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Chosen aspects of the protection of private communication in legal systems and the influence of the European Court of Human Rights jurisdiction of their formation by the application of procedural telephone interception

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The protection of secrecy of communication

The right to the protection of secrecy of communication involves the right to communicate (in any form; therefore, it can be written or sound, in the form of a writing consisting of alphabet signs, images or other graphic symbols, sound signals etc.). The right excludes entities for which the content of the information transferred is not intended and the possibility that the entities, who are not the addressees of the message, will get acquainted with a given pierce of information[1].

According to the right to privacy, an individual must be provided with the possibility of an unfettered establishment of a contact with other people, according to one's choice, as well as the possibility of deciding about the scope of information disclosure[2].

The legal system of democratic countries provides their citizens with the protection of the secrecy of communication.

The case of German constitution (*Grundgesetz*), whose first articles treat about the issue in question, exemplifies the essence and the meaning of the

[1] A. Bojańczyk, *Karnoprawne aspekty ochrony prawa pracownika do tajemnicy komunikowania się*, „Palestra" 2003, no. 1–2, p. 45.

[2] M. Safjan, *Prawo do ochrony życia prywatnego*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, pp. 127–144.

rule concerning the protection of secrecy of communication. Article 10 guarantees the inviolability of the secrecy of communication[3]. This protection is not absolute and it can be limited basing on a legal act. If the limitation of such freedom serves the purpose of protecting the democratic structures of a country, the control of communication may take place without the subjects' consent.

Similarly, in Poland the art. 49 of the Constitution of the Republic of Poland states that the right to protection of the secrecy of communication can be limited, however only for the reasons and under the conditions defined by a legal act and in a way that is defined by this act.

Regulations established in particular countries provide and allow in certain cases to introduce limitations in the field of the protection of secrecy of communication. It may be associated with the necessity of providing a country with protection or, for instance, with fighting particularly threatening crimes. However, only in a scope that is necessary in a democratic country, not in a wider one. The application of the proportionality rule requires taking into consideration all the goods that a certain national interference protects, as well as all the goods that a particular interference violates. While evaluating the necessity of introducing the interference with the right to secrecy of communication, one should take into consideration all the social costs. Postal and telephone communication interception far intervenes with the sphere of an individual's rights, especially with the right to privacy, unconstrained communication and the right to keep the confidentiality of correspondence. These rights are protected by the International Covenant on Civil and Political Rights[4] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[5].

Without any doubts, in some cases the interference with the secrecy of communication in a modern country is inevitable. A country which is obliged to provide safety stands before a difficult task as it has to take into consideration the threats of terrorism and organized crime. Technical improvements, which influence the fast pace of communicating and travelling, can be used by both the authorities, for the purpose of national protection, and by the criminals.

The telephone communication interception, commonly known as the telephone tapping, comprises one of the most controversial sources of seizing evidence during a criminal lawsuit. This kind of actions performed by the

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[3] *Grundgesetz für die Bundesrepublik Deutschland, 1949,* available at: <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf> (last visited 26.03.2011).

[4] International Covenant on Civil and Political Rights opened for signature at New York 19.12.1966, ratified by Poland 3.03.1977, J.L. [D.U.] §167, n. 61.

[5] ECHR of 14.11.1950, ratified by Poland 7.04.1993, J.L. [D.U.] § 285, n. 61.

authorities arouse intense reactions, discussions and suspicion associated with the secrecy of the telephone tapping.

The contemporary level of technical development creates unlimited possibilities of controlling citizens. While observing the contemporary life of an average European citizen it is hard to escape the impression that we are permanently under surveillance; we are followed by video cameras at work, banks, shops and schools. The development of telecommunication together with its digitalization (e.g. GPRS) enables (by recording the data) to establish the location of the person calling us. Thanks to such technologies the discretion of millions of people is potentially threatened. A telephone, also a mobile phone, has become a regular means of interpersonal communication. We keep in touch with our families, friends and acquaintances. In such a situation and at least in this area an individual should be provided with the highest level of security.

The experiences of the contemporary democratic countries indicate that the executive power and its subjects are responsible for the security and public order and are in the possession of means whose application in the name of the public order may lead to the destruction of the democratic institutions and the reduction of civil rights. Such a situation occurs due to the fact that confidentiality and lack of external control can lead to an excessive autonomization or subjectivization of the very purpose of such actions. Moreover, it can lead to the non-observance of a proper restraint while interfering with the rights and civil liberties. Once in a while however, such situation can result from political reasons. If not, the feature of the secrecy of the communication interception makes it more prone to abuse. Public safety being one of the national goods justify the limitation of civil liberties, therefore, it requires preserving the proportionality of an admissible interference in the name of security protection and an efficient system controlling the process of retaining such proportionality in practice. Otherwise, measures applied while protecting the safety, such as a legally permitted telephone tapping, pose a risk to these freedoms themselves. This will occur when – first and foremost – the limitations introduced are arbitrary and disproportionate to the possible threats and – secondly – when they are excluded (either lawfully or factually) from the control exercised by democratic institutions. Freedom and the protection of the secrecy of communication comprise one of the fundamental constitutional rules of every democratic country.

Communication interception in the light of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights jurisdiction

The basic document which created the fundaments for the European system of human rights protection is the European Convention on the Protection of Human Rights and Fundamental Freedoms drafted on 4th November 1950 in Rome, next modified by Protocols 3, 5 and 8 and supplemented by Protocol 2. The Convention is drafted by the Council of Europe and is available only for the Member States of the Council. The right to respect for one's private life and one's correspondence comprise one of the fundamental human rights protected by the Convention.

Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The phrase "in accordance with the law" does not merely refer back to the domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. There must be a measure of legal protection in the domestic law against arbitrary interferences by public authorities with the rights safeguarded by art. 8 sec. 1. It is unlawful to allow the discretion granted to an executive to be expressed in terms of an unfettered power. As the consequence the legal measure "must indicate the scope of any discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference".

The jurisdiction of the European Court of Human Rights is unequivocal in terms of the requirements concerning the quality of regulations which control the appliance of the telephone communication interception.

The foregoing issues were adjudicated in the Court's verdict regarding the Malone v UK case from 2th August 1984. The following theses were adopted:

1. Since telephone conversation falls under the concepts of both "private life" and "correspondence" in art. 8 of the Convention, interception of a telephone call comprises "the interference of public authority in the exercise of the right safeguarded" in art. 8.

2. The phrase "interference in accordance with the law" does not only refer to national law but also to the quality of such law, as it requires it being compliant with the Convention. The phrase thus implies – and this follows from the object and purpose of art. 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by § 1. Especially, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. The requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals.The requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the police are empowered to resort to this secret and potentially dangerous measure.

3. Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.

4. The interference with the rights resulting from art. 8 can be considered "necessary in a democratic society" when the system of telephone communication interception adopted by the police contains adequate guarantees against the abuse[6].

This is how the European Court of Human Rights determined in the aforementioned statement and others, the requirements towards the national law regulating the issue. Such law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot

[6] See: M.A. Nowicki, *Europejski Trybunał Praw Człowieka – orzecznictwo*, t. 2: *Prawo do życia i inne prawa*, Kraków 2002, pp. 826–831; ECHR decision of 2.08.1984 regarding Malone v. UK, A. n. 82; ECHR report of 17.12.1982, 8691/79.

be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The indicated requirements are identical for both continental and common law.

The European Court of Human Rights evaluates the interference with the protection of private correspondence first by examining the formal legality – the existence of regulations of proper rank, secondly by examining the substantial legality – the quality of regulations in force.

The European Court of Human Rights stated that the majority of verdicts issued in the 90's violated art. 8 of the Convention already at the stage of examining the formal legality[7]. This led to the introduction of significant changes in the field of European countries legislation.

The verdicts of the Court in Kruslin v. France[8] and Huvig v. France cases (decision of 24th April 1990, art. 176-B, § 54–55)[9] should be mentioned here. With regard to these cases the European Court of Human Rights formulated the minimal guarantees, which an act referring to telephone tapping needs to include in order to protect against any violations.

Therefore, the domestic law should:
- define the categories of people liable to have their telephones tapped;

Furthermore it should determine:
- type of crime which allows for the appliance of telephone tapping;
- the limit on the duration of telephone tapping;
- the procedure to be followed for examining, using and storing the data obtained;
- the precautions to be taken when communicating the data to other parties, making it possible to control the recordings by a judge or defense;
- the circumstances in which recordings may or must be erased or the tapes destroyed, especially when the investigation was discontinued or the court acquitted the defendant[10].

In these cases the Court acknowledged that the French system did not define the categories of people liable to have their telephones tapped and the type of crimes in connection to which a telephone tapping can be applied. Moreover, it did not stipulate the procedure of preparing reports concerning

[7] See: L. Garlicki, *Komentarz do art. 8*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do art. 1–18*, Warszawa 2010, p. 244.

[8] See: decision of 24.04.1990; M. A. Nowicki, *Europejski Trybunał Praw Człowieka...*, pp. 834–838.

[9] Compare: M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, p. 862.

[10] See: M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, pp. 860–864; idem, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2002, pp. 282–283. The Court took an identical stand in Valenzuela Contreras v. Spain – decision of 30.07.1998, RDJ 1998–2.

replaying the recorded conversations and did not determine the regulations concerning storing or the way of destroying the original recordings.

The aforementioned decisions led to changes in the French legislation system and to the adjustment of the system to the requirements enumerated in the decisions of the Court.

What enables meeting the requirements indicated by the Court during the trials Kruslin v. France[11] and Huvig v. France is first and foremost creating a catalogue of crimes in which a telephone tapping is allowed. It refers both to the procedural interception of communication, namely the one applied basing on the criminal and procedural regulations) and external interception – conducted by the competent authorities as the result of operational actions.

It should also be stated that such a catalogue of crimes involving the appliance of telephone tapping is exercised by the German law.

According to § 100a of the German Code of Criminal Procedure (*Strafprozessordnung*) telephone metering can be applied in case of:

1) justified circumstances which give bases to assume that the person included in the telephone metering is the offender committing a catalogued offence (katalogtat) enumerated in items 1–5 of § 100a of the Stafprozessordnung,

2) necessity of telephone metering to carry out criminal proceedings[12].

The catalogue of offences (or crimes), which discusses cases in which the procedural interception and metering of telephone communications can be adopted, is also included in the Polish Criminal Code in art. 237 § 3. Telephone metering is permissible only when the proceedings in force or the justified fear of committing a new offence refer to the enumerated crimes.

The Russian Criminal Code (*Уголовно-процессуальный кодекс Российской Федерации*) however, does not include such a catalogue. It only states in art. 186 § 2 that metering and recording telephone conversations can be adopted in cases of an average weight and in crimes of a serious and exceptionally serious nature[13]. Additionally, art. 186 of § 2 stipulates that if there is a risk of violence, extortion and other criminal acts towards the aggrieved person, witness or members of their family, relatives and close people, the interception and recording of telephone conversations can be introduced by putting forward a written application and in case of the absence of such application – basing on the legal decision of the court.

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[11] See: decision of 24.04.1990, A. 176–A: 2, M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, pp. 834–838.

[12] Bundesministerium der Justiz, *Strafprozessordnung,* available at: <http://www.gesetze-im-internet.de/stpo/> (last visited 26.03.2011).

[13] *The Civil Code of the Russian Federation,* 1996, available at: <http://www.roskodeks.ru/> (last visited 25.03.2011).

It should also be mentioned that in the decision in connection with Silver and others v. the United Kingdom[14] case, the Court stated that the regulation which grants legal discretion to the executive power needs to determine the limits of such discretion. If the measures of secret surveillance of communications are not open to by the individuals concerned or the public at large, legal discretion of the executive power cannot be expressed in terms of an unfettered power. It would be contrary to the rule of law. The foregoing example refers also to the person of a judge and his being conferred with the power of making decisions regarding the appliance of telephone metering.

In the light of the jurisdiction of the European Court of Human Rights it should be assumed that the situation in which a domestic law does not stipulate the type of offences in which a telephone metering system can be applied is unacceptable and comprises the violation of art. 8 of the Convention.

This requirement is not met while using the general concepts, which provide the authorities with a wide scope of discretion in terms of considering the appliance of telephone metering. Such law does not provide the citizens with adequate information concerning the circumstances and conditions in which the authorities are authorized to act secretively and to interfere with the right to respect for one's private life and one's correspondence. It is unacceptable in the light of the Court's jurisdiction.

The decision concerning the Iordachi and others v. Moldova[15] case should also be mentioned here. The European Court of Human Rights noticed the violations of art. 8 of the Convention by the Moldovan authorities, inter alia violation concerning the excessive scope of subjective operational control. The plaintiffs were members or the Lawyers for Human Rights organization. They claimed that the form of the Moldovan regulations concerning the postal and telephone communications interception indicates that such measures can be applied in cases regarding unspecified serious crimes. As the consequence, in the opinion of the plaintiffs telephone metering could be applied in proceedings regarding over a half crimes enumerated in the Criminal Code.

Another requirement, which was indicated by the Court with respect to Kruslin v. France[16] and Huvig v. France cases, and which a domestic law needs to meet, is to define the categories of people liable to have their telephones tapped as the result of a warrant.

According to art. 237 § 4 of the Criminal Procedure Code, in Poland a legally ordered telephone metering can be applied towards:

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[14] Decision of 25.03.1983, ECHR report of 11.10.1980, 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75.

[15] ECHR decision of 10.02.2009, 25298/02.

[16] See: decision of 24.04.1990, A. 176–A: 2; M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, pp. 834–838.

- the suspect person,
- the defendant in the broad meaning, that is also the suspect,
- the aggrieved,
- other person who can be contacted by the defendant, the suspect and a maiori ad minus the suspect person (these can include family members, close acquaintances from work or the place of living etc.), if there is data indicating the possibility of contacting such persons and towards,
- other persons, who may be related to the offender or involved in the crime, when there is data indicating the potential possibility of such relation, for instance the abducted person's neighbors or ransom[17].

As it can be noticed from what has been stated so far, the catalogue of people liable to have their phones tapped is unbounded.

A similarly wide scope of subjects, towards whom the telephone communication interception can be applied, is stipulated by art. 186 of the Russian Criminal Code. It states that telephone tapping can be applied towards a suspect, defendant and other persons in the possession of information which is important in the criminal case.

On the other hand, the German Code of Criminal Procedure stipulates in § 100a that a telephone tapping can be applied towards people who are suspected of being the offenders (or co-offenders) of crimes enumerated in points 1–5 of § 100 and towards people, who as facts suggest, exchanges messages with the defendant.

The Austrian Code of Criminal Procedure (*Strafprozessordnung*) allows the application of telephone tapping when:

a) the telephone owner himself is suspected,

b) there are reasons for assuming that the suspect will contact the owner of the telephone,

c) the telephone owner allows the tapping[18].

While defining the categories of people liable to have their telephones tapped, the issue of admissibility of applying such measure towards the defender arises.

An attempt of formulating a stance in this matter should begin with the statement of the European Court of Human Rights[19] which indicates that every person who is in need of a legal advice should be entitled to being provided with one that enables an unconstrained conversation. Hence, the relationship client – lawyer is privileged. If the lawyer is not able to talk

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[17] Compare: T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Kraków 2005, p. 290.

[18] Jusline, *Stafprozessordnung, Berücksichtigter Stand der Gesetzgebung,* 2011, available at: <www.jusline.at/Strafprozessordnung_(StPO).html> (last visited 25.03.2011).

[19] Compare: Campbell v. UK, UKHL, 25.03.1992, A. 233, ECHR report of 12.07.1990, 13590/88.

with his client in such a way, the legal advice becomes useless and a problem associated with the right of defense and the reliability of the trial arises (art. 6 of the Convention). The aim of the Convention is to guarantee laws which are real and effective. The same thing concerns, according to the Court, the correspondence related to deliberate legal actions and legal proceedings in force.

It is difficult in such a situation to confer discretion to any authority that would control the talks between the lawyer and his client and only then evaluate them after determining the character of the conversations. This would make the foregoing laws illusory.

The Court's decision regarding the Kopp[20] v. Switzerland case should be mentioned here. The case concerned telephone metering in a lawyer's office. In the opinion of the Court the observance of the relationship client – lawyer requires to assume that all the telephone conversations from and to the lawyer's office are professional in nature. The interpretation of Swiss authorities which indicates that the regulations enable them to register and listen to lawyers' telephone conversations before determining whether they are included in the professional immunity, was not accepted by the Court. Additionally, the Court in its decisions relating to the violation of art. 8 of the Convention always examines whether the interference with rights guaranteed by the article was necessary in a democratic society. Thus, telephone communication interception, which includes particular regulations being the results of the interference of such form of evidence seizure with the rights guaranteed by the Convention and the possibility of interrogating the lawyer are not equal.

The stance of the Court should be agreed with, since the application of communication interceptions towards the defender is unacceptable, similarly to intercepting lawyer's offices as they comprise the place of work in which an unconstrained contact between the lawyer and the client should be provided. The interference with this type of contacts is not justifiable in a democratic society.

After the Court's decision regarding the change of Swiss regulations, art. 66 and 77 of the federal act forbid the telephone communication interception of lawyers. Paragraph 147 of the Code of Criminal Procedure forbids controlling and metering telephone conversations between the defender and the suspect (defendant). Taking into considerations the fact that it is not clear whether the injunction is absolute, German doctrine presents various opinions concerning the issue. H.J. Rudolphi claims that as long as the defender has not been excluded from participating in the trial under the § 138 of 1 Act no. 1, applying telephone communication interception towards him is unac-

[20] Decision of 25.03.1998, ECHR report of 16.10.1996, 23224/94.

ceptable, even if there is a justified suspicion that he cooperated with the defendant[21]. On the other hand, W. Joecks allows the possibility of intercepting telephone conversations of the defender if he is suspected of complicity, criminal support or foiling criminal proceedings[22].

In the European legal systems, similarly to the Polish one, the authority entitled to order telephone communication interception is the judicial authority.

In Germany the only authority entitled to order telephone metering is a judge – § 100b of *Strafprozessordnung*. However, similarly to Poland, the law provides for the situation when it is the persecutor who is entitled to order it. Such situation is permissible in case of a delay which poses the risk of losing the information or hushing up or destroying the evidence of an offence. Nevertheless, the persecutor is obliged to have his decision approved by a judge within 3 days. Otherwise the order is invalid. In German law it is assumed that if the judge approves the prosecutor's order after the 3-day-term, the order should be regarded as a new decision of the judge concerning communication interception[23].

The Austrian Code of Criminal Procedure (§ 149) stipulates that the decision regarding the appliance of telephone metering is made by the court. Only in cases which are urgent such decision can be made by the examining judge, who however needs to immediately obtain the court's consent, in case of the absence of the consent the device must be turned off and the recoding destroyed.

In the legal system of the United States of America in the light of general rules included in the 4th Amendment to the United States Constitution, the adoption of telephone metering is under the control of the court of law and permitted by it. The absence of such procedure exposes the police to the risk of losing the evidence – in accordance with exclusionary rule which provides that evidence obtained illegally are generally not admissible by the prosecution during the defendant's criminal trial[24].

One of the fundamental requirements a domestic law has to meet in terms of protecting against any violation or abuse of the right which is to estimate the maximum time during which telephone metering can be adopted, which should arise right from the act[25].

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[21] Compare: H.J. Rudolph, *Grenzen der Überwachung des Fernmeldeverkehrs nach den § § 100 a, b StPo: Festschriftfü Friedrich Schaffstein*, 1975, p. 627.

[22] Compare: W. Joeck, *Die strafprozessuale Telefonüberwachung,* "Juristische Arbeitsblätter" 1983, p. 60.

[23] H.J. Rudolphi, *Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz: Beschlagnachme, Überwachung des Fernmeldeverkehaers Rasterfundung, Einsatz technischer Mittel Einsatz Verdeckter Ermittel und Durchsuchung,* 1994, p. 95.

[24] T. Tomaszewski, *Proces amerykański. Problematyka śledcza*, Warszawa 1996, p. 211.

[25] See: M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, p. 860–864; idem, *Wokół Konwencji Europejskiej...*, pp. 282–283. The Court took an identical stand in Valenzuela Contreras v. Spain – decision of 30.07.1998, RDJ 1998–2.

In the Valenzuela Contreras v. Spain case of 30th July 1998[26] the Court stated that the warranties required by the Convention should arise from the regulations. In addition, in its decision concerning case Prada Bugallo v. Spain[27] case, the Court concluded that the notion of preserving defective regulations supplemented by a constant court jurisdiction is at variance with the standards of the Convention.

The Polish Code of Criminal Proceeding mentions the requirement of estimating the maximum time during which telephone metering can be adopted. Article 238 § 1 of the Code states that intercepting and recoding telephone conversations can be introduced for the period of 3 months maximum, with the possibility of extending the term in particularly justified circumstances, by the next 3 months.

Similarly, the Russian Criminal Code also includes the requirement of estimating the maximum time during which telephone metering can be adopted and it amounts to 6 months.

It is significant when determining the fact whether domestic law protects against the authorities' abuse properly, to ensure that the information seized illegally as the result of telephone metering will not be used.

Basing on the negative premises the representatives of the Polish law formulate the following inadmissibility in evidence concerning using the information seized during the time when telephone metering was adopted; they occur when:

- the telephone was wired despite the absence of a court order – art. 237 § 1 of the Code of Criminal Procedure – or despite the absence of a persecutor's decision in cases described in art. 237 § 2;
- the telephone number which was wired differs from the one stipulated in the decision of the court of law;
- the proceedings were continued despite the fact that the term of telephone metering expired (art. 238 § 1 and 2);
- telephone communication interception was adopted in a different crime than enumerated in art. 236 or the legal qualification of the rime has changed, as a result it does not belong to the catalogue of crimes enumerated in art. 237 § 1 of the Code of Criminal Proceeding;
- the decision concerning metering the telephone was issued before instituting legal proceeding or it was issued by an unauthorized subject (for instance, police officer confided with an investigation)[28].

It should be noticed that the foregoing enumeration is not finite and comprehensive. The inadmissibility of evidence will be placed for example on

[26] See: M.A. Nowicki, *Europejski Trybunał Praw Człowieka...*, p. 863.
[27] Decision of 18.02.2003, 58496/00.
[28] Z. Kwiatkowski, *Zakazy dowodowe w procesie karnym*, Katowice 2001, p. 298.

the information seized during the interception of the defender. Such a conversation could be recorded for example during intercepting the suspect, who held a telephone conversations with his defender.

Telephone metering could also be adopted as the result of a ruse, constraint or misrepresentation. Therefore, the judicial authorities need to examine every time whether the recordings of telephone conversations can be additionally used. Similar examples of inadmissibility of evidence concerning using the recordings from the telephone interception are present in other legal systems.

In the German criminal trial, one cannot use the information seized during the telephone interception when:

- at the moment of making the decision concerning applying telephone metering there was no justified suspicion of committing the catalogued crime (§ 100a of *Strafprozessordnung*), and other measures enabled to detect the suspect's place of stay or to explain the necessary circumstances of the case;
- the telephone metering was applied towards an individual or institution, which is protected against having their telephone communication intercepted. No decision regarding determining whether in case of a delay which poses a danger to the case – the prosecutor's or the prosecutions' official's decision concerning the application of telephone metering was issued;
- the period during which the telephone interception was to be adopted expired[29].

According to the Austrian criminal law there is a complete restriction towards the inadmissibility of evidence regarding using the information obtained during telephone communication interception, if the substantive circumstances stated in § 149 of *Strafprozessordnung* were not fulfilled and if the procedure of writing down the telephone conversation was inadmissible.

The Austrian law accepted the versatile regulation concerning the situation of 'an accidental coming into possession of information'. If the 'accidental entry' refers to an additional crime concerning the defendant, who provided a reason for ordering a telephone wiring, using such evidence is always possible – § 149 Act 3 point 1 of the *Strafprozessordnung*. However, if the "accidental entry" comprises information concerning committing a crime by a third person, using such information as the evidence will be admissible only when the crime is of such a serious nature that it would justify the appliance of the telephone interception itself – § 149 Act 3 point 3[30].

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[29] Compare: H.J. Rudolphi, *Systematischer Kommentar zur Strafprozessordnung...*, p. 108.

[30] K. Schmöller, *Najnowsze rozwiązania prawne w zakresie zakazu wykorzystania dowodów w austriackim prawie karnym*, „Prokuratura i Prawo" 1996, no. 2–3, p. 69.

The current legal regulations in the Polish, German and Austrian code of criminal proceedings comply with the standards concerning telephone communication interception ordered by the law introduced by the European Court of Human Right.

One should bear in mind however, that the restrictions, which result from the regulations concerning criminal and trial proceedings and which refer to the interception of telephone communication, are directed at authorities associated with the legal proceedings, they do not concern however, private seizure of evidence with the adoption of telephone tapping.

Therefore, there are no legal bases on the ground of, for instance the Polish law to reject such evidence seized by a private person even in an unlawful way. The issue which emerges is whether using this type of evidence in a trial, especially evidence seized as the result of a crime, does not violate the rule of a fair trial, which is mentioned in art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights in the decision regarding Schenk v. Switzerland[31] case stated that despite the fact that the art. 6 of the Convention guarantees the right to a fair trial, it does not establish any regulations concerning the admission of evidence. Hence, this notion is regulated by the domestic law. Therefore, the Court cannot exclude as a rule that the illegal seizure of evidence is inadmissible. It needs to ensure whether the lawsuit was entirely reliable. Some of the judges who adjudicated in this case had a different opinion. They stated that a court of law cannot rely not only on evidence seized unfairly, but first and foremost on evidence seized illegally. If this occurs the trail cannot be recognized as a fair one in the light of the Convention.

Without any doubts issues which have a bearing on the protection of privacy and the secret of telephone communication and which are of such a significance for the citizens, should be regulated in procedural acts. Alongside with the technical development, the possibility of surveillance, thus, also telephone tapping, is enormous. The privacy of many people is threatened. This issue has stood out in the recent years as this type of evidence are submitted in a large number of cases. It is not legitimate to allow situations in which the rights guaranteed in the Convention will exist only on paper, and in the reality they will be universally violated even in the most trivial cases. Very often the information from the private or even intimate life of the third persons, not related to the criminal proceedings in any way, can be revealed.

[31] Schenk v. Switzerland, ECHR, 12.07.1988, 10862/ 84.

Streszczenie

Wybrane aspekty ochrony prywatnej komunikacji w systemach prawnych, a także wpływ jurysdykcji Europejskiego Trybunału Praw Człowieka na ich powstawanie poprzez stosowanie podsłuchu telefonicznego

Słowa kluczowe: prawo do komunikowania się, prawa fundamentalne, podsłuch telefoniczny.

System prawny państw demokratycznych zapewnia swoim obywatelom ochronę tajemnicy komunikowania się. W poszczególnych krajach obok zagwarantowania tego prawa w niektórych przypadkach wprowadzone zostały ograniczenia w zakresie ochrony tajemnicy komunikowania się. Może to być związane z koniecznością zapewnienia ochrony indywidualnej lub ochrony kraju. Bez wątpienia zdarza się, iż ingerencja w tajemnicę komunikowania się jest nieunikniona. Przechwytywanie komunikacji telefonicznej – powszechnie znane jako podsłuch telefoniczny – to jedno z najbardziej kontrowersyjnych źródeł dowodowych. Ten rodzaj działań podejmowanych przez władze budzi skrajne reakcje, dyskusje i podejrzenia.