LRCM | LEGAL RESOURCES CENTRE FROM MOLDOVA

SUBMISSION

Made in accordance with Rule 9.2 of the Rules of the Committee of Ministers
Supervision of execution of the Iordachi and others v. Moldova judgment

Contents

INTRODUCTION

The Legal Resources Centre from Moldova (LRCM)[1] is a not-for profit non-governmental organization based in Chişinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice, effective observance of civil and political rights and an enabling environment for civil society organizations in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner.

LRCM has an extensive expertise in analyzing the activity and reforming the justice sector, reporting on human rights and representation before the European Court of Human Rights (ECtHR), ensuring the equality and nondiscrimination, as well as in promoting reforms for an enabling environment for civil society organizations.

LRCM monitors the process of execution by the Moldova authorities of the ECtHR judgments. It published two reports on the execution of ECtHR judgments by the Republic of Moldova, for the period 1997 to 2012[2] and for the period 2013 to 2014[3]. These reports are available in Romanian and English.

Until February 2016 no Action Plan regarding the execution of the *Iordachi and others v. Moldova*[4] judgment was presented by the Moldovan Government. This submission analyzes the effectiveness of measures taken by the authorities to execute this judgment. The statistical data presented in the document is the official data presented by the Moldovan Department of Judicial Administration.

In December 2015, LRCM organized a round table on the phone tapping in Moldova, bringing together parliamentarians, representatives of the Supreme Council of Magistracy, investigative judges, prosecutors, lawyers and representatives of other legal professions.[5] The round table was aimed to discuss the findings from this document.

ECtHR FINDINGS IN *IORDACHI AND OTHERS V. MOLDOVA*

In its judgment *Iordachi and Others v. Moldova*, ECtHR found that the domestic legislation on phone tapping did not contain sufficient safeguards against the arbitrary. ECtHR noted that, although Moldovan legislation on the phone tapping adopted after 2003 was clearer than the previous one, it was not compatible with the ECHR. ECtHR analyzed both the initial stage of authorisation of phone tapping and the tapping itself.

Regarding the initial stage of authorisation of phone tapping, the ECtHR found that:

- the legislation did not define clearly enough the nature of offenses which might give rise to the issue of an interception warrant, because more than half of offenses provided by the Criminal Code were susceptible to fall under this category;
- the law did not define clearly enough the categories of persons liable to have their telephones tapped;
- there was no clear time-limitation for authorising phone tapping;

---

[1] http://crjm.org/en.

[2] Legal Resources Centre from Moldova, Execution of judgments of the European Court of Human Rights by the Republic of Moldova: 1997-2012, available in English at http://crjm.org/wp-content/uploads/2014/04/Execution_of_Judgments_of_the_ECHR_by_the_Republic_of_Moldova_1997-2012.pdf.

[3] Legal Resources Centre from Moldova, Execution of judgments of the European Court of Human Rights by the Republic of Moldova: 2013-2014, available in English at http://crjm.org/wp-content/uploads/2015/09/LRCM-Report-ECtHR-31-03-2015.pdf.

[4] ECtHR, Judgment *Iordachi and others v. Moldova*, 10 February 2009, para. 19-54.

[5] Video recording of the round table discussions (in Romanian) is available at the following link https://www.privesc.eu/arhiva/64754/Prezentarea-constatarilor-si-concluziilor-cu-privire-la-legislatia-si-practica-in-domeniul-interceptarii-convorbirilor-telefonice.

- the law vaguely regulated situations and circumstances when this measure could be authorised.

Concerning the stage of phone tapping, the ECtHR noted that:

- although the law provided for judicial control, the role of the judge was limited to only authorising the tapping. The law did not provide the obligation to inform the investigative judge about the results of the tapping and did not require his/her control over prosecutors' compliance with the legal requirements;
- the law did not provide how tapping results need to be examined, kept and destroyed;
- the law did not establish an effective mechanism of parliamentary control over observance of the legislation on phone tapping and the law did not regulate what happens when conversation between the client and his/her lawyer is tapped;
- the law did not provide that tapping could have been used as ultimate resort. This fact, analyzed through extremely high number of authorization requests (some 3,000) and the high rate of authorized tapping (in 2005 - 98.81%; in 2006 - 97.93%; and in 2007 - 99.24%), was particularly worrying in the opinion of the ECtHR. Accordingly, the ECtHR looked not only into the quality of the law, but also into the national practice of its implementation.

AMENDMENT OF THE LEGISLATION IN 2012

Following the *Iordachi and others v. Moldova* judgment, in 2012 Moldovan legislation was amended by the introduction of a separate section in the Criminal Procedural Code dedicated to special investigative activity[6] and by adopting a new Law on special investigation activity.[7]

The new legislative provisions substantially limit the possibilities of unjustified tapping as to follows:

- the nature of offenses which may give rise to the issue of an interception warrant - the list of crimes for which phone tapping is allowed is exhaustively provided in art. 132^8 para. (2) of the Criminal Code. However, following the extension of the list in 2013[8] and 2014,[9] the crimes eligible for phone tapping represent about 1/3 of all crimes under the Criminal Code;
- the categories of persons liable to have their telephones tapped - according to art. 132^8 para. (3) of the Criminal Procedural Code, only the suspect, accused or persons whose identity was not established can be tapped, only if there is sufficient data confirming that they contributed to crimes. In 2014, the legislation introduced the possibility of authorising phone tapping at the request of the victim, damaged party, relatives, his/her family members and witness, if there is imminent danger for his/her life, health or other fundamental rights, if it is necessary to prevent a crime or if there is a clear risk of irreparable loss or distortion of evidence.[10] The legislator prohibited the ordering and tapping of phone conversations between the lawyer and his/her client concerning relations of legal assistance.[11] On the other hand, when a conversation with the lawyer is tapped accidentally, transcript of this communications is prohibited;[12]
- the time-limit for phone tapping - the new provisions limit phone tapping warrant for a period of 30 days, which can be extended to maximum 6 months, and each extension can be ordered for up to 30 days.[13] After 6 months, a new phone tapping on the same ground and on the same subject is prohibited, except when new circumstances occur[14];

[6] Law no. 66 of 5 April 2012 on amending the Criminal Procedural Code, p. 48 and 49.
[7] Law no. 59 of 29 March 2012 on special investigation activity.
[8] Law no. 270 of 7 November 2013 on amending some legislative acts, Art. II, p. 3.
[9] Law no. 39 of 29 May 2014 on amending the Criminal Procedural Code, p. 8.
[10] Art. 132^8 para. (4) of the Criminal Procedural Code.
[11] Art. 132^4 para. (10) of the Criminal Procedural Code.
[12] Art. 132^9 para. (9) of the Criminal Procedural Code.
[13] Art. 132^4 para. (7) of the Criminal Procedural Code.
[14] The same rules apply in case of using undercover agents or in case of investigation of facts related to prosecution of organized crime and financing of terrorism, as well as for searching the accused.

- circumstances in which tapping can be authorised - phone tapping can be requested only within criminal investigation.[15] According to art. 132[1] para. (2) of the Criminal Code, special investigation activity can be applied only if the following conditions are cumulatively met:
  (1) it is impossible to reach the objective of the criminal proceedings by other measures and/or the administration of evidence could be seriously hindered;
  (2) there is a reasonable doubt that a crime is planned or committed; and
  (3) proportionality between the need for action and interference in the human rights of a person.

The investigative judge can authorize the use of data obtained during the phone tapping in another criminal investigation if the crime committed is of the same nature; in terrorism cases; organized crime cases or crimes against the state security, but not later than 3 months from the moment when the data became available.[16]

NATIONAL PRACTICE ON PHONE TAPPING

Although the legislation was amended to guarantee the respect of human rights during phone tapping, there are several worrying aspects that raise serious doubts as to respect of the new safeguards in practice. These aspects are the increasing number of phone tapping requests and a very high rate of approvals issued by the investigative judges; the manner how the judicial control after the interception takes place; information of people whose phone conversations were tapped; storage and destruction of the results of interceptions; and parliamentary control.

a. Number of tapping warrants

The phone tapping can be carried out only after authorization of prosecutors' requests by the investigative judges. Although back in 2009 the ECtHR noted in the judgment *Iordachi and Others v. Moldova* a too frequent use of phone tapping and a particularly high rate of requests authorised by investigative judges, the official statistics confirm that the situation has not changed significantly. On the opposite, the number of such requests increased significantly. Annually, investigative judges constantly admit about 98% of requests for phone tapping, and this percentage has not changed significantly after the judgment *Iordachi and Others* was delivered and the legislation was amended.

The number of phone tapping requests submitted by the prosecutors increased constantly. For example, in 2012 when the legislation was amended, the number of requests (5,029) raised by 40% compared to 2011 (3,586). In 2014, the number of phone tapping requests increased by over 100% compared with 2013 and was even higher than the number of requests examined before the Criminal Procedural Code was amended in 2012. In 2015 Moldovan prosecutors requested permission for interceptions 9,962 times, what represents an increase of 67.3% compared to 2014 and of 241% compared to 2013. Although the number of requests varied from year to year, the rate of authorisations granted by investigative judges remained usually very high - about 98%. The statistics in the table below suggest that the authorisation of phone tapping requests is almost automatic, irrespective of the content of the prosecutors' requests.

Table: Statistics on prosecutors' requests for authorisation of phone tapping examined by investigative judges in 2006, 2009 - 2015 [17]

Year	No. of examined requests	Variation comparing to the previous year	No. of authorised requests	% of authorised requests
2006	1,931	-	1,891	**97.9%**
2009	3,848	+199%	3,803	**98.8%**

[15] Art. 132[1] para. (1) of the Criminal Procedural Code and art. 18 para. (3) of the Law on special investigation activity.
[16] Art. 132[5] para. (9) of the Criminal Procedural Code.
[17] Data presented by the Department of Judicial Administration.

2010	3,890	+1.1%	3,859	**99.2%**
2011	3,586	- 7.8%	3,539	**98.7%**
2012	5,029	+40.23%	4,911	**97.6%**
2013	2,915	-42.03%	2,876	**98.66%**
2014	5,952	+104.18%	5,861	**98.47%**
2015	9,962	+67.3%	9,704	**97.4%**

As the ECtHR noted in *Iordachi and Others v. Moldova*, "*these figures show that the system of secret surveillance in Moldova is, to say the least, overused*".[18] Moreover, as the ECtHR found, "*this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance*".[19] It seems that investigative judges verify whether the prosecutors presented the entire list of documents needed for examination of the request and not if phone tapping is indeed justified and used at the last resort. This conclusion was reiterated at the round table discussion on phone tapping in Moldova organized by LRCM in December 2015 with investigative judges, prosecutors and representatives of other legal professions.[20] This practice is also generated by the modality in which the phone tapping requests are examined. The request is examined by the investigative judges in the presence of prosecutors only. Lawyers are not admitted in examination of these requests.

b. Judicial control

Within 24 hours after the expiration of the period for which the tapping was authorized, the criminal investigation body or the prosecutor must draft the minutes of the phone tapping and the relevant transcripts of the tapping.[21] The prosecutor decides which transcripts are important for the criminal case and have to be transcribed separately and attached to the criminal file.[22] The rest of the records are not attached to the criminal file and, therefore, are not accessible to the defendant. This raises issues regarding the equal access to the materials of the criminal case files and the efficiency of the right to defense.

Within 48 hours after the expiration of the period for which the tapping was authorized, the prosecutor must send the minutes and the original recordings to the investigative judge. The judge has to verify the compliance of the tapping with the legal requirements.[23] In case if obvious violations of human rights occurred as a result of the tapping, the investigative judge has to annul the measures undertaken. This decision is final. [24]

Although the prosecutors are obliged to inform the investigative judge about the results of the phone interceptions and submit the minutes, the transcript and the recorded materials, this does not happen in all cases.[25] This happens mainly in larger cities, such as Chisinau, Balti and Cahul, while in other regions the requirement of information is often neglected.[26] As a result, in many cases of interception, there is no post-factum judicial control. There is no official statistical data on the number of cases when prosecutors informed or not the investigative judges about the results of the interception.

c. Informing people whose conversations were tapped

The Law on special investigation activity provides the right of every person that was subjected to special investigation activity to be informed later about that.[27] After the person has been informed

[18] ECtHR, Judgment *Iordachi and Others v. Moldova*, 10 February 2009, para. 52.
[19] ECtHR, Judgment *Iordachi and Others v. Moldova*, 10 February 2009, para. 51.
[20] Video recording of the round table discussions (in Romanian) is available at the following link https://www.privesc.eu/arhiva/64754/Prezentarea-constatarilor-si-concluziilor-cu-privire-la-legislatia-si-practica-in-domeniul-interceptarii-convorbirilor-telefonice.
[21] Art. 132^9 para. (7) of the Criminal Procedural Code.
[22] Art. 132^9 para. (12) of the Criminal Procedural Code.
[23] Art. 132^9 para. (15) of the Criminal Procedural Code.
[24] Art. 132^5 para. (6) of the Criminal Procedural Code.
[25] Interviews with investigative judges carried on in February 2015.
[26] Interviews with investigative judges carried on in February 2015.
[27] Art. 4 para. (1) of the Law no. 58 of 29 March 2012 on special investigation activity.

about tapping, s/he has the right to have access to the minutes on tapping, the recordings, as well as the decisions of the investigative judge on the legality of the measure.[28] However, the person will only have access to the materials considered relevant for the criminal investigation by the prosecutor and attached to the case file (see above the section on judicial control).[29]

According to the Criminal Procedural Code, investigative judges are obliged to inform only the person whose phone conversations were tapped in case if after the judicial control it was established that the tapping complies with the legal requirements.[30] There is no legal requirement for the judge to inform the person when the interception did not meet the legal requirements.

Although the right of the person to be informed about the phone tapping existed also prior to the amendment of the Criminal Procedural Code in 2012, in practice this happened in extremely rare cases. The situation has not changed radically since then. The investigative judges are reasonably in the impossibility to inform people, because the prosecutors do not inform them in all cases on the results of the tapping (see above the section on judicial control).

Moreover, the investigative judges can postpone the moment of the information of the person by a motivated decision. In any event, the information must be done not later than the end of criminal investigation.[31] The law does not provide reasons for a delayed information. In practice, there are many cases when the person is not informed at all or is informed with significant delays.[32]

There is no public statistical data about the cases where the interception was considered illegal by the investigative judges, or about the case where the persons were informed with delay about the tapping.

d. Storage, destruction and archive rules

The materials obtained as a result of the phone tapping are stored both by the investigative judges and the prosecutors.

Records kept by the investigative judges. Investigative judges receive the original recordings from the prosecutors and have to keep them in secure spaces.[33] This information is not available to the suspect, accused or defense attorney. Some courts lack special secure places to store the materials kept by the investigative judges. Storing the records of the phone conversations in unsecure places might affect the right to private life of persons whose conversations were tapped.

After one year from the moment when the court decision became final, the information obtained as a result of the interception that is kept by the investigative judge has to be destroyed by the prosecutor, based on the decision of the investigative judge.[34]

Records kept by the prosecutors. During the criminal investigation, the leading prosecutor is responsible for the storage of all the materials and results of the phone tapping that are attached to the criminal case file.[35] As it was stated above, the prosecutor decides which transcripts are important for the criminal file and only this information will be communicated to the defense attorney. During the judicial control of the legality of the interception, the investigative judge has to decide what records need to be destroyed and designates the responsible person, who in practice is usually a prosecutor. This action has to be recorded in separate minutes attached to the case file. [36]

---

[28] Art. 132^5 para. (8) of the Criminal Procedural Code.
[29] Art. 132^9 para. (12) of the Criminal Procedural Code.
[30] Art. 132^5 para. (7) of the Criminal Procedural Code.
[31] Art. 132^5 para. (7) of the Criminal Procedural Code.
[32] Interviews with investigative judges carried on in February 2015.
[33] Art. 132^9 para. (13) of the Criminal Procedural Code.
[34] Art. 132^5 para. (11) of the Criminal Procedural Code.
[35] Art. 132^9 para. (14) of the Criminal Procedural Code.
[36] Art. 132^9 para. (15) of the Criminal Procedural Code.

The General Prosecutor's Office drafted a guideline that provides rules for keeping, destroying and archiving the materials obtained during special investigation activity. [37] This guidebook, as well as the information about the number of records kept, destroyed and archived by the prosecutors as a result of special investigation activity is confidential.

Since the guidebook mentioned in the previous paragraph is confidential, it is unknown whether there are safeguards to secure the integrity of the results of the phone tapping by the investigative authorities. Storing of personal data by itself represents violation of the private life of a person, regardless of whether these data was or was not further used.

The need to ensure security of records by the prosecutors is also a concern.[38] In 2012 mass-media published several phone conversations of high state officials, such as the Prime-minister and the head of State Tax Inspectorate at that time.[39] The leading prosecutor recognised afterwards that these recordings were done within a criminal investigation.

e. Parliamentary supervision

The General Prosecutor has to present every year, until mid of February, a report on the special investigative measures (including phone tapping) to the Parliamentary Commission on National Security, Defense and Public Order (Parliamentary Commission). The report has to include the number of authorised measures, the number of annulled measures and the results of special investigative measures. The Parliamentary Commission has the right to request additional information, but has no powers to study the case files.[40] Such reports were presented to the Parliamentary Commission in 2013, 2014 and 2015,[41] but were never made public.

On 2 June 2015 the Parliamentary Commission organized a meeting with the authorities involved in special investigative activities (General Prosecutor's Office, Ministry of Internal Affairs, Ministry of Defense, National Anticorruption Centre, Intelligence and Information Centre, Protection and Guard State Service, Customs Service, Department of Penitentiary Institutions) where the practical issues on applying the special investigative activity were discussed. The meeting was conducted behind closed doors. After the meeting, a press-release was published on the web page of the Parliament, without providing some information on the situation of the special investigative measures in Moldova.[42]

The reports presented by the General Prosecutor's Office were classified as state secret.[43] The report contains information of general interest, such as the number of authorised measures and the number of cancelled measure. These statistical data cannot affect state security. Moreover, the law provides that the Parliamentary Commission cannot deal with information about specific case files and we suppose that the report does not contain any protected personal data. Therefore, it is not justified to classify this report and to conduct Parliamentary hearings behind closed doors.

We consider that this report should include information of general interest, such as: data on the number of interceptions carried out without authorisation of the investigative judge; the number of interceptions that didn't meet the legal requirements and rejected following judicial control; the number of persons who were and were not informed of the tapping; the number of cases when

---

[37] Information provided by the General Prosecutor's Office on 16 April 2015.

[38] In *Craxi v. Italy*, judgment of 17 July 2003, the ECtHR noted that dissemination by newspapers of information collected by a public authority in circumstances where those newspapers must have obtained the information from the public authority without any procedural safeguards constitutes a breach of Article 8.

[39] http://www.publika.md/interceptari-telefonice-care-ar-putea-crea-un-nou-scandal-politic--nume-citate--filat--vicol--recean--ciocan--strelet-audio_1265141.html.

[40] Art. 38 of the Law no. 59 of 29 March 2012 on special investigation activity.

[41] Information provided by the General Prosecutor's Office on 29 July 2015.

[42] http://www.parlament.md/Actualitate/Comunicatedepresa/tabid/90/ContentId/2164/Page/5/language/ro-RO/Default.aspx.

[43] Art. 23 of the Law no. 58 of 29 March 2012 on special investigation activity and art. 7 para. (4) a) of the Law no. 245 of 27 November 2008 on the state secret.

persons were informed with delay about the fact that their phone is tapped the number of tapping stored, destroyed and archived by prosecutors; etc.

f. Other relevant legislative initiatives

On 17 July 2014, Parliament adopted in the first reading a draft law on combatting extremism[44]. Under this draft law, the Intelligence and Security Service will be the main authority responsible for preventing extremist activities and will be able to apply special investigation activity outside criminal proceedings, based on a 'security warrant'. Among others, the Intelligence and Security Service will be able to carry out phone tapping. The draft law has been criticized by the Venice Commission[45] for several reasons, including for extremely vague formulations that allow authorities to not inform the person about the application of special measures after their finalization; lack of requirement that the request for the security warrant refers to any justification of interference in the right to private life of a person; extremely extensive list of crimes for which security warrant can be issued; materials of the case files related to security warrant represents state secret, etc. There were extensive discussions in the Parliament lately supporting the promotion of the 'security warrant'. It this law will be adopted, the legal safeguards against arbitrary phone taping will be seriously reduced.

RECOMMENDATIONS

We urge the Committee of Ministers to enhance its oversight on the execution of the *Iordachi and others v. Moldova* judgment. In light of the alarming statistics, combined with an imperfect legislation presented above, we ask the Committee of Ministers to raise during its Human Rights meetings the question if the judgment *Iordachi vs Republic of Moldova* was in fact executed, and if not, what further steps have to be taken by Moldovan authorities in order to comply with it. We recommend that Moldovan authorities present a thorough analysis to the Committee of Ministers on the practice of phone tapping after the entry in force of the legal amendments from 2012, and therefore clarify if those amendments provide sufficient guarantees against arbitrary phone tapping. If appropriate, the Governmental Agent should present a detailed Action Plan regarding the execution of the *Iordachi and others* judgment.

[44] Draft no. 281 of the Law on amending certain legislative acts, registered at the Parliament on 9 July 2014, available at http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/2388/language/ro-RO/Default.aspx.

[45] Venice Commission, Opinion no. 756/2014 of 2 April 2014, CDL-AD(2014)009, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)009-e.