provide (often direct evidence) but especially to respect the imperative imposed by the Constitution and the European Convention on Human Rights, that any restriction of human rights be provided for by law. Such a restriction will exist whenever a special investigative technique is used as it is a defining feature of these measures. Although there are other evidentiary procedures that involve such restrictions, only special investigative techniques will be secret, this feature means more than the non-public nature of the criminal investigation, not allowing the participation of the parties.

**Title II - Compatibility of the use of special techniques in relation to respect for fundamental human rights and freedoms** - In this part of the paper we analyzed the main fundamental rights that may be affected by the use of special techniques to investigate crimes. We have tried to reveal through the jurisprudence of the ECHR within what limits both the legislature and the judiciary will have to be placed so that the use of such techniques does not constitute a violation of the fundamental rights established by the Convention.

**Conclusions:**

The restriction of fundamental rights and freedoms has been analyzed in the light of the jurisprudence of the ECHR noting that the main right affected is the right to privacy provided by art. 8 of the Convention. This concerns both the broad meaning of the right to privacy but also the right to privacy in the narrow sense, the right to domicile and especially the secrecy of correspondence. Most jurisprudence refers to the need for a clear and predictable law for the authorization of special techniques but also to the establishment of guarantees that allow the supervised person to subsequently challenge the supervision measures and obtain their annulment and destruction of the results obtained. Along with the right to privacy, freedom of expression may be affected when special techniques are used en masse against a population as well as if they

violate the confidentiality of media sources. Another important right is the right to a fair trial, the analysis in the paper aimed at administering evidence in a fair way to the right to defense, the ability to challenge the authenticity of evidence, prohibit the taking of evidence by causing crimes and guarantee the right to defense by confidentiality client-lawyer relationship. From the point of view of the fairness of the criminal proceedings, I concluded that a violation of the right to privacy will have to lead to the automatic exclusion of evidence from the criminal proceedings, considering that the use of such evidence would violate the fairness of the proceedings.

**Title III – Legal provisions of special methods of surveillance provided by the Criminal Procedure Code** - The most extensive title of the paper is dedicated to the procedural aspects of surveillance, being grouped under the conditions necessary for authorization of surveillance, authorization procedure, implementation, signing, verification and certification of results, recording of activities, informing the supervised person (including challenging the legality and validity of technical supervision in the preliminary chamber phase), recordings that can be made without authorization, the lawyer as a subject of technical supervision and capitalization of technical supervision results.

### **Conclusions:**

In the case of surveillance, Romanian law provides for legal conditions that must be observed, substantive conditions and procedural conditions. First of all, the criminal investigation must be started, as a precondition, as it is not possible to administer any evidence until after the issuance of an ordinance to start the criminal investigation according to art. 305 para. 1 C.pr.pen.

The first substantive condition is that there is a reasonable suspicion of a criminal offense, the term being a legislative loan from American and British law. A reasonable suspicion presupposes both the existence of an objective element - information on the commission of a crime, but also a subjective element - that the body that finds the existence of a reasonable suspicion can conclude, based on its experience that there is such a suspicion from the objective elements. Thus, abusive investigations to detect offenses known as "fishing expeditions" are prohibited.

Reasonable suspicion will have been for a crime of considerable severity, being defined by the legislator a list in art. 139 para. 2 C.pr.pen. The criticism is that this list is far too permissive, including crimes often encountered in society but of a severity that cannot justify such measures (crimes against traffic safety on public roads).

The proportionality of the measure must be respected in all cases where surveillance is authorized, assuming that the judge of rights and freedoms assesses the importance of the evidence that could be obtained and the seriousness of the intrusion into a person's privacy. In order to carry out this control, it is necessary for the prosecutor to be explicit in the requested surveillance measures, having to detail also the way and the limits in which they will be implemented.

The subsidiarity of surveillance is an essential condition, intricately linked to proportionality, but the legislator has introduced additional elements that have nothing to do with this, namely the existence of a danger to the safety of persons or property. The latter criterion must be removed as it leaves room for abuse and would not prove effective as the collection of evidence will not protect those persons or property, involving direct intervention by the prosecuting authorities. Subsidiarity will mean that other less intrusive evidentiary procedures will have to be preferred than surveillance.

The proposal for authorization of surveillance will have to contain the elements in art. 140 para. 2. C.pr.pen. and the prosecutor to give good reasons for the proposal in relation to the legal conditions set out above. The prosecutor will have to explain each measure he requests but also to indicate concretely, as the case may be, how the intrusion into private spaces for the installation and uninstallation of the operative technique will be performed, how many times it will be performed, by how many people and where. the devices will be mounted.

The authorization of surveillance will be made by the judge of rights and freedoms who will verify the fulfillment of all the legal conditions, immediately issuing a surveillance warrant and obligatorily drawing up the minute of the judgement. If the proposal is rejected, a new proposal can only be formulated if it is based on the discovery of new facts.

In urgent cases, the current Code of Criminal Procedure has maintained the institution of provisional authorization by the prosecutor, a procedure that we consider to be unconstitutional and contrary to the jurisdiction of the judge of rights and freedoms in the urgent settlement of such cases. We appreciate that the text of art. 141 C.pr.pen. it is susceptible to abuse as the prosecutor is not an independent authority and an *a posteriori* control by such an authority is not effective.

The execution of surveillance has been met with numerous criticisms, being the point of discord in judicial practice, caused by the illicit involvement of state security bodies in the implementation of surveillance warrants with the complicity of the Prosecutor's Office. This practice began in 2003 and extended until the pronouncement of Decision no. 51/2016 of the

Constitutional Court, subsequent decisions emphasizing the extent of the phenomenon. As a rule, the execution will be carried out by the prosecutor, who may order that the criminal investigation bodies or the specialized police workers carry out this act. During the execution, the prosecutor will carry out a continuous control and supervision of the measure, a situation that is open to criticism as this role should be that of the judge of rights and freedoms.

If the execution of the measure results in data that is not relevant to the case or that does not contribute to the identification or location of persons, they will be archived if they are not be used in other cases. It is questionable for the legislator to choose to claim that their use in court should be limited if the party presents new evidence that would justify the use of the surveillance results in the case, putting the defense in an unfair situation as it does not even have access to these results of surveillance and must prove to the court that they can be useful in resolving the case.

The Criminal Procedure Code established an optional procedure for the electronic signing of the results of surveillance activities, using electronic signatures. It exploits the fact that the results of technical supervision activities are computer data and can be electronically signed, ensuring their authenticity, and preventing unauthorized changes. It is necessary for Parliament to establish the mandatory nature of digital signatures on the results of the technical supervision, but, in advance, qualified signing devices and certificates will have to be issued for all judicial bodies.

The notification of the supervised person has legislative shortcomings, also found by the Constitutional Court, as the legislator failed to introduce in the law the most important element related to notification, challenging the legality and validity of surveillance. From the jurisprudence of the ECHR it follows that this right is an essential one for any surveilled person, notification being not an autonomous right but only a condition to allow the challenge of the surveillance measure. At this moment, Romanian law is still deficient, only praetorian remedies based on the Decision of the Constitutional Court no. 244/2017 being foreseen.

A special problem related to surveillance is the possibility of obtaining evidence without authorization, this being established by the legislator through art. 139 para. 3 C.pr.pen. only in favor of recordings made by individuals regarding their own conversations. No interference from the criminal investigation bodies will be admitted, the action of the individual being an independent one, otherwise the jurisprudence of the ECHR establishing that it would be a violation of the provisions of art. 8 of the Convention. What is missing in the Code of Criminal Procedure is the need for any evidence obtained through recordings made without authorization

to be passed through a filter of proportionality and subsidiarity. In the paper we have reflected on this problem, analyzing the situations in which private individuals have flagrantly exceeded the proportionality of the measure and violated the private life of another person in making recordings.

Lawyers may be a subject of surveillance as Criminal procedure law does not grant adequate protection to the profession and there are no guarantees to prevent the accidental recording of the interactions between the lawyer and his client. Even if such surveillance took place, the evidence would be destroyed immediately by the prosecutor, but it cannot be ignored that he acquires knowledge about the content of the conversations. Moreover, the lack of effective guarantees is also highlighted by the optional nature of informing the lawyer that his conversations with the client were monitored accidentally. The degree of protection offered to lawyers is low, as he they be directly subjected to technical supervision measures under the same conditions as for any other person, thereby affecting his professional relationship with any client he may have.

**Title IV - Interception of communications or any type of communication** - In the fourth title we analyze the first special method of surveillance, which is most often found useful in criminal proceedings. Its particularities are treated in terms of authorization and execution, but also the practical ways in which interception can be performed. As a distinct issue, we addressed the secret protocols signed between the Prosecutor General and the Romanian Intelligence Service in connection with the execution of the interception of telephone communications and the illicit collaboration between criminal investigation bodies and secret services, by analyzing them and the Constitutional Court's decisions.

#### **Conclusions:**

The interception of communications and other remote communications is the special method of surveillance most often used in practice, being the one that has caused the most discussion and problems regarding the legality of evidence obtained in criminal proceedings, especially due to enforcement by law enforcement agencies. information, instead of criminal prosecution bodies. This measure can play a decisive role in the cases in which it is used, which can lead to direct evidence of the existence of criminal offenses.

The authorization of the measure and its execution will be governed by the same rules as in the case of surveillance, the evidence that will result will be the minutes provided by art. 143 C.pr.pen, of which the most important will be the transcripts of conversations, communications

or conversations provided by art. 143 para. 4 C.pr.pen. which will need to be certified by the prosecutor.

In the past, the surveillance measure was used excessively, by issuing an impressive number of technical supervision warrants, all of which were implemented by the Romanian Intelligence Service until the pronouncement of Decision no. 51/2016 of the Constitutional Court. Currently, the way of intercepting communications allows the criminal investigation bodies to directly access, through their own terminals, the computer system developed by the National Center for Interception of Communications and through it to implement independently and directly any technical supervision mandate, without an interference of the SRI

*De lege ferenda* we consider that the activity of intercepting communications will have to be carried out by an independent body or at least subordinated to the Ministry of Justice in order to avoid any future involvement of the Romanian Intelligence Service in carrying out any criminal investigation.

**Title V – Accessing a computer system** - A less known method and subject to little attention in specialty literature, accessing a computer system is a great opportunity for prosecutors to act by modern means in the online environment but also to obtain evidence in the form of computer data, without the need for a computer search warrant. In addition, the measure has the advantage that it can also be done remotely and in real time. Of interest will be the aspects of territoriality when the computer system in question is outside the country, some international conventions that allowing national criminal prosecution in this situation as well.

### **Conclusions:**

The regulation of the surveillance method of accessing a computer system has deficiencies, being lacking in clarity and adequate legal support, which would remove the confusion in its application, although it has a special role in the future and opens new opportunities for investigating crimes. By using it, content data can be obtained, which may have a more important role than other types of evidence, considering that modern human life is increasingly taking place in virtual space. Compared to another similar evidentiary procedure, computer searches, it has the advantage of being carried out remotely for a period of time, and can be used as a means for other evidentiary proceedings such as interception of communications or video, audio or photography surveillance.

Accessing a computer system is currently the only legal way to obtain evidence on a remote computer system, especially when it is an e-mail server or a social networking service. Given that

the latter are often public by law, the surveillance method is required to constitute only if the data accessed are not public, or it will be desirable to enter an information system in order to suppress access to the computer data or to remove it.

In conclusion, accessing a computer system, in the way it is currently regulated, creates confusion in its application, which must be remedied by the legislator, given that its usefulness and advantages over other evidentiary procedures are undeniable.

**Title VI - Video, audio, or photography surveillance** - The sixth title is dedicated to the most invasive forms of surveillance possible and from which derives the very idea of surveillance. Video, audio, and photography surveillance involves the observation or recording of conversations, movements, or other activities of a person subject of the surveillance warrant and may be performed in public or private places.

**Conclusions:**

Video, audio, and photography surveillance is a special method of surveillance that is particularly intrusive in a person's private life, which is why its use should be limited only to cases of severity and complexity. It is susceptible to many abuses and must be strictly controlled by the bodies that authorize and enforce it as it can result in finding out the most intimate details of a person. Considering the possibility to record activities in real time, the surveillance measure is apt to lead to obtaining direct evidence in criminal proceedings.

Audio video surveillance can be performed in public or private spaces, in the latter case being restricted to a maximum duration of 4 months, shorter than in the case of other surveillance measures.

If surveillance in private spaces is required, the judge of rights and freedoms will be able to authorize the entry into private spaces to activate or deactivate the technical means used for surveillance. This activity can be carried out only by the criminal investigation bodies, being part of the execution of the measure. A disadvantage of the law is that it does not provide clear rules on entry into private spaces, as there are no provisions to limit it. In this sense, it is required that by virtue of observing art. 8 of the ECHR, the judge of rights and freedoms to indicate how many times the criminal investigation bodies are allowed to enter, how this will be done, what activities they can carry out for the installation or uninstallation of devices, how long they can stay in the private location, etc.

Through technological development, surveillance in private spaces will not be conditioned by the penetration in that space, and powerful and specialized microphones can be used that can receive sound through the walls or, especially, through the windows of a house.

**Title VII - Location by technical means** - In the seventh title of the paper we analyzed a special method of surveillance less intrusive than others through which criminal investigators can know only the movements of a person or object. To use this special technique it will be necessary to attach a locating device to the target or to use alternative methods of location such as the use of a mobile device in the possession of the person under surveillance.

**Conclusions:**

Surveillance by determining the location is an evidentiary procedure by which the prosecution can find out the movements or location of a person during the criminal investigation, thus being able to obtain indirect evidence. The surveillance will be highly precise as localization technology produces scientifically verifiable results and may be more difficult to combat by the defense. Location surveillance can be used on a person or on an object. The level of interference with the private life of the person subject to the measure will be more limited than in the case of other special methods of surveillance, not being able to know the exact activities carried out by the person but only where they take place.

**Title VIII - Obtaining data on a person's financial transactions** - The first special method of investigation analyzed in the paper is obtaining information on transactions that a person carries out through a credit institution or other financial institution. The use of this technique is very important for crimes that can be committed through a financial system as evidence will be obtained about the person who receives or transmits a sum of money as well as what that amount represents. By using the method, evidence can be obtained both on future transactions and on past transactions only with the prior authorization of the judge of rights and freedoms.

**Conclusions:**

Obtaining data on a person's financial transactions is a special method of investigation useful in discovering and proving crimes, which can lead to obtaining evidence in criminal proceedings, including direct evidence, by reference to the specifics of the crime. Although the method is considered an investigative one, it has characteristics that bring it very close to surveillance. However, one difference lies in the possibility of finding out and the content of a person's past transactions, which differentiates it from surveillance.

The authorization will be given by the judge of rights and freedoms, at the request of the prosecutor, and the measure must be analyzed by reference to all legal conditions, in particular that of proportionality. In this respect, it is preferable for the judge of rights and freedoms to be demanding in determining the past period for which data on financial transactions will be obtained.

Lastly, the special method of investigation has serious shortcomings in its authorization for a lawyer, especially in the context in which the financial transactions of the investigated person may include those carried out with his lawyer, which are protected by the lawyer's professional secrecy. The legislator will have to find a mechanism through which to exclude the transactions carried out with the lawyer and to establish the obligation to inform him about the measure even when he only targeted him incidentally.

**Title IX - Obtaining data on a person's financial situation** - In the ninth title of the paper we analyze another special investigative method related to obtaining data on a person's financial transactions. In contrast, the prosecutor will only be able to obtain a statement of a person's accounts from a financial institution, without being able to know the actual transactions that led to that statement. The special investigative method will be a static one, and only the balances of a person's accounts can be known.

### **Conclusions:**

The obtaining of data on the financial situation of a person is an evidentiary procedure by which the prosecutor can obtain evidence on the financial situation of a person materialized in identifying the accounts held and their balance.

From the point of view of interference with the right to privacy, the special method is less invasive than other methods such as obtaining data on a person's financial transactions, meaning that the legislator has allowed its use in any case that is the subject of prosecution.

The authorization procedure is a simplified one, through the issuance of an ordinance by the prosecutor to be administered, not specifying special legal conditions for the authorization of the measure.

The special method of investigation is questionable from a legislative point of view, regarding the elements that must be contained in the prosecutor's order, especially from the perspective of the right of the person concerned by the measure to be informed about its development. *De lege ferenda* it is required that the person who was the subject of the special

investigation method be informed by the prosecutor in accordance with art. 145 C.pr.pen. and have an effective right to challenge the legality of the measure taken against him.

**Title X - Obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public** - This special investigative method is a controversial one, suffering multiple changes during the elaboration of this doctoral thesis, being affected by an invalidation of the supporting legislation and a complete rethinking of the measure. At present, it is inapplicable from our point of view, the paper will also contain the arguments for which the measure is a form of mass surveillance that cannot be accepted in a democratic society. In essence, the method would be used to obtain retroactively information on the information traffic of an electronic communication (date, time, nature of the communication, amount of information sent, etc.) other than the content but also the location of the terminal used for electronic communications.

### **Conclusions:**

The special method of investigating of obtaining traffic and location data provided by the Code of Criminal Procedure has experienced an existence troubled by the repeated problems of legality of data retention and storage by communications service providers. Although it has undergone changes, both it and the special legislation that creates the framework for its application have problems that can only be solved through a wider intervention of the legislator.

Romanian law has terminological inconsistencies but also contradictions regarding the maximum duration of data storage, meaning that it will not be possible to achieve a legal storage of data and, consequently, they will not be able to legally communicate to criminal prosecution bodies to constitute evidence in criminal proceedings. *De lege ferenda*, it is necessary to remove the maximum term of three years for which traffic data can be retained and stored in order to achieve the transmission of the communication. There is no technical justification for which the data must be stored for such a period, they must be deleted as soon as they are no longer necessary for communication or be anonymised.

From the perspective of the European Court of Justice's jurisprudence we consider that it will no longer be possible to continue to use this special method of research in its current form, as retention and storage of data on an indefinite number of people is no longer allowed, and mechanisms must be found whereby only certain categories of people to be affected.

By law, the special method of investigation should be transformed into a special method of surveillance by which, for certain persons and only for the future, it is authorized to collect traffic and location data for the purpose of gathering evidence, it is not acceptable to carry out this activity in the past as it would contradict the need to limit data collection to certain persons only.

**Title XI - Seizure, handover, and search of postal items** - In this part of the paper I analysed a special method of investigation with a rich history, being known since the invention of the post. The special method is like the search and seizures, involving the opening of a postal item to verify the contents.

**Conclusions:**

The seizure, handover and search of postal items is a form of search, not fully understood by the Romanian legislator. The regulation of this measure can be improved by emphasizing the role of the judge of rights and freedoms in the process of detailing the approved activities and on the subjects against whom the measure will be taken. We consider that it is necessary for the legislator to impose restrictions because it is not admissible to search all correspondence sent or received by a person, especially if the Code does not condition that the person that's subjected to this measure is suspected of having committed an act.

**Title XII - Use of undercover investigators and collaborators** - This section is dedicated to a special method of investigation controversial and distinct from others as it involves the infiltration of a state agent - police officer or collaborator - within a criminal organization to obtain information in order to identify the members of the group and to prosecute them. Problems that we will insist on are the way in which the collaborators are motivated and the way in which it will be possible to obtain evidence derived from the special investigative method. As the use of undercover investigators or collaborators cannot lead directly to obtaining evidence, being only an investigative procedure, the evidence can be obtained only by making recordings by the investigator or collaborator or by hearing them in criminal proceedings.

**Conclusions:**

The use of undercover investigators and collaborators is an investigative method that is still in an early stage of development and regulation in the Romanian judicial system. Although it constitutes a serious interference in the private life of the person subjected to the measure, its use is a necessity in the investigation of crimes such as terrorism, trafficking, and illicit drug use and even corruption offenses.

The regulation of the investigative method can be improved by revising the way of authorizing it, in the sense of transferring the competence to the judge of rights and freedoms, as well as regulating a collaboration agreement for the persons to be used as collaborators. Such an agreement would be a guarantee for a fair trial, giving both the defense and the court the opportunity to investigate the credibility of the employee by reporting his motivation - retention of a cause of impunity, reduction of punishment, offering compensation, etc. For the services provided by the collaborator, it is necessary that they can be paid in order to motivate as many people as possible to collaborate with the prosecution.

At the same time, it is necessary to provide legislative support to allow criminal investigation bodies to legally develop a network of informants, paid regularly, in order to benefit from information on any crime, without the need to authorize a special investigative method.

The existence of the investigative measure is imposed by the need to prevent and punish serious crimes committed by criminal organisations. As such, the idea of its existence, the importance of the information it can provide and the understanding that its power lies not so much in proving the existence of a crime but in helping it to dismantle criminal groups and to prevent new crimes must be widely accepted.

**Title XIII - Authorized participation in certain activities** - In the continuation of Title XII we analyze another special method of research whose name does not seem to indicate clearly its object. It proves to be a special method of investigation when an undercover investigator or a collaborator has to carry out the act provided by the criminal law in order to help prosecute another person. The central problem in this measure is to avoid entrapment. In the paper we will analyze the conditions under which the authorized participation in certain activities will have a legal character.

### **Conclusions:**

Authorized participation in certain activities is a special method of investigation introduced by the Code of Criminal Procedure as a distinct method of investigation. Although, legislatively, it could be considered an autonomous measure, it will always be part of a criminal investigation in which forms of covert investigation are used (through investigators, collaborators, informants) being inconceivable outside such a situation. .

Although the Code of Criminal Procedure provides for the possibility of authorizing a criminal investigation body to carry out authorized participation in certain activities, in reality such a situation is not feasible, and an undercover investigator or collaborator will be used.

As it implies an authorized activity that would take the form of a criminal act, it is obligatory that through its activity, the undercover investigator or collaborator does not determine the commission of a crime but must adopt only a passive attitude, at most to offer the investigated person only a simple opportunity to commit a crime, without taking any action to persuade him to do so.

**Title XIV - Controlled deliveries** - The last special method of investigation is controlled deliveries, a method less analyzed by Romanian doctrine and which is an effective method in combating illicit cross-border trafficking. The special method has the peculiarity that it is carried out, in its original form, through cross-border actions by several states in order to combat serious crimes such as illicit drug trafficking, a crime for which this measure was invented.

### **Conclusions:**

Controlled deliveries are a special method of investigation that already existed at the time of the entry into force of the Code of Criminal Procedure, being used in the case of serious crimes related to drug trafficking and the activities of organized crime. The current legislation is a combination of special legislation applicable prior to the entry into force of the Code of Criminal Procedure.

The nature of the special investigative method is that of a special investigative technique, as it cannot lead directly to obtaining evidence in criminal proceedings. However, the special method of investigation has never been conceived as a measure to be applied alone but will have to be associated with other special methods of surveillance. The purpose of the controlled deliveries will be the investigation of a crime or the identification of persons involved in the commission of crimes involving the illegal transport of goods. It will lead, most often, to the organization of the *flagrante delicto* at the end of the supervised delivery, which will lead to the arrest of criminals and the obtaining of evidence.

Controlled deliveries will have their maximum applicability when used to combat cross-border crime, especially in the case of drug trafficking, involving cooperation between the prosecutor and the authorities of the countries of origin and transit.

Apart from minor shortcomings, either in terms of terminology or lack of corroboration of the texts of the criminal procedure law, controlled deliveries are currently regulated in an appropriate way to help achieve the purpose of the measure, although it is of particular complexity its great application in practice. Due to this complexity in relation to the number of people involved, the necessary material efforts, ensuring international cooperation between institutions,

permanent coordination and control of the prosecutor, permanent monitoring of transport, the use of the special measure is suitable only in cases of great importance and for the discovery and capture of important criminal groups.

**Title XV - Special investigation techniques provided by the special law** - In the last part of the paper we analyzed the special investigation techniques provided by Law no. 51/1991 as the only special law left in force regulating such techniques. Looking into the historical context at the special investigative techniques, most of the times they originate in the activities carried out by the intelligence services. The special investigative techniques provided by Law no. 51/1991 will be used only by state bodies in the field of national security and are known as activities specific to gathering information.

### **CONCLUSIONS:**

Ensuring national security is an obligation for any country, regardless of its political regime, special investigative techniques being developed mainly through the activities of the secret services. By knowing, preventing, and removing threats, it is possible to maintain the supreme values of the state but also to ensure its continued existence.

In the field of national security, the main actors will not be the judicial bodies but the state bodies in the field of national security that permanently carry out their activity both inside and outside the country. However, as some of the activities of these services will restrict the fundamental rights and freedoms of private individuals, Parliament has established an *a priori* control through the judicial authorisation of special investigative techniques. Although this condition is met, the subsequent supervision and control will not be performed by an independent body or even by the prosecutor. The situation of regulating particularly long deadlines for which special investigation techniques can be authorized is also worrying, which makes them even more intrusive. Moreover, the validity of the information that led to the formulation of proposals for the authorization of special investigative techniques cannot be investigated in the authorization process, as no evidentiary standard to be observed is indicated. This situation also seriously affects the possibility to fully investigate the proportionality and subsidiarity of the measure, Law no. 51/1991 providing for impermissibly broad conditions in comparison with the provisions of the Code of Criminal Procedure.

## CONCLUSIONS

Special investigative techniques constitute an evidentiary procedure derogating from the rules established in the case of regular procedures, being noted for its secret and intrusive character, its strictest regulation should be observed in order to prevent abuses in its use by the prosecution. Also, they will also be used for carrying out information gathering activities by state bodies in the field of national security, this purpose being incompatible with the use of information obtained as evidence in criminal proceedings.

Summarizing the above, the Romanian criminal procedure legislation has deficiencies regarding the regime of special techniques for investigating crimes by which fundamental human rights are not given due protection, proving that the regulation is still in its infancy and requires its maturation through a deeper reflection on the origin of legal texts but also on the jurisprudence of the ECHR.