COMPUTER SEARCH VERSUS TECHNICAL-SCIENTIFIC FINDING

Radu SLĂVOIU*

Abstract

The study intends to establish delimitation between computer search and technical-scientific finding, having as a starting point certain cases encountered in the judicial practice when the law enforcement authorities confused the scopes of these two evidentiary procedures. The author emphasises that such an error can injure the fundamental rights of the parties of the criminal case, including the right of defence that the suspect or the defendant has, and can lead to the exclusion of the gathered evidence.

Keywords: *search, technical-scientific finding, computer system, the role of the specialists, the exclusionary rule.*

1. Introduction

It is a more and more frequent practice that law enforcement bodies, especially during the criminal investigation stage, confuse the two technical evidentiary procedures: computer search and technical-scientific finding of the storage media.

The situation seems to be generated by the fact that both investigative methods involve the support of specialists in fields that exceed criminal procedure, which tends to generate the perception that it is one and the same procedure.

Such an evaluation is actually false, and the decision for a technical-scientific finding when the case asks for a computer search can lead to a breach in certain procedural rules that impact on the rights, which are guaranteed as a fundamental principle for the parties of the trial, including on the right of defence. The problem does not imply a simple displacement of evidentiary procedures and this is due to the fact that the Criminal Procedure Code stipulates considerably different norms in respect to the computer search compared with the technical-scientific finding. Therefore, the consequences can take severe forms, up to the point of a nullity of the procedure and to the exclusion of evidence.

This study intends to wise up the fundamental differences between the two evidentiary procedures and to identify the situations and circumstances in which the judicial authority can resort to one of them and to offer solutions in order to rectify an inconsistency in case of evidence collection during a criminal case. The analysis is structured based on a real case identified in the practice of the criminal investigation bodies, and the arguments shall capitalize the aspects that the doctrine has developed till now regarding the scientific evidentiary procedures.

Content

Jurisprudence recorded the following situation:

In the case no. 183/P/2013 run by a unit of the prosecutor's office, several documents were collected as evidence and, according to the prosecutor; they were obtained during a technical-scientific finding of a **memory-stick**. The technical-scientific finding is performed by specialists who work within an authority outside the General Prosecutor Office.

The examined memory-stick had been previously lifted from a person's house place in the course of a house search authorized by the judge for rights and liberties.

After the house search was completed, the prosecutor asked the judge for rights and liberties for the authorization of a computer search on the memory-stick, under the provisions of Article 168 Criminal Procedure Code, because the memory-stick is a computer data storage medium [art. 181 Criminal Code]. The judge for rights and liberties **authorized the computer search,** explicitly pointing out the legal provisions to be complied with during the evidentiary procedure.

After the computer search was authorized, the prosecutor actually ordered **a technical-scientific finding** over that computer data storage medium. In the order that authorized the search, the prosecutor referred to the resolution and the authorization of a computer search.

The designated specialists started to search the memory-stick and identified several scanned documents and printed them in a written form. A **technical-scientific report** was written, containing the technical methods used to access the computer data storage medium, and the written documents were attached to the file case as evidence.

From the above mentioned summarized presentation, we notice that the prosecutor used the authorization of a computer search to order a technical-

* Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: raduslavoiu@yahoo.ro)

scientific finding over a computer data storage medium. At least apparently, this latter procedure was the one to be performed.

The juridical problem is actually generated by the considerable differences in regards to the procedural circumstances of each of the two evidentiary procedures.

Thus, according to Article 172 paragraph (9) Criminal Procedure Code, the technical-scientific finding may be ordered by the criminal investigation body when there is a peril for the evidence to be lost or for the facts to change or an urgent clarification of the facts and circumstances of the case is needed.

According to Article 181[1] paragraph (1) Criminal Procedure Code, the criminal investigation body identifies the object of the technical-scientific finding, the questions that the specialist has to answer to and the time limit for this action. The criminal law doctrine noticed that, unlike search, in the case of a technical-scientific finding, the law does not stipulate the obligation of the judicial authorities to present the objects to the parties and likewise nor the possibility for the parties to have a party-specialist[1].

On the other hand, the computer search is ordered when an investigation of a computer system or of a storage media is required. Due to the fact that such a procedure is a blatant intrusion into a persons' private life, the previous authorization from a judge for rights and liberties is compulsory. Moreover, according to Article 168 paragraph (11) Criminal Procedure Code, the computer or a computer data storage medium search is performed in the presence of the suspect or of the defendant, and he is allowed to be attended by a trustful person and by his attorney.

Likewise, we can notice a difference of content between the procedural documents written at the end of each procedure. Thus, the technical-scientific finding is followed by a report including the description of the operations performed by the specialist, the methods, the programs and equipments used, and of the technical-scientific finding conclusions [art. 181[1] paragraph (2) Criminal Procedure Code], while the computer system search ends with a written record that contains other type of data [for example, according to Article 168 paragraph (13) letter c) Criminal Procedure Code, the name of the persons who assist the search].

Due to these differences, the confusion between the two evidentiary procedures generates severe effects for the criminal trial, and leads even to the avoidance of certain norms, which have the purpose to guarantee the parties' defence right during a criminal trial.

Thus, the substitution of a computer search with a technical-scientific finding triggers the consequence that the person from whom the storage media was taken is not going to be present during the technical operation procedure because the law does not enforces the obligation that the criminal investigation body or the specialist invites or asks the person to be present during the procedure. Such an obligation is stipulated for the computer search, and not for the technical-scientific finding.

Subsequently, as the party is not present and has no knowledge of the performance of the evidentiary procedure (because, we recall it, there is no obligation of telling the parties about the performance of the technical-scientific finding), the party will not know what evidence was extracted from that specific storage media and therefore he will not be able to certify in any way (for example, with a signature) the fact that the evidence was obtained during that evidentiary procedure.

Under these circumstances, due to the fact that it is a violation in the criminal procedure norms, the problem of nullity of the evidentiary procedure raises, the natural consequence being the exclusion of the gathered evidence.

We add the fact that, under these circumstances, there is the risk that the evidence is irremediably lost for the case. Theoretically, we do not exclude a new performance of an evidentiary procedure under the law, but this option is rarely encountered in practice because the prosecutor usually orders that the computer data storage medium is given back to the suspect/defendant immediately after the specialist searched the content of the device; the case file shall only keep the copies ("clones") on which the procedures were performed. Under these circumstances, there is an obvious risk that the original is later destroyed by the suspect/defendant, as he has no interest to keep it especially if he knows that the data on the device are unfavourable to him during the trial. Consequently, the evidence that remains in the file ("the clones") automatically looses its function to support the circumstances of the case that it apparently shows.

Under these circumstances, a correct delimitation of the two evidentiary procedures is necessary.

We note that **computer system search** designates the procedure for the **investigation**, **discovery**, **identification and collection** of evidence stored in a computer system or in a computer data storage medium [Article 168 paragraph (1) Criminal Procedure Code]. Due to its technical characteristics the computer system search is performed either by specialized police personnel, or by specialists that work within the judicial authorities or somewhere else [Article 168 paragraph (12) Criminal Procedure Code].

Instead, the technical-scientific finding designates the procedure of using the knowledge possessed by a specialist to **analyse and explain certain evidence** in possession of the judicial body. This procedure asks for a specialist because the judicial authority cannot understand and assess, exclusively on its judicial background, the information contained in the evidence because this information belongs to another technical area and not to law area.

[1] M. Udroiu, A.M. Şinc în M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, ediția a 2-a, Ed. C.H. Beck, Bucureşti, 2017, p. 899-900; B. Micu, R. Slăvoiu, A.G. Păun, *Procedură penală. Curs pentru admiterea în magistratură și avocatură*, ediția a 3-a, Ed. Hamangiu, 2017, p. 172

This difference is eloquently described by the criminal law doctrine, which notes that: "The criminal investigation bodies **collect** the traces and the material evidence during various tactical forensic activities: search on the scene, collection of objects and documents, **search,** establishment of the flagrant crime, etc. The traces and the material evidence **are of no value to the case as long as they have not been analyzed, interpreted or capitalized** in order to collect the maximum of data needed to contribute to the elucidation of various circumstances regarding the commission of the crime, the offenders, etc. for the purpose of finding the truth. For **the capitalization of the traces and material evidence,** for the above mentioned purpose**, adequate specialized knowledge and technical means are needed, which the criminal investigation bodies, regardless of their equipment**, **do not possess.**" It is stressed out that ordering of technical-scientific findings is necessary "in order to ensure **the scientific capitalization** of the traces and of the material evidence" [2].

Consequently, although the two evidentiary procedures – computer system search and technical-scientific finding – are similar because, due to their technical characteristics, they ask for the presence of specialists, the essential difference consists on **the completely different purpose** that the specialists have.

Thus, for the computer system search, the specialist **limits to discover, identify and collect the evidence** found in the computer system, but he is not assigned to analyse them.

On the other hand, for the technical-scientific finding, the specialist's role is precisely to support the judicial authorities to analyse and understand the technical information that the evidence reveals.

We can say that the relation between the two evidentiary procedures represents an exchange, for the situation of computer data, of the classical relation between a house search and a technical-scientific finding. If, for example, "a work of art" is found in a suspect's house and the criminal investigation body suspects it was stolen, it is absolutely necessary to establish if that "work of art" is the original or a copy. In this case, the specialist's support does not consist in finding the evidence, because it is collected during the house search. In fact, thanks to his specific knowledge in the art field, the specialist analyzes the inherent characteristics of the evidence, which, obviously, the criminal investigation body cannot perform.

If the specialist limits to identify the existence of certain documents (for example, bills, agreements, notes, photos, etc.) in the computer data storage medium, and he later on prints them, we consider that he does nothing more than to identify a computer data storage medium and to extract various information that can turn into evidence. In this case, we cannot talk about the specialist's contribution to the interpretation of the data, as it is obvious that the data have no technical nature that recalls for the person who identified and printed them to be an IT specialist. Therefore, the support of the specialist is not necessary for the scientific capitalization of the evidence, because such evidence has no scientific nature, and his support is necessary only to identify the evidence, as it is stored on a computer system.

The evidentiary procedure for this case is actually a genuine computer system search.

Technical-scientific finding is yet performed when, for example, the IT specialist's role is to analyze the software characteristics (functions, capacity, the possibilities to encrypt, etc.) after that software was discovered during a computer system search on a hard drive. In this case, the specialist contributes, based on his skills, to the analysis of the criminal method or result, which the criminal investigation body could not make without his support.

Conclusions

A fair delimitation between the various technical evidentiary procedures stipulated by the criminal procedure legislation is essential for the proper conduct of the criminal investigation activities.

The right identification of the procedure that has to be performed in a certain criminal case, taking into consideration its characteristics, can ensure the premises for the compliance with the fundamental rights of the parties during the criminal trial and, at the same time, reduces also the risk to apply the exclusionary rule.

Taking into consideration the fact that collecting evidence in a criminal case is a difficult task, the consequences of errors when an evidentiary procedure is ordered and performed can hardly be repaired and, most of the times, they will affect the solution of the case.

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[2] C. Aioniţoaie, I.E. Sandu (coord.), *Tratat de tactică criminalistică*, Ed. Carpaţi, 1992, p. 238-239