GYLA's Legal Evaluation of the Questions on the Secret Surveillance Records Publicized by Rustavi 2

As it is known, on May 6, 2014, "Rustavi 2" publicized the records of the secret video and audio surveillance. At the press-conference conducted on the same day, the CEO of the TV outlet stated that the secret records were provided by the representatives of the Ministry of the Internal Affairs.

On May 7, 2014, the Prosecution publicized the statement, in which it mentions that the investigation was launched on the information publicized by "Rustavi 2" on the

allegations of violating the Article 158 of the Criminal Code (infringement of the private communication secrecy).
On May 10, 2014, in the TV program of “Rustavi 2” – “Different Accents”, other secret wiretapping records were publicized, in which high level officials and businesspersons were recorded.

On May 11, 2014, the Prosecution of Georgia started the investigation on the allegations of violating Paragraph 3 of the Article 158 of the Criminal Procedural Code, which relates to an illegal use of the private communication records or publication in the aggravating circumstances.

Due to the high public importance and interest towards the issue and due to the diversity of opinions, contradicting, and in some cases legally incorrect positions, we consider it reasonable to give proper legal answers to the most frequent questions that have arisen throughout the last few days.

1.In this case, is the journalist obliged to name the source of the information?

It is important for the started investigation to be conducted in protection of the vital international and domestic standards of the journalists’ professional operation. One of those cornerstone standards is the right of a journalist not to reveal the source of an information. This standard is protected by a number of the international acts and recommendations of the international organizations, it is strengthened by the case law of the international courts, is protected under the domestic legislation of Georgia and represents the component of the right to freedom of expression.

According to the Sub-Paragraph “h” of the Paragraph 1 of the Article 50 of the Criminal Procedural Code of Georgia, a journalist is not obliged to be a witness “in relation to the information received as a result of a professional operation.”

2. Does the journalist have an obligation to give testimony in this case (to name the source) or will the journalist be questioned under the status of a victim and not under the status of a witness?

According to the Article 47 of the Criminal Procedural Code of Georgia, the victim

enjoys the status of a witness, has its rights and obligations during the court testimony. According to the Paragraph 1 of the Article 56 of the same Code, “the victim is granted all the rights of a witness and has all of its responsibilities.” Therefore, regardless of what status will the journalist be questioned under, in this case the journalist’s right not to name the information source may not be restricted. It is clear, that the subject of the protection under the law is not the status of a journalist within the investigation, but the source of the information; the different interpretation of this issue puts the source under the risk.

3. What significance does the right of a journalist not to name the information source have?

The European Court of Human Rights, in its decision – Goodwin v. The United Kingdom has underlined the importance of the secrecy of the source of the information for the freedom of the media. The decision says that “the protection of the information sources of the journalists is one of the most important preconditions for the freedom of the press, as it is reflected in domestic legislations of a number of member states and in professional codes of conduct and is strengthened in a number of international documents relating to the journalist sources. Without such a protection the sources might be hindered in their possibility to help the press in informing the society on the issues of public importance; therefore, as a result, the role of the press, as the important public watchdog, might be diminished and the capacity of the press to ensure exact and trustable information might be hindered.”

4. What does the right of a journalist not to reveal the source (identity of a source) include?

While considering the right to maintain the secrecy of the source, the recommendations of the EU Council are important; those recommendations have interpreted that the “identity” means: a name, personal data, voice and an image of a source; the circumstances of receiving the information by the journalist from the source; the essence of the unpublicized information provided by the source to the journalist; personal data of the journalist and its employer, which is related to their professional operation.

5. Who is considered to be a journalist?

Neither the legislation of Georgia, nor the European Court's practice establish the exhaustive list of the journalists or persons acting within the journalistic activities. The term is interpreted according to the each specific case. The recommendation of the EU Council R(2002)7 "On the Rights of Journalists Not to Reveal the Information Source" interprets, that the term "journalist" means any natural or legal person, who is involved in gathering and publicizing the information through the means of mass media, either regularly or through professional activities."

According to the interpretative memorandum of the EU Council recommendation R(2002)7 (Paragraph "a"), both a journalist and his/her employer might be the owners of an information, provided by a source. In its decision on the case De Haes and Gijsels v. Belgium (1997), the European Court of Human Rights interpreted that "the editor of the journal and the employed journalist equally enjoy the right not to reveal the source according to the Article 10 of the Convention." Moreover, according to the interpretative memorandum of the recommendation, this principle of the European Council covers not only the journalist and the manager of the media organization, but also "other persons" who receive such an information within their professional relations with the journalist.

Therefore, if the law-enforcement bodies of Georgia, while investigating specific violations, will interpret the term "journalist" in its narrow meaning, implying that the CEO did not exercise the journalistic professional activities while gathering and publicizing the secret recordings, then both the domestically and internationally provided legal guarantees for journalist professional operation lose their meaning.

6. What kind of violation does obliging a journalist to name the source represent?

According to the Sub-Paragraph "d" of the Paragraph 2 of the Article 3 of the law of Georgia on the "Freedom of Speech and Expression", the freedom of expression, among others, entails the right of a journalist to protect the secrecy of the information source. According to the Paragraph 1 of the Article 11 of the same law, "the source of professional secrecy is protected with an absolute privilege and no-one has a right to request to reveal this source." According to the Paragraph 3 of the Article 12 of the

same law, “inviolability of private life and personal data protection may not be used as a motive for limitation of the freedom of expression (the right to receive and publicize the information) in relation to the events which are important for individuals to know for the purpose of exercising public self-governance in a democratic state.”

Therefore, obliging a journalist to reveal the information source, represents an infringement the journalist’s right to freedom of expression (the right to receive and spread the information), which is directly linked to the implementation of the freedom of expression of each member of the society (the right to receive the information). Illegal interference in the enjoyment of the freedom of expression represents the violation prescribed under the Article 153 of the Criminal Code of Georgia, while illegal interference in the professional operation of a journalist (therefore, forcing a journalist to spread the information or to refrain from spreading the infromation) represents the violation, prescribed under the Article 154 of the Criminal Code of Georgia. Therefore, if anyone forces a journalist to spread the above information, it is possible for such an action to include the signs of a violation.

7. Does the broadcasting of the wiretapped records of the communication among the politicians and business persons include the signs of a violation?

The Article 158 of the Criminal Code of Georgia prohibits “to illegally use or spread the private communication records”. The text of the norm clearly shows that use or publication of the private communication record is prohibited not in any case, but only when it is conducted illegally. To define what is the legal form of publicizing the records, it should be clarified, what are the requirements prescribed to each TV and Radio outlet under the Code of Conduct, provided for by the Sub-Paragraph “tt” of the Article 2 of the law on “Public Broadcaster”. According to the Paragraph 17 of the Article 35 of the Resolution #2 of March 12, 2009 of the National Communication Commission of Georgia on “Approving the Code of Conduct of the Broadcasters”, “broadcasting the secret surveillance records is only allowed if such an action is justified.” When broadcasting the secret recordings serves informing the society of a secret surveillance, this clearly represents an object of the high public interest, in case of which the actions of the journalist should be considered to be justifiable. When the action is justified, it is not “illegal”, which means that the violation described under the Article 158 of the Criminal Code was not committed.

Apart from that, according to the Paragraph 3 of the Article 12 of the law of Georgia on the “Freedom of Speech and Expression”, “inviolability of private life and personal data protection may not be used as a motive for limitation of the freedom of expression (the right to receive and publicize the information) in relation to the events which are important for individuals to know for the purpose of exercising public self-governance in a democratic state.”

The investigation should also take into the consideration the goal of publicizing the records by the media: when the publication of the records of the conversation among the private subjects aims at informing the society of possible violation by the State (that the state continues illegal eavesdropping of the private conversations) and not at revealing the essence of the conversation of specific persons, this represents legitimate grounds for media to publicize such records, because it is important for the society to know in a democratic state and serves the idea of the necessity of the public control over the government.

8. Is the publication of the secret records by the journalists always legal or not?

Publication of secret records by a journalist should not always be considered to be legal. In each specific case it should evaluated whether the actions and goals of a journalist were justified and whether the gained benefits outweigh the possible harm, which resulted from the publication of the secret records.

9. Did the State Security Special Service have a right to examine whether the secret surveillance devices were installed in the private television or not?

According to the spread information in December 2012 the State Security Special Services examined “Rustavi 2” to establish whether or not the secret surveillance devices were installed or not. A question arises – whether or not did the Special Services had such an authority?

The very first Article of the law on the “Special Security Services of the State” mentions that: “the State Special Security Services provides physical protection to the

three branches of the government and to their officials from an unlawful infringment for ensuring the security of the state." In addition, according to the Article 3 of the same law, the lawfulness is the basic principle of operation of the State Security Special Services, which means that the mentioned services may only exercise those functions, that are directly granted to them under the law. Article 4 of the law (as of 2012) mentioned, that: "it is prohibited to delegate those functions to the State Security Special Services and its employees, that are not mentioned in this law, except for the cases prescribed under the bylaws issued by the President."

The law on the "Special Security Services of the State " does not grant a right to examine the private company on whether the secret surveillance technical devices are installed or not. We did not find the provision granting such a right in the bylaws issued by a President either. Therefore, with the high level of probability we assume that the State Security Special Service does not have such an authority regardless of the fact whether the examination is conducted under the request and on the initiative of the TV outlet or whether it is initiated by the State Security Services itself.

It is also interesting, whether the written communication was established among the TV outlet and the Special Services and what were the legal grounds indicated for such an examination. In addition, if there was a doubt, that there might have been secret surveillance (which is a violation), the question arises - why didn't the TV outlet inform the Prosecution or the Ministry of the Internal Affairs.