INTERNATIONAL ASSOCIATION OF JUDGES
THIRD STUDY COMMISSION
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QUESTIONNAIRE
THE INTERCEPTION OF COMMUNICATIONS
AND ITS IMPACT ON PRIVACY RIGHTS

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This year’s questionnaire will explore the use in member countries of electronic devices as a criminal investigation tool to intercept communications. Technological advances have increased the sophistication of and the reliance by investigative agencies on devices to intercept all forms of communication transmission, from the use of microphones to capture face-to-face conversations, to wiretapping, to the interception of computerized and satellite communications.

This questionnaire will explore: (i) the conditions under which the electronic interception of private communications is authorized in member countries; and (ii) the legal principles that apply to the admissibility of evidence derived from the interception of communications.

This questionnaire does not address the electronic interception of private communications for the purpose of detecting terrorist activities as legislative responses of member countries to terrorist activities may be the basis for discussion at a future conference.

Topic I: The initial authorization to intercept private communications

1. (a) Does your country have special legislation that authorizes the interception of private communications to assist in the investigation of crime?

   Yes
   Investigative measures regulated in sections 135 and 136 Code of Criminal Procedure are the following:
   Surveillance of messages (section 135)
   (Optical and) acoustical surveillance of persons (section 136)
   Surveillance of messages means the determination of the contents of messages which are exchanged or forwarded via a communication network or a service of the information society.
   Acoustical surveillance of persons means the surveillance of the conduct of persons by penetrating their private sphere, as well as the comments of persons which are not intended to come to the immediate knowledge of third parties, by using technical means for sound transmission and sound recording.

   If yes, does the interception require the prior authorization of a Court of law?
   Yes, with the exceptions mentioned below.
   The interception of communication shall be ordered by the public prosecutor on the basis of a court authorization.
   The criminal police may conduct an acoustic surveillance of a person on its own initiative
   • if and so long as it is urgently suspected that a person affected by the surveillance has kidnapped or otherwise seized another person, and if the
surveillance is restricted to comments at the time and location of the deprivation of liberty

- to prevent the perpetration of crimes or to defeat criminal organisations if the surveillance is restricted to comments made in public or comments that are made in the presence of an investigator
- at public places and events to prevent or stop dangerous attacks against life, personal security or property of persons, in either way this has to be announced in advance.

If yes, please answer questions (b), (c) and (d) below:

(b) what conditions must be present or criteria met before a Court will grant an order authorizing the interception of private communications?

The surveillance of messages is admissible

- if and so long as it is urgently suspected that one of the persons concerned by the information has kidnapped or otherwise seized another person, and if the surveillance is restricted to messages received or sent by the accused and the time of the deprivation of liberty
- if it is to be expected that this can promote the clearing up of a punishable act, committed with intent, which carries a prison term of more than six months, and if the owner of the technical equipment, which was or will be the source or the target of a message transmission, agrees to it
- if this appears to be required to clear up a punishable act, committed with intent, that carries a prison term of more than one year, or if the clearing up or prevention of a punishable act, committed or planned within the framework of a criminal or terrorist association or organisation (pursuant to §§ 278 to 278b of the Criminal Law Code) would otherwise be essentially impeded, and
  - the owner of the technical equipment, which was or will be the source or target of messages is urgently suspected of that punishable act, or
  - it is to be expected, on account of certain facts, that a person urgently of the offence will use the technical equipment or will establish contact with it
- if it is to be expected, on account of certain facts, that the whereabouts of a fugitive or absent accused may be determined, who is urgently suspected of a punishable act, committed with intent, that carries a prison term of more than one year.

The acoustical surveillance of a person is admissible

- if it is restricted to comments that are intended to be brought to the knowledge of an under-cover investigator, or another person informed of the surveillance, or that may be perceived by that person directly, and if it appears to be required in order to clear up a punishable act, committed with intent, that carries a prison term of more than three years
• if the clearing up of a crime carrying a prison term of more than ten years, or a crime by a criminal organization or terrorist association, or the clearing up or prevention of a punishable act seriously endangering public society committed or planned within the framework of such an organization or association, or the whereabouts of the person accused of such a punishable act would otherwise be without prospects of success or be essentially impede, and
  o the person who is the target of the surveillance is urgently suspected of that crime, or
  o if it is to be expected, on account of certain facts, that a person who is urgently suspected of having committed that crime will establish contact with the person who is target of the surveillance.

To the extend that it is unavoidable for performing the surveillance it is admissible to penetrate a certain flat or other rooms protected by domestic authority, if it is to be expected, on account of certain facts, that the accused will use the rooms in question.

(c) describe the hearing in which the application for an authorization to intercept private communications is granted. Who presents the application (police? prosecuting attorney)? How is the evidence presented (viva voce, by sworn written statement)? Is the application audio-recorded?

The application for an authorization for the surveillance of messages or the acoustical surveillance of persons is presented by the public prosecutor. Normally, evidence is presented through written statement. The court decides in written proceedings. In urgent cases the application may be presented and the authorization may be given orally in advance.

(d) must the authorization to intercept private communications specify:
  • what types of interception may be used (i.e. microphone, interception of computer communications, wiretap of phones)?
  Yes, the type of message communication, the technical equipment and the terminal device or the type of the technical means have to be specified.
  • the length of time the authorization remains in effect?
  Yes, the order and the authorization have to contain the time when the surveillance begins and ends.
  Is there a maximum time provided by law that an authorization to intercept can remain in effect?
  No. Investigative measures may be ordered for such a period of time that is likely to be required in order to fulfil the purpose. Another order is admissible in every case, whenever it is to be expected on account of certain facts that the further performance of an investigative measure will lead to success.
  • the names of the persons who are the target of the authorization
  Yes

2. Do legislative provisions require that the person whose communications have
been intercepted be notified of this fact once the interception has ended?

Yes
After ending an investigative measure the public prosecutor has to serve his/her order and the court authorization on the accused. This service may be postponed for as long as the purpose of the proceedings would be jeopardized.
Furthermore the accused shall be given the opportunity to receive all results, also in written form. In the interest of third parties the public prosecutor may exclude from becoming known to the accused those parts that are not of significance for the proceedings. These results must not be used in the trial.

Topic II: The admissibility of intercepted communications in criminal trials

3. Is some type of admissibility hearing held to determine whether evidence obtained through the electronic interception of communications may be admitted in evidence against an accused person at his/her trial?

No
A preliminary hearing does not take place. The admissibility of intercepted communications may be challenged at any time during the proceedings or during trial before and after the introduction of evidence.

4. Is the accused in preparation for his/her criminal trial permitted to review all evidence that was presented at the initial request or application for an authorization?

Yes
However, in the course of the proceedings the public prosecutor may exclude evidence from becoming known to the accused if and so long as the purpose of the proceedings would be endangered.

5. Is the accused’s counsel permitted to question the persons who prepared written or made oral statements at the initial request or application for an authorization?

Yes
The accused has the right to take part in the interrogation of witnesses. He/she may question the attesters or the policemen who prepared the request.
If yes, are there criteria used by the Court to permit this questioning?
Yes
If yes, what are the criteria?
The accused has to claim or if necessary provide basis that the questioning will prove the absence of one of the conditions required for the approval of the authorization.

6. For what reasons would a Court not permit the use of intercepted private communications in a criminal prosecution?

Intercepted private communications may only be used as evidence if an investigative measure was lawfully ordered and authorized.
- Would the Court refuse to permit the use of intercepted private communications depending on the occupation of the person to whom the communication is made (i.e. lawyer, priest, doctor) or the relationship between the persons whose communication has been intercepted (i.e. marital)?
Yes
A conversation between the accused and a clergyman regarding matters which were confidential to them during confession or otherwise under the pledge of clerical confidentiality is protected. The acoustic surveillance of a clergyman in a confessional or a room determined for spiritual talks is illicit.

The interception of a conversation between the accused and certain persons privileged to refuse to give evidence e.g. defence counsels, attorneys-at-law or specialists in psychiatry, psycho-therapists and psychologists with regard to matters concerning their capacities is inadmissible.

The interception of communications may only be authorized if one of the persons mentioned above (e.g. clergymen, defence counsels) is urgently suspected of having committed a punishable act that gives reason to interception. The request for authorization requires the prior consent of the commissioner established for these purposes within the Supreme Court.

The Code of Criminal Procedure prescribes no restrictions concerning the relationship between the persons whose communication is intercepted.

• Can the Court refuse to admit evidence such as drugs and cash seized as a result of an unlawful interception of a private communication?

No

7. In your country, are there domestic legislative provisions or international conventions that regulate the interception of private communications by foreign investigative agencies (i.e. CIA, DEA)?

No

There is no specific legislation empowering foreign agencies to intercept private communications. International legal assistance may be granted under the conditions stated therefore. Anyway, the requirements set up for the authorization of the interception of communications have to be met.