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Search, evidentiary procedure for discovering and removing documents and material means of evidence

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Abstract. The paper deals with the importance of the legislative framework governing domicile search and the procedure by which it can be ordered. Domicile search is decisive in solving the criminal case by obtaining evidence necessary to establish the facts or circumstances in which the crime was committed and to identify the perpetrator. A house search is a criminal procedure in which judicial authorities carry out certain searches of residential premises in order to obtain physical evidence of certain crimes. The searches require "legality" and participation in appropriate procedural safeguards against arbitrariness and abuse in order to respect the human rights enshrined in the Romanian Constitution and also in the European Convention on Human Rights, especially with respect for private and family life. I am trying to analyse to what extent the new legal provisions fall within the guarantees imposed by human rights law. To do this, I look at the search warrant procedure and the legal conditions that judicial authorities must follow during the home search procedure. Domiciliary search is regulated in Articles 157-164 of the NCPP, and in Art. 27 of the Romanian Constitution and art. Article 8 of the ECHR expressly provides that the conduct of this procedure presupposes respect for the inviolability of the person's domicile and private life.

Keywords. judicial activities, investigation on the spot, material means of evidence, criminal investigation body, taking evidence in criminal proceedings

Importance, regulation of criminal procedure and procedure for ordering a search

The term "search" originates from the Latin "perquiro", meaning to search, to investigate with care, everywhere, designating an extremely important activity in the criminal process¹.

According to V. Manzini, "searches are material investigations, coercively carried out, permitted by exceptions to the normal guarantees of individual liberty, in order to secure to the trial things that can serve as evidence, or to arrest the defendant or other person suspected of crime or escaped²".

Domiciliary search is the evidentiary procedure ordered by the criminal investigation bodies, the judge of rights and freedoms or the court, in order to find and seize objects or

¹ <http://oaji.net/articles/2015/2064-1432804904.pdf>

² V. Manzini, *Treatise on Criminal Procedure*, vol. III, Turin, 1931-1932

documents not voluntarily handed over or whose existence or possession is hidden by the person who was asked to hand over the object or document³.

In the specialized literature, the importance of the search is highlighted by the fact that it becomes decisive in solving a criminal case, by obtaining evidence necessary to establish the facts or circumstances in which a crime was committed, as well as to identify the perpetrator⁴.

The characteristic of the search results from the possibility of judicial bodies to carry out this act even if it would mean a violation of the inviolability of the domicile, of the person or of the secrecy of correspondence, in compliance with the legal provisions in force⁵.

The Romanian Constitution provides in Article 27 that "domicile and residence are inviolable and that no one may enter or remain in the domicile or residence of a person without his/her consent". This right springs from respect for the human personality and the environment in which it carries out its daily life⁶. The wording of that article provides that the inviolability of domicile may be violated, inter alia, for the execution of an arrest warrant, the removal of a danger to the life, physical integrity or property of a person, or for the protection of national security or public order. The intervention of the authorities, in this case, is of public order, aimed at achieving justice, protecting the life or physical integrity of the person or defending essential values.

Prior to the adoption of the current supreme law of the country, different opinions were expressed regarding the conduct of the domicile search in the absence of the prosecutor. One opinion stated that it could be carried out in the absence of the prosecutor only with the written consent of the person at the place where the search was carried out⁷.

The consent of the person to whom the search is to be carried out affects the execution of the evidentiary procedure, so if the goods or persons mentioned in the warrant are surrendered voluntarily, the search is no longer carried out. In this case, consent has consequences for the execution of the investigative procedure and not for the search without legal authorisation.

At the same time, the European Convention on Human Rights stipulates in art. 8 para. 1, that: "Everyone has the right to respect for his private and family life, home and correspondence⁸".

In *Varga v. Romania* (ECHR judgment of 11 March 2008), the Court held that, in accordance with the domestic law in force at the time of the facts, the prosecutor decided, in the present case, to carry out the domicile search, carrying it out without the benefit of a warrant, much less a judicial warrant. The only written document that succinctly stated the purpose of the search and the reasons that led the prosecutor to carry it out was the search report drawn up at the end of the home visit. The Court notes that there is a serious impairment of the right of the first two applicants to respect for their domicile, left to the discretion of the prosecutor, who,

³ C. Paraschiv, *Criminal Procedure Fişe*, 4th ed., Ed. Hamangiu, Bucharest, 2019

⁴ N. Volonicu, *Treatise on Criminal Procedure*, Michaela Press Publishing House, Bucharest, 2001, vol. II

⁵ C. Drăghici, C. E. Ştefan, *The tactics of searching and lifting objects and documents*, Sitech Publishing House, Craiova, 2006

⁶ Marian Alexandru, *Criminal Procedure, general part*, Pro Universitaria Publishing House, 2015

⁷ In judicial practice, according to the provisions in force at that time, it was shown that the domiciliary search is not legally carried out without the prosecutor's authorization, under the word that the searched person tacitly accepted its performance (T.S., c 7, dec. No. 63/1972, in Ion Neagu, *Criminal Procedure Treaty. General part*, 3rd ed., revised and added, Universul Juridic, Bucharest, 2013

⁸ <https://www.avocatoo.ro/blog/percheziția-domiciliară/>

as has already been held, as a magistrate in the Public Prosecutor's Office, did not meet the requirement of independence from the executive⁹.

We can define domiciliary search as the evidentiary procedure by which the investigation is carried out at the home of the natural person (dwelling, room, outbuilding, fenced place belonging to them) or in the places where he/she lives or at the headquarters of a legal person, aiming to identify objects, persons, traces, computer data related to the crime for which criminal prosecution was initiated, preservation of traces of the crime or to catch the suspect or Offender¹⁰.

The specialized literature highlighted the importance of the domicile search, which ensured the procurement of indispensable evidence, unique for solving the case¹¹.

The NCPP regulates by the provisions of Article 157 the cases and conditions for ordering a domicile search, thus "a search of domiciliary or property in the domicile may be ordered if there is reasonable suspicion that a person has committed a crime or possession of objects or documents related to a crime and it is presumed that the search may lead to the discovery and gathering of evidence regarding this crime, to preserve traces of the crime or to apprehend the suspect or defendant".

Domicile searches are a complex activity because of their nature, circumstances and content. It is characterized by certain features such as judicial character, its performance is carried out without taking into account the consent of the person. Also, domiciliary search implies compliance with the principle of legality and finding out the truth, through objects and documents seized that may be relevant in finding out the truth¹².

Another feature is that it is an act of criminal prosecution, constitutes an evidentiary procedure, being executed only in criminal proceedings, in connection with a case. It should be noted that it may be ordered and carried out after the commencement of criminal proceedings and during criminal proceedings. It is a field activity of the judicial bodies, involves a search and investigation activity on the spot, and the report establishing how the domiciliary search was carried out and its result represents evidence in the criminal proceedings. Last but not least, a final feature is its relative character, the search will be carried out only in certain criminal cases and only in the context in which the surrender of objects or documents is refused or their existence is denied, being expressly requested by judicial bodies, serving as evidence in a particular case under investigation or trial. Knowledge of mental factors by the judicial body is necessary for the success of a search. The issue of psychology involves distinguishing between the psychology of the person conducting the search and the psychology of the person being searched. The psychology of the judicial body conducting the search must be defined by a well-developed sense of observation, stability of attention, quick intuition and capacity for analysis and synthesis¹³.

Procedure for ordering a domicile search

Domiciliary searches may be ordered during criminal proceedings and trials, and may not be ordered prior to the commencement of criminal proceedings and in preliminary chamber

⁹ ier.gov.ro

¹⁰ <https://avocatercristiangindac.ro/percheziția-domiciliară/>

¹¹ Vintilă Dongoroz, Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, Rodica Stănoiu, *Theoretical explanations of the Romanian Code of Criminal Procedure. General part*, Academy Publishing House, Bucharest, 1975, vol. I

¹² Ion Neagu, *Criminal procedural law*, Global Lex Publishing House, Bucharest, 2002

¹³ V. Enătescu, *The doctor-patient dialogue*, Dacia Publishing House, Cluj-Napoca, 1981

proceedings, since the judge of the preliminary chamber does not have functional competence to allow a domicile search to be carried out¹⁴.

During criminal proceedings, a domicile search is ordered, at the request of the public prosecutor, by the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade within whose jurisdiction the seat of the public prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs.

During the trial, the search is ordered, ex officio or at the request of the prosecutor, by the court hearing the case.

In cases expressly provided for by law, a search may be ordered in locations other than those mentioned in the warrant if, during the search, it is found that evidence, data, or wanted persons have been transferred or the wanted persons have hidden in neighboring places. In this situation, the search warrant is also valid for these places, and the continuation of the search in this context is approved by the prosecutor.

In order to order a domicile search, it is necessary to fulfil all of the following conditions: the existence of reasonable suspicion that a person has committed a crime - further prosecution must have been ordered against a person (in personam), acquiring the status of suspect; possession of objects or documents related to a crime – it is sufficient that criminal proceedings have been initiated in respect of the act (in rem). Another necessary condition is that there is an assumption that the search may lead to the discovery and gathering of evidence relating to the crime, the preservation of traces of its commission or the apprehension of the suspect or accused person.

Although the legal provisions state that the referral to the judge of rights and freedoms is made by means of an application, during the criminal investigation the prosecutor will draw up a reasoned proposal for issuing the domiciliary search warrant, ex officio or at the proposal of the criminal investigation bodies. This proposal must necessarily contain particulars of the description of the place where the search is to be carried out or of the place where there is reasonable suspicion as to the existence or possibility of transferring evidence, data or persons concealed to neighbouring places¹⁵. It is also necessary in this proposal to specify the indication of evidence, data from which reasonable suspicion has arisen that the act provided for by criminal law has been committed, possession of objects, documents related to the crime, its indication, evidence or data from which it appears that the suspect or accused person is located in the place where the search will be carried out or evidence can be discovered that the offence or traces thereof. Last but not least, it is necessary to mention the name, surname, description of the suspect or defendant, indication of traces of the crime or other objects presumed to be in the place where the search is to be carried out.

The application shall be submitted to the court competent to hear the case at first instance or to the court of the corresponding court in its grade within whose jurisdiction the seat of the public prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs. After registration, the judge of rights and freedoms will be randomly assigned in a computer system. The application will be settled by conclusion, not subject to appeal, 24 hours after registration, in the council chamber, without summoning the parties, with the participation of the prosecutor.

¹⁴ C.Paraschiv, *Criminal Procedure Files*, 4th ed., Hamangiu Publishing House, Bucharest

¹⁵ Anane Ivan, *Elements of theory and tactics of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

During the trial, jurisdiction to issue a domiciliary search warrant rests with the judge of the panel to which the case was randomly assigned. The warrant may be issued ex officio or at the request of the prosecutor, the settlement procedure remaining the same as in the criminal investigation phase. Compared to the criminal investigation phase, at the trial stage the law gives the court the option of ordering the domiciliary search warrant ex officio.

Failure to meet the conditions laid down by law for issuing the domiciliary search warrant may lead to the rejection of the proposal. A new application may be made only if new facts or circumstances unknown to the judge at the time of the previous application arise or are discovered.

The admitted application shall contain indications, in accordance with Article 158 para. 7 NCPP, referring to the name of the court; date, time and place of issue; name, surname and capacity of the person who issued the search warrant; the period of issuing the mandate, which may not exceed 15 days; the purpose of issuing the mandate; a description of the place where the search is to be carried out or, where appropriate, also of its surroundings; the name or business name of the person at whose domicile, residence or premises the search is being carried out, if known; the name of the perpetrator, suspect or defendant, if known; description of the perpetrator, suspect or accused person suspected of being at the place where the search is being carried out, indication of traces of the crime or other objects presumed to exist at the place to be searched; a statement that the search warrant may be used only once; Judge's signature and court stamp.

Both the conclusion granting the request for a domicile search and the rejection are not subject to appeal.

The duration of the domiciliary search warrant is a maximum of 15 days, during this period it can only be used once.

Procedure for conducting a domicile search

The public prosecutor or the investigating body carries out the domicile search during the criminal investigation. Where appropriate, he shall be accompanied by operatives. The public prosecutor may order the delegation of activities necessary for the execution of the domiciliary search warrant.

During the trial phase, the warrant is sent to the prosecutor to take the necessary measures to enforce it.

The approach of the searched person must be carried out by surprise, so as not to be given time to remove objects or documents targeted by the judicial body, or to disappear from the domicile.

Going to the place of search must be carried out with great care to ensure that the action is unannounced.

If the search is to be carried out in larger localities, team members will stop the car at a greater distance from where the search is to be carried out¹⁶. In the case of smaller localities, such as villages, the car will be stopped in front of state administration headquarters, companies or shops, etc.

Regarding the searches carried out in multi-storey blocks, the elevator will be stopped one floor higher or lower than the floor where the apartment is located, some team members will use the stairs to avoid forming a compact group.

In the event of guard dogs in the yards of people to be searched, a way will be found to calm them down, by inviting a neighbor he knows or by calling a person from the house, using

¹⁶ Anane Ivan, *Management of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

some pretext, in which case only one person, at most two, will present himself at the gate, of the team that will carry out the search.

Regarding the entrance to the place of search, as a rule, there is a ring or knock on the door, in front of the visor will sit only one person from the team.

In case of a refusal from the person to be searched or if there is no one in the house, information will be requested from neighbors about the presence of people in the house, if no movement is noticed. In this case, the door will be opened in the presence of the representative of the searched person or a neighbor, or the person in charge of the tenants' committee. If someone is in the dwelling, it will be drawn to the fact that the door will be forced to be opened, specifying the quality of the judicial body that will carry out the search.

In the case of dangerous individuals, repeat offenders, forced entry shall be carried out without delay at the place of search, in the presence of assisting witnesses, invited to participate in the search and, possibly, of the chosen defender.

According to legal provisions, a domiciliary search cannot be carried out during the night.

The criminal investigation bodies will enter the home of the person where the search will be carried out between 6:00 and 20:00. The search started during the above-mentioned hours may also be continued during the night.

An exception to this is where the offence is flagrant or the search is to be carried out in a public place which is open after 20:00, provided that it was started before 06:00 or after 20:00. The doctrine¹⁷ considered justified the regulation adopted by the legislature in this regard, such a rule of forensic tactics being justified, because an interrupted search could not achieve its purpose, the persons searched being able to destroy or hide the objects sought by the judicial bodies in another place.

The access of persons to the place where the search is carried out may be restricted and does not constitute, within the meaning of Article 5 of the ECHR, a deprivation of liberty. The specialized literature¹⁸ specifies that the body search of persons in the dwelling can also be carried out, during the domiciliary one, in practice being discovered, in this way, material evidence, white weapons, firearms on these persons. Persons at the scene of the search shall be collected in a single room or in a limited space, except for small children or sick persons. They will not leave the space until the end of the search, except with the approval of the criminal investigation body supervising them¹⁹.

These persons encountered at the scene of the search will be legitimized and asked in what capacity or purpose they are in that place.

Before the actual start of the domicile search, the judicial body shall be legitimized²⁰, it shall hand over a copy of the warrant by the judge to the person with whom the domiciliary search is carried out or to his representative or to a family member, and in the absence thereof, to any other person with full legal capacity who knows the person with whom the search is carried out or to the custodian. In the case of a search at the premises of the legal person, the search warrant shall be handed over to its representative or, in the absence of the representative,

¹⁷ Gheorghe Mateuț, *Criminal procedure. General part*, Universul Juridic, Bucharest, 2019

¹⁸ G.I. Olteanu, M. Ruiu, *Forensic tactics*, AIT Laboratories Publishing House, Bucharest, 2009

¹⁹ Anane Ivan, *Investigation of criminal prosecution bodies*, Pro Universitaria Publishing House, Bucharest, 2014

²⁰ Anane Ivan, *Elements of computerized evidence of the person*, Pro Universitaria Publishing House, Bucharest, 2015

to any other person with full legal capacity who is on the premises or is an employee of that legal person.

A series of preliminary measures will be taken, such as rapid inspection of the entire searched site and attempts to signal outside, by using maneuvers such as placing or moving flower glares from the window or balcony or arranging curtains in a predetermined position.

Measures will also be taken to counter any violent action, especially if information is held that the person searched may be armed, as well as to prevent suicide attempts.

In order to know exactly the topography and characteristics of the place to be searched, it is necessary to carefully study and familiarize with it, on which occasion the initial data held by the criminal investigation body are also verified. Explanations shall be required concerning the purpose of each room, the persons who inhabit or use them, as well as the furniture, appliances or installations existing in that place. After recognizing the searched place and until checked, the rooms will be locked. The modalities of action will be indicated to each member of the team by the judicial body coordinating the search²¹.

If the domiciliary search extends to other neighbouring places, persons in these premises shall be notified of the extent of the search.

Before the search begins, the judicial body will require persons to voluntarily hand over the objects or wanted persons. If such objects or persons mentioned in the warrant are handed over, no further search shall be carried out.

That assumption does not apply to the extension of the domicile search, since it is presumed that the intention to conceal evidence or to steal the requested persons is presumed.

The persons concerned shall be informed that they have the right to have a lawyer involved in the search. If requested, the start of the search is postponed until the lawyer arrives, but not more than two hours after the communication of this right, and measures are taken to preserve the place to be searched. In cases where an emergency search is required or if the lawyer cannot be contacted, the search will also be carried out before the expiry of the two-hour period.

Where it is evident that preparations are being made to cover the traces or destroy important evidence in question or there is a suspicion that a person whose life or physical integrity is in danger is in the premises where the search is to be carried out or the requested person may abscond, the search may be carried out without the need to hand over a copy of the search warrant or without requiring the objects to be surrendered voluntarily or requested persons, as well as without prior information of the possibility of requesting a lawyer or person;.

The person searched must be present when the search is carried out, even if he is detained or arrested. He or she shall be allowed to be assisted or represented by a trusted person. Its reactions will be constantly observed, being important to insist on searching for objects or documents in places where the emotional tension of the searched person is noticed. Thus, in relation to the characteristics of the place searched at that moment, the criminal investigation body will notice the emotional reactions of the searched person and will establish to what extent a certain object or space investigated is related to the purpose of the search, using inductive and deductive reasoning.

The searched person will pass, at the time of the search, through specific emotional states, the psychological tension being more accentuated when the objects or documents sought are at his home or on him. The normal expression of the face will change by performing

²¹ Anane Ivan, *Elements of criminal procedural law*, Pro Universitaria Publishing House, Bucharest, 2015

unnatural movements, gestures or actions, breathing and vocal emission will be disturbed, cardiovascular activity will be altered, manifested by congestion or pallor, typical of emotion.

The latency time will be modified, the searched person will respond late, and at other times, precipitately to emotionally charged questions.

The searched person communicates, without his will, data about hidden objects or documents about which he would like the judicial body not to find out.

Some people display a lot of calm and indifference, until the moment when the prosecution approaches the place where objects or documents are hidden. Other people react contrary to the above, displaying a voluble attitude, being seemingly relaxed, until the critical moment, when they suddenly become silent.

In order to prevent certain techniques of the searched person to distract attention from the places where objects or documents are hidden, the judicial body must adopt a sober, restrained attitude and not react immediately.

In order to see more clearly the reactions of the searched person, a useful procedure is to ask questions about the destination of objects, inviting the searched person to open or move various pieces of furniture, etc.

If the person searched cannot be produced, the domiciliary search shall be carried out in the presence of a representative or an assisting witness, the presence of the latter not being required where no person is present at the place where the search is being carried out. We note the only reference to the current CPP, through the procedure of conducting a domicile search, to the institution of the "assistant witness", a procedural subject that enjoyed in the previous regulation of express regulation²².

The search must be carried out in accordance with the legal provisions in force. The judicial body conducting the search will competently coordinate the work of the team in order to avoid abusive operations such as initiating people. Also, the judicial body conducting the search will avoid destroying objects or degrading them, or unnecessarily ransacking the room.

In the case of hidden objects, for their discovery, the technical means in the forensic kit will be used, especially in the hypothesis of the need to control the interior of apparently compact objects.

When conducting a domicile search, force may be used to open rooms, premises and other objects where documents, traces of crime or wanted persons may be found, if their owner is not present or does not wish to open them voluntarily. It is necessary to avoid unjustified damage when opening the aforementioned rooms.

The search will be carried out thoroughly, the extent and depth of the research depending on the nature of the objects to be discovered.

The search is carried out methodically, systematically, each room, piece of furniture, plumbing or household object will be examined in detail.

The direction in which the research is done will be established, starting from the right or left of the entrance. It can also be carried out in parallel, investigating several rooms concomitantly, if the criminal investigation bodies have sufficient staff.

As mentioned above, the behavior of the searched person will be permanently observed, an observation made by the criminal investigation body conducting the search. It will insist on

²² Thus, according to Article 92 of the previous Code of Criminal Procedure, when the law provided that the presence of assistant witnesses was required when performing a procedural act, their number had to be at least two. Minors under 14 years of age, the persons concerned concerned and those who belonged to the same unit as the body carrying out the procedural act could not be assistant witnesses

the places where emotional tension is accentuated, asking for more details about these places, in order to observe how the person reacts.

Objects or documents whose circulation or possession is prohibited or there is a suspicion that they may be related to the commission of a crime for which criminal proceedings are always initiated, as well as those related to the act for which criminal prosecution is being carried out shall always be seized.

The existence of reasonable grounds to anticipate armed resistance, other types of violence, the existence of danger of destruction of evidence or the refusal or, if no response has been received, to requests from judicial bodies to enter the home, lead to the appropriate and proportionate use of force to enter a home for the purpose of conducting a domicile search.

The place of the search, persons, objects found during its conduct may be photographed or recorded, they shall be attached to the search report, constituting an integral part thereof.

The person from whom the objects or documents are taken and the persons present will be presented with them for recognition, in order to counteract the possible defense of the defendant, in the sense that they were not taken from his home. Subsequently, they will be marked by the same person, unchanged, after which they are labeled and sealed. If it is impossible for them to be labeled, marked or seals cannot be affixed, the objects and inscriptions seized will be packed and closed, if possible, together, after which seals will be applied. Objects that cannot be picked up will be left in the custody of the person with whom they are or a custodian, taking into account the obligation to keep and preserve them, as well as making them available to the criminal investigation bodies, at the request of the latter.

The samples²³ for analysis will be taken in double and sealed, one of them being left to the person from whom they are collected or to his representative.

Since it is a procedural act, the seizure of objects and documents will be recorded in a report whose preparation is mandatory, which will include the activity carried out by the judicial bodies and its results.

According to the provisions of the NCPP in force, the result of the search is recorded in a report. As auxiliary technical means of fixing the search results, photography, video-magnetic recording, filming are also used, and when the need requires it, sketches or drawings of the searched place.

The main means of recording the result of the search is the report which will include mentions regarding the name, surname and capacity of the person who concludes it; the number and date of the search warrant; the place where it is concluded; the date and time at which the search began and ended, with an indication of any interruption which had occurred; name, surname, occupation and address of the persons who were present at the search, mentioning their capacity; informing the person to whom the search will be carried out of the right to contact a lawyer to participate in the search; a detailed description of the place and conditions under which the documents, objects or traces of the offence were discovered and removed, their enumeration and detailed description, in order to enable them to be recognized; details of where and under what conditions the suspect or accused person was apprehended; objections and explanations of persons who participated in the search, as well as mentions of audio-visual recording or photographs taken; mentions of objects that have not been picked up, but have been left in storage; the particulars provided by law for special cases.

²³ The meaning of this notion, in the context of the regulation we are considering, is not the same as evidence within the meaning of Article 97. 'Evidence for analysis' is included in the broad sense of 'objects which may serve as evidence in criminal proceedings': they are, in other words, material means of evidence

Each page of the report shall be signed, and at the end by the person who concludes it, by the person searched, by his/her lawyer, if present, as well as by the other persons participating in the performance of this procedural act. Mention shall be made of any person's refusal to sign or of the reasons for inability to sign.

A copy of the report shall be left to the person with whom the domiciliary search was carried out or from whom the objects or documents were seized, and in his absence, to the representative, a family member, the custodian or any other person with full legal capacity, if they participated in the search.

Fixing by photography is a technical procedure whose importance results from the objectivity of rendering the characteristics of the objects, but also of the hiding places where the objects and inscriptions were discovered. The photograph from the search site must meet the same technical and methodical requirements as the photograph taken during the on-site investigation. Photographs showing the image of objects and documents not attached to the file shall be endorsed, stamped and included in the file in the form of drawings.

The recording on videomagnetic tape renders, in a dynamic form, significant aspects of the search, the image of objects or documents with the peculiarities at the time of their discovery. This technical procedure for fixing the results of the search does not preclude the taking of forensic photographs.

The sketch-drawing shall include the place of search, indicating the places where the objects or documents were discovered, made similar to the sketch made during the on-site investigation.

This technical procedure is useful both in the case of searches of large areas of land and in closed places, difficult to describe in the minutes or to fix by photography.

Until the final resolution of the criminal case, the material means of evidence shall be kept by the criminal investigation body or by the court where the file is located. Objects which serve as evidence but are not subject to confiscation²⁴ shall be returned to the person to whom they belong prior to the final settlement of the case, unless such restitution would hinder the discovery of the truth.

Objects unrelated to the case will be returned to the person to whom they belong, except for those subject to confiscation, according to the law.

If among the seized goods there are also some of those referred to in Article 252²⁵ in respect of which there is no case to be returned, they shall be preserved or capitalized through specialized units²⁶.

In cases where the seizure of objects or documents is carried out at a public authority, public institution or other legal entities of public law, the procedure will be carried out according

²⁴ For example, they are subject to special confiscation, according to art. 112 para. (1) C. Pen.: property produced by committing the act prescribed by criminal law; property which has been used in any way or intended to be used in the commission of an act provided for by criminal law, if it belongs to the offender or if, belonging to another person, he knew the purpose of its use; goods used, immediately after committing the act, to ensure the escape of the perpetrator or the preservation of the use or product obtained, if they belong to the perpetrator or if, belonging to another person, he knew the purpose of their use, etc

²⁵ These goods are: perishable goods, objects of precious metals or stones, foreign means of payment, domestic securities, art and museum objects, valuable collections, as well as sums of money

²⁶ For example, perishable goods are handed over to economic units, according to their specialty, which have the obligation to receive and capitalize them immediately, according to the rules of market trade. Precious metals or stones or objects made with them and foreign means of payment shall be deposited with the nearest competent banking institution

to the above, complementing, according to art. 164 NCPP, with the following provisions: the judicial body shall identify itself and hand over a copy of the search warrant to the representative of the authority, the institution or legal person governed by public law; the search shall be carried out in the presence of the representative of the authority, institution or legal person governed by public law or of another person with full legal capacity; A copy of the search report shall be left with the representative of the authority, institution or legal person governed by public law.

Body search

The legal institution of the search regarding the exercise of rights and freedoms has its foundation in Article 29 point 2 of the Universal Declaration of Human Rights²⁷, in Article 8 point 2 of the European Convention on Human Rights²⁸ and in Article 53 of the Romanian Constitution²⁹.

In the broad sense of the word, a search of a person means a thorough search of both the person's body and clothing. In criminal procedural law, it is regulated as a body search, which includes the actual body search, but also the search of clothing.

Body search is governed by article 165 NCPP and concerns both the person's body and the articles of clothing that the searched person is wearing at the time of the search. From a legal point of view, body search involves inspecting clothing and removing items on the searched person, which can help to find out the truth in a criminal case³⁰.

Body search can be defined as a form of search that involves the external examination of a person's body, mouth, nose, ears, hair, clothing, objects that a person has on him or under his control at the time of the search. It aims to search for objects and documents presumed to be or concealed in a person's clothing or body, including luggage and means of transport in which he is travelling³¹.

The object of the body search is the human body and its clothing, although in some cases the place and circumstances of the searched person are concomitantly searched for the discovery and seizure of goods, documents or other valuables previously abandoned or during the body search.

Conducting the search involves observing tactical rules, such as thoroughness, each room, piece of furniture, plumbing, etc. will be thoroughly investigated. The behavior of the searched person will be constantly observed, insisting on the places where emotional tension is

²⁷ "In the exercise of his rights and freedoms, every person shall be subject only to such restrictions as may be prescribed by law, for the sole purpose of ensuring the recognition and respect of the rights and freedoms of others and of satisfying the just requirements of morality, public order and the general welfare in a democratic society."

²⁸ "Everyone has the right to respect for his private and family life, home and correspondence. 2. There shall be no interference by a public authority with the exercise of this right except in so far as such interference is provided for by 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 and morals or for the protection of the rights and freedoms of others."

²⁹ (1) The exercise of certain rights or freedoms may be restricted only by law and only if necessary, as the case may be, in order to: protect national security, public order, health or morals, citizens' rights and freedoms; conducting criminal investigations; preventing the consequences of a natural disaster, disaster or particularly serious disaster. 2. Restriction may be ordered only if necessary in a democratic society. The measure must be proportionate to the situation giving rise to it, applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom.'

³⁰ Dictionary of Legal Terms – Legal Collection, Emil and Pavel Abraham, 1999 Publishing House, p. 460

³¹ <http://revista.universuljuridic.ro/particularități-privind-efectuarea-percheziției-corporale/#f1>

accentuated and details will be asked about it. Also, the body search must be carried out in accordance with the legal provisions in force, more so as no illegally obtained evidence is considered in the trial of the case.

Body searches may be ordered by the investigating bodies, the public prosecutor or the judge, both during the criminal investigation and before it begins, in the case of flagrant offences, when a person is caught at the time or immediately after the crime was committed, in order not to remove objects and documents on him³².

A search warrant is not required and may be used whenever necessary in the interests of prosecution.

Body searches shall be carried out by the judicial body which ordered it or by the person designated by that body, who must be of the same sex as the person searched. This legal norm was based on compliance with the principle of social morality, but also in order to leave no room for interpretation regarding the purpose of carrying out body searches and preventing bizarre situations.

Body searches may be carried out at any location of the person searched at any time of the day and night. Judicial practice recommends as far as possible avoiding it in public places for reasons of social morality or to prevent unforeseen situations from arising. The Romanian Constitution provides in art. 27 that "searches during the night are prohibited, except in the case of flagrant crime".

Since it is a coercive activity carried out without the consent of the person searched, the execution of the body search must be carried out in a manner that does not prejudice the honour and dignity of the person searched. In its judgment of 17 January 2017, in *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania*, the European Court of Human Rights found a violation of the provisions of Article 8 of the Convention as regards the search of the applicant's bag. According to the case-law of the Court, the use of coercive powers conferred by legislation to search a person, his clothes and personal belongings constitutes an interference with the right to respect for private life. Such interference is justified considering para. (2) of Article 8, only if it is provided for by law, pursues legitimate aims and is necessary in a democratic society.

Before the search, the judicial body will proceed to identify and identify the person to be searched, explaining the reason for which this measure was ordered. The person concerned will be asked to hand over the sought-after objects and will proceed to search for them only if the person refuses or claims not to have them on him.

In judicial practice, the top-down search method is used, starting from head to the feet. The searched person will be asked to sit in an uncomfortable position, raise his hands and lean against a wall, tree or other object that can be used for this purpose, and remove his legs.

The judicial bodies that will carry out the search will be composed of at least two members, one will carry out the search and the other will carefully supervise the movements of the searched person, intervening and restraining the person to prevent an act of violence.

The person carrying out the surveillance shall not interfere between the person searched and the person conducting the body search.

The search of the person begins with that of clothing, prior to the disarmament of the person, if any.

Carefully search the goods worn by the searched person, such as wristwatches, purses, cigarette packets, purses, sticks, etc.

³² V. Pavaleanu, *Criminal procedural law. General part*, Lumina Lex Publishing House, Bucharest, 2001, p. 333

Particular attention should be paid to women's hairstyle, which can be a safe hiding place and gives less to suspect.

The searched person will be asked about the provenance and purpose of possession of objects or documents discovered on him. Items unrelated to the case under investigation or lawfully worn and possessed will not be picked up.

If the body search is carried out on persons with legal standing, the presence of the defence counsel is mandatory.

The body search will be repeated if the first search was carried out in improper atmospheric or lighting conditions, and at the end of the search, the person will be left to arrange himself for a certain time, looking around him to check if objects or documents have been thrown away.

The manner in which the body search was carried out and its results will be mentioned in a report signed by all participants and will contain data, according to art. 166 NCPP, about the judicial body that carried out the search; the identity of the person searched; date, time and place of execution; the conditions under which the objects and documents were discovered; particulars of articles and writings seized; particulars of the detailed description of the objects and documents discovered in order to make them more easily identifiable and recognisable.

The report shall be drawn up in two copies, one shall be handed over to the searched person and shall be signed on each page by the person searched and by the person who concludes it.

Search of a vehicle

It consists of examining the exterior or interior of a vehicle or other means of transport or its components³³.

It is regulated in the provisions of Art. 167 NCPP, may be ordered, as appropriate, by the criminal investigation body, prosecutor or judge, and may be carried out on vehicles running in traffic, those stopped or parked in public places.

The search of a car or means of transport stopped or in traffic will be carried out when there are data and information that the vehicles concerned, transport, goods or valuables derive from crimes or persons prosecuted, or if the judicial body has to implement administrative police measures. The search will be carried out with the support of auto mechanics specialists³⁴.

After the search of the vehicle, the judicial body will draw up a report containing mentions on the name of the person whose vehicle was searched, the number of persons present at the search, the list of objects found during the search and those seized for investigation.

Computer search

It is the process of researching, discovering, identifying and collecting evidence stored in a computer system or computer data storage medium, carried out by means of appropriate technical means and procedures, capable of ensuring the integrity of the information contained therein.

As regards the competent judicial body, during the criminal investigation, the computer search is ordered at the request of the prosecutor, by the judge of rights and freedoms of the court competent to hear the case at first instance or of the corresponding court in its grade within whose jurisdiction the seat of the public prosecutor's office to which the prosecutor conducting or supervising the prosecution belongs.

³³ Article 167 para.1 of the Code of Criminal Procedure

³⁴ Ioan Dascălu, Cristian Eduard Ștefan, Claudiu Țupulan, *Judicial search*, Sitech Publishing House, Craiova, 2008, p. 113-114

During the trial, the computer search may be approved by the court ex officio or at the request of the prosecutor, the parties or the injured party.

The only requirement that must be met for a computer search to be permitted is the need to discover and gather evidence.

The judge of rights and freedoms will be notified by the prosecutor with a request, drawing up a report with a reasoned proposal for this.

The application will be settled in the council chamber, without summoning the parties, with the participation of the prosecutor. If it is found that the application is delayed, the judge of rights and freedoms will grant the request by reasoned conclusion and will also issue the computer search warrant.

The computer search may be approved and enforced throughout the prosecution phase.

It will be carried out in the presence of the suspect or defendant, who will be allowed to be assisted or represented by a trusted person. If the person being searched is apprehended or arrested, he or she shall be searched. Otherwise, the computer search will be carried out in the presence of a representative or assistant witness.

If it is found that the computer data sought are contained in a different computer system, accessible from the initial system, the prosecutor will order the preservation, copying of the identified computer data and will urgently request the completion of the warrant.

The facts and circumstances of the life of the person being searched must not unreasonably become public. Computer data identified as secret shall be kept under the law.

During the trial, the prosecutor executes the computer search and the court provides the search warrant.

After conducting the computer search, a report will be drawn up containing the appropriate mentions, according to the law.

Search of enclosed rooms or places

Regarding the search of closed places or rooms, the exact address (street, number, staircase, floor, apartment), construction peculiarities, layout and destination of rooms, outbuildings, possible modifications or arrangements made by tenants, location of doors, windows, access ways other than usual ones, persons residing or temporarily residing at that address, frequent visitors are concerned, neighbors³⁵, etc.

Search of open places

In the case of open places, it is of interest the arrangement, surface, topographical peculiarities of the soil and vegetation, any constructions located on this place, their destination and interior characteristics, roads and access ways, way of delimitation (degree of plank, wire, concrete, etc.), places or gardens bordering the persons to whom they belong, use or care for those places, etc.

Collection of objects and documents

This evidentiary procedure shall be governed by the provisions of Articles 169 to 171 NCPP.

The seizure of objects and documents is an evidentiary procedure carried out by the criminal investigation body or the court, which aims to gather evidence in criminal proceedings. This procedural act requires knowledge both documents or objects relating to the criminal case and of their location.

³⁵ <https://andreivocila.com/2010/04/06/tactica-efectuării-percheziției-ridicarea-de-obiecte-și-înscrieripercheziția-sistemelor-informatic/>

Documents may constitute evidence only if, in their content, acts of thought and will, relevant to the facts or factual circumstances, which fall within the case of the object of proof in a particular criminal case, are materialized. In the legal literature, the opinion has been expressed that only objects on which the signs of phonetic writing are marked enter as evidence in the sphere of documents³⁶.

Judicial bodies have the obligation to remove objects or documents that can serve as evidence in criminal proceedings, and those who hold them have the obligation to hand them over.

The natural or legal person in possession of a certain object or document has the obligation to present and hand it over, at the request of the criminal investigation body or the court, if there is a reasonable suspicion of preparation or commission of a crime or when there are grounds to believe that the object or document may serve as evidence in the criminal case.

Also, the criminal investigation body and the court may order the communication of certain computer data stored in a computer system or on a computer data storage medium, in the possession or under the control of any natural or legal person on the territory of Romania.

Last but not least, the criminal investigation body or the court may request any provider of public electronic communications networks or publicly available electronic communications services to communicate certain data on subscribers, users and services provided, in its possession or under its control, for which the authorization of the judge of rights and freedoms is required.

If the handing over of objects, documents or computer data is requested by the prosecutor, the request will be made by order, and if the court is the one wishing to surrender, a conclusion will be made. The procedural document requesting the delivery of objects, documents or computer data shall contain mentions regarding the name and signature of the person who ordered the surrender, the name of the person obliged to hand over the object, document or computer data, their description, as well as the date and place where the delivery will be made.

The criminal investigation body or the court will retain only the copy of documents or computer data, if this can also constitute evidence. As regards their secret or confidential character, their presentation or surrender shall be carried out under conditions which ensure secrecy or confidentiality.

If the owners of these objects do not surrender them voluntarily, upon request, the forced seizure carried out during the domicile search will be ordered.

The forced seizure of objects and documents is always carried out by the criminal investigation bodies, the order regarding the performance of the activity belonging to the prosecutor, by ordinance, or to the court, by conclusion.

As regards the procedure for removing objects and documents, it is the same as in the case of a search.

The objects or documents shall be presented to the person from whom they are picked up and to those who assist, in order to be recognized and signed by them for change, subsequently labeled and sealed.

Objects, documents and computer data unrelated to the case shall be returned to the person to whom they belong, except for those subject to confiscation.

³⁶ Ion Neagu, Mircea Damaschin, *Treatise on criminal procedure. General part, Considering the New Code of Criminal Procedure*, Universul Juridic, Bucharest, 2014, p. 515

A report will be drawn up about the seizure of objects or documents, which must include the mentions provided by law. Some minutes have evidentiary functions on the merits of the case, while others help to prove the performance of procedural acts (serving the summons, handing over the warrant, etc.).

The person concerned may complain about the measure of forced removal of objects or objects or about the manner in which this measure was carried out, the provisions relating to contestation of precautionary measures applying.

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