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**STATE INTRUSION INTO THE HOME OF THE
PERSON UNDER INVESTIGATION BY MEANS
OF SOUND AND IMAGE RECORDING
DEVICES**

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SUMMARY: I. INTRODUCTION; II. CAPTURING AND RECORDING IMAGES AND ORAL COMMUNICATION USING ELECTRONIC DEVICES ON THE PUBLIC HIGHWAY, IN THE HOME OR OTHER ENCLOSED PLACES: II.1. Scope of the measure; II.2. Presumption of legitimacy; II.3. Content of the enabling judicial decision: the reinforced requirement of the principle of proportionality in the definition of the places in the home susceptible to surveillance; II.4. Monitoring the measure; II.5. Duration; II.6. Cessation of the measure.

I. INTRODUCTION

The invitation to include an article in the first issue of the *Revista Científica del Centro Universitario de la Guardia Civil* is, in itself, a source of immense satisfaction. I recently had the opportunity to learn about the academic work and training of future Guardia Civil officers at this university centre in Aranjuez first-hand. I was able to see the professionalism of its management team and, of course, its students' hard work and enthusiasm. In such a scenario, all I can express is my appreciation for a job well done.

When I was offered the opportunity to publish an article on an aspect of criminal investigation, it seemed to me that my contribution should have the same *avant-garde air* that is breathed at this university, where new technologies are a tool used in students' day-to-day education. As I have pointed out on other occasions, the criminal process has not stood the test of time. The Criminal Procedure Act of 1882 (hereinafter, LECrim), a masterpiece of codified law, is still the basis for criminal investigation and prosecution, but it is constantly being challenged to be updated. On the one hand, because of the need to incorporate the directives and other instruments of European Union law into its precepts to consolidate a European legal heritage with the vocation of unity. On the other, due to the impact on criminal investigation brought about by the technological revolution that irreversibly dominates our daily lives.

Nobody questions the truly revolutionary message contained among the precepts of the LECrim. One need only read its frequently praised Explanatory Memorandum to conclude that the entry into force of the 1882 text made a radical change to the principles and practice hitherto prevailing in criminal procedure. Its original systematic structure has been affected by successive partial reforms that have adapted the old building to the new needs that time has brought to light. The wording of its precepts has been modulated to adapt it to continuously evolving constitutional and Supreme Court jurisprudence. All this

has helped to forge a regulatory framework that lacks firmness and to consolidate a text that has become increasingly distant from the procedural practice it was originally intended to regulate. Despite this, the systematic disorder and lack of logical unity in the conglomerate of legal norms that regulate the criminal process have not hindered a jurisdictional activity that has helped to consolidate what has been described as a true constitutional reading of the criminal process.

The regulatory coverage offered by LO 13/2015, 5 October, allowing the possibility of introducing image and sound recording devices in the home of the investigated person has already had a jurisprudential treatment worth an analysis. The ruling of the Criminal Chamber of the Supreme Court 718/2020, 28 December laid the foundations for the interpretation of this measure that entails a high degree of interference in the space of privacy guaranteed by the EC. Its knowledge and, above all, the reiteration of its doctrine in subsequent pronouncements, give it a special value.

II. CAPTURING AND RECORDING IMAGES AND ORAL COMMUNICATION USING ELECTRONIC DEVICES ON THE PUBLIC HIGHWAY, IN THE HOME OR OTHER ENCLOSED PLACES

Art. 588.4.a, headed "*recording of direct oral communications*" establishes the following:

"1. The placing and use of electronic devices allowing the capturing and recording of direct oral communications made by the person under investigation on the public highway or in another open space, in their home or in any other enclosed place may be authorised.

Listening and recording devices may be placed either outside or inside the home or enclosed space.

2. If it is necessary to enter the home or any of the spaces intended for the exercise of privacy, the authorising decision must include a statement of reasons as to the appropriateness of access to these places.

3. The listening to and recording of private conversations may be complemented by the capture of images when expressly authorised by the judicial decision.

The wording of this provision therefore authorises a different scope of the interference measure. This may consist of: a) the capture and recording of direct bilateral or multilateral conversations that may be held by the person under investigation; b) the obtaining of images that complement the conversations intercepted.

None of the options knows - beyond the meaning of Art. 588.4.c - locational limits. In other words, the investigating judge can order the recording in both open and closed public and private spaces, including the person under investigation's home. We understand that the judicial authorisation for access to the home is only admissible with respect to the property or properties where the person under investigation lives. It would not be legal to install such devices in the home of a third party who is not under investigation but who serves, for one reason or another, as a meeting point of interest to the investigation. The use of such devices for sound and image recording involves an act of material imputation,

in terms of the sacrifice of the fundamental rights to inviolability of the home and privacy, which is justified solely by the foreseeable formal imputation that will follow the adoption of this measure. Therefore, is not only the right to privacy of the person under investigation at stake (art. 18.1 EC), but also the right to inviolability of the home (art. 18.2 EC).

In judgement 145/2014, 22 September, the Constitutional Court was able to rule on the legality of the use of a hidden microphone that captured conversations that took place in a police cell between different detainees under investigation, among other facts, for the crimes of murder and illegal detention. The device that made these conversations possible was installed with judicial authorisation and in the presence of the court secretary, who recorded the terms under which it was activated.

In addition to the right to inviolability of communications, the petitioner claimed a violation of the right against self-incrimination or to testify against oneself, manifestations of the generic right of defence (Art. 24 EC).

The Constitutional Court held the evidence consisting of the recording of the conversations that took place in the cells illegal as it lacked sufficient regulatory coverage. It proclaimed the insufficiency of art. 579 of the LECrim to cover this type of proceedings within its scope. It held that the right to inviolability of communications, as recognised in art. 18.3 of the EC, had been violated.

This understanding has permeated the legislative provision called for by the Constitutional Court. In fact, the prerequisites for its adoption coincide with those imposed, in general terms, in articles. 579.1 and 588.3.a of the LECrim, called for the definition of the premises that enable the interception of communications. In our view, however, the degree of interference that the measure we are analysing implies for the investigated party is not comparable to that inherent to two-way communication, made possible by a third party providing the technical means for its connection. Neither is it comparable because there is no expectation of privacy in either case. Indeed, whoever uses a telephone or any other telematic communication system is aware that he is connected to a closed channel medium which, except in exceptional circumstances, does not allow third party interference. They also know that if such interference occurs, it will affect the content of the dialogues, messages or, in short, the files of one kind or another that may be shared. However, people who are at home, in that physical permanent or temporary physical space where the most basic functions of their lives are carried out, they cannot even imagine the extent of the interference. The person under investigation may become transparent. When the State transgresses the physical borders of exclusion by means of a judicial decision, there are no limits to its desire for knowledge.

Beyond the discussion as to whether or not these direct oral conversations are identifiable with the right to inviolability of communications, it is certain that the judicial decision referred to in art. 588.4.c entails a restriction of the right to inviolability of the home. The material content of Art. 18.2 of the EC is not restricted to the prohibition of any unauthorised presence of a third party in one's own home. Its content must be extended to the public authorities' knowledge of what is happening in the home, even when this knowledge is obtained through the interposition of a technical device that *reveals* the dweller under investigation. It also restricts the rights to privacy and self-image. Think, for example, of the possible contexts in which such dialogues might take place. And, of course, consider the recording of images in situations and at times when the exclusion of

third parties is part of the most fundamental claim to privacy. Furthermore, while the measure of interception of telephone and telematic communications is generally bilateral, the same does not apply to the installation of this type of device. Rights are affected not only for the person under investigation but for the entire family unit and, in another case, for those who share the same property for some reason.

In short, the mimetic importation of the conditions required for the legitimacy of the measure, when intercepting conversations in a closed channel -cfr. arts. 588.3.a and 588.4.b - blurs the terms of the issue and makes it difficult for the court to weigh up the rights to be balanced.

This is beyond the scope of our analysis - it has not been regulated by the reform - to examine the prerequisites for the legality of the use of recording instruments between private individuals. STS 793/2013, 28 October, dealt *in extenso* with its singularity and the application in criminal proceedings of the limits proclaimed by constitutional jurisprudence, in civil claims referring to the violation of the rights to privacy and to one's own image, in STS 793/2013, 28 October.

II.1. Extent of the measure

This issue is one of the controversial points of the new regulation. In fact, if you read the heading of Chapter VI and compare it with the content of the precepts it contains, you might come to the conclusion that what is announced does not correspond to the contents. Indeed, the "*capturing and recording of oral communications*" is completed by the possibility, within the powers of the investigator, of authorising the "*obtaining of images*" (Art. 588.4.a. And this overflowing scope of interference is justified, on the one hand, by a minor systematic processing, whereby the capture of these images appears as the third of the sections that make up the precept that starts the regulation. On the other hand, by presenting this measure as an instrumental complement, an accessory to the real interference, which would consist of the "*listening and recording of private conversations*".

The degree of encroachment on fundamental rights can be at the highest level. Suffice it now to point out that, under the protection of Art. 588.4.a, measures with very different effects on the particular area of exclusion of any citizen are possible. The court decision granting one of them may have different coverages. In fact, it can authorise: a) the capture and recording of oral communications in a public space; b) the capture and recording of conversations in an enclosed space; c) the capture and recording of oral conversations in a person's own home; d) the obtaining and recording of images in the same circumstances in which these conversations of interest take place.

This can be done by means of technical devices placed inside or outside these enclosed spaces.

Several points must be made.

The first is that the legal scheme governing the capture of images in public spaces does not make their validity conditional on judicial authorisation. This is clear from Art. 588.5.a that empowers the Judicial Police to make use of these technical instruments to identify the investigated person or the location of instruments or the effects of the crime. It

is important to stress that the officers are empowered solely to capture images. It can extend to the simultaneous recording of conversations involving the investigated person in these spaces. In this case, judicial authorisation is mandatory under the terms set forth in Art. 588.4.a.

Secondly, the home must always and without exception be entered with judicial authorisation. Any clandestine installation of these recording instruments - not covered by judicial authorisation to enter the property or fraudulently, by deceiving the inhabitant - may render the evidence obtained inadmissible. Therefore, it is important for the grounds for the order that authorises access to the site include, in a systematic manner, the reasons justifying the installation of the devices according to the parameters of proportionality, necessity and exceptionality. Otherwise put, the jurisdictional grounds for bypassing the inviolability of the home of the person under investigation do not, in themselves, cover the need to record conversations or images of interest to the investigation. Nor does the person's consent to enter the dwelling suffice as a source of legitimacy for installing the recording devices.

Finally, the use of cameras able to record images is presented in paragraph 3 of Article 588.4.a as an investigative measure that is only of use as a complement to listening and interception of oral communications. A careful reading of this paragraph reveals that the authorisation for the exclusive installation of technical mechanisms that make it possible to capture images does not seem to be contemplated as an autonomous measure, rather it is subordinate to serving as a complement to the recording of sound ("*listening to and recording private conversations may be complemented by image capturing...*").

II.2. Presumption of legitimacy

The validity of the measures contemplated in art. 588.4.a is subject to the concurrence of a series of assumptions which, when analysed, coincide substantially with those that allow interception of telephone or telematic communications (cfr. Art. 588.3.a and 579.1 LECrim). This is a consequence of the unjustified equating of the two measures.

"1. The use of the devices referred to in the previous article must be linked to communications that take place in one or more specific encounters between the person under investigation and other persons, the foreseeability of which is revealed by the investigation.

2. It may be authorised only if the following conditions are met:

a) The facts under investigation constitute one of the following offences:

- 1. Fraudulent offences punishable by a maximum of three years' imprisonment.*
- 2. Offences committed by a criminal group or organisation.*
- 3. Terrorism offences.*

b) It can be reasonably foreseen that the use of the devices will provide essential information of evidential relevance to clarify the facts and to identify the perpetrator".

It is precisely for this reason that now more than ever, the motivation of the judicial body that has to issue the enabling decision must be sound. Art. 588.4.a also allows for investigative measures with different degrees of interference. Of course, it is not the same to capture oral conversations in a public space as it is to obtain the dialogue in the person under investigation's home. Nor can the scope of the interference be equated when solely the suspect's conversations are recorded, and in other cases where recording images in any of the rooms of the suspect's home is also authorised. Hence, the balancing test carried out by the investigating judge must be extremely meticulous when explaining the reasons for infringing on the rights of the person under investigation as opposed to the constitutionally legitimate interest of uncovering the criminal acts. It is therefore necessary to do away with formal schemes whereby the constitutional guarantee is interpreted as a bureaucratic decision in which the judge is limited to a type of oversight that is both diffuse and materially non-existent. The need for an *ad hoc* statement of reasons based on an anticipated judgement of necessity is emphasised in the first paragraph of the provision transcribed. It is clear from reading it that the reasoning decision must specify the encounters whose foreseeability has been revealed in the investigation. It would not, therefore, be in keeping with the constitutional model to install image or sound recording devices without any support other than the intuitive hope that such encounters will take place. In short, the predictable reality of these encounters and their evidential relevance are elements that must converge to validate the jurisdictional limitation of the investigated party's rights.

The legislator has chosen to relax the requirements for defining the conditions for legitimacy for the adoption of any of these measures. However, the text of the bill initially disclosed and submitted for report to the General Council of the Judiciary Branch (GCJB) took a very different view. In fact, it envisaged a wording which established as a prerequisite for the validity of the measure "*that the facts under investigation constitute an offence committed by criminal organisations, a terrorism offence, an offence against minors or individuals whose capacity has been modified by a court or other offences which, by virtue of the circumstances of the case, may be considered particularly serious*". Criticisms in the GCJB's report of the alleged lack of definition of what was meant by "*particularly serious crimes*" led to the change of criteria. The judges' governing body demanded more specificity, from the perspective of the requirements of the principle of legality, and reacted against what it considered to be *subjectivisation* in the analysis of gravity, which was made dependent on the "*circumstances of the case*".

In our view, however, the initial formula was more appropriate. It conveyed the need to operate with a restrictive criterion of absolute exceptionality. The criticism of the alleged subjectivity in the analysis of the assumptions of validity of the measure is not accurate. The initial model did not leave the legitimacy of interference to pure judicial voluntarism. Objective parameters were included, linked to the nature of the act investigated or the particular vulnerability of the victim. And, more importantly, the investigating judge's discourse when justifying the reasons for the infringement, however much subjectivity he may wish to attribute, was perfectly auditable through ordinary mechanisms that allow for dissent from the motivation with which the restriction of fundamental rights is justified in one case or another.

Jurisprudence from the Supreme Court has already had the opportunity to rule on the use of such invasive investigative measures. In STS 718/2021, 28 December, it pointed out that the use of electronic devices to capture and record oral communications and, where appropriate, to obtain images in the home of the person under investigation, is not just an ordinary piece of evidence. It cannot be considered by the investigating magistrate as an interference measure that can be agreed under the same conditions of legitimacy with which other technological investigation measures are adopted in criminal proceedings.

The judgement added that *"...the degree of interference that this measure represents in the space that each citizen defines in order to exclude the public authorities and third parties from their own privacy cannot be weighed with the same assessment criteria with which other investigative measures are accepted. The expectation of privacy of someone who closes the door of his or her home is unparalleled when, for example, he or she uses a phone that can be tapped or travels in a vehicle to which a geolocation device may have been attached. By means of a technical mechanism that allows the recording of conversations and images in the home of the person under investigation, the state enters into the hard core of any person's privacy. This interference measure, moreover, goes far beyond the capture of a two-way conversation held by the interlocutors concerned. The use of the devices referred to in Art. 588.4.a does not only affect the person under investigation. It also covers the suspect's family, usual residents and those who may in exceptional cases or sporadically share the suspect's home. Hence, the strength of the grounds for the decision authorising the interference, the respect for the standards imposed by the principles of proportionality and necessity and, above all, the duration of the measure must be subject to scrupulous judicial assessment. The use of such a device strips the person under investigation of his or her family life and puts them at the mercy of the investigators, who thus become the privy to privileged information generated on a day-to-day basis and which goes far beyond what may be relevant to the crime under investigation. Judicial authorisation for the placement of devices renders the constitutional protection of inviolability of the home null and void. It also neutralises the right to privacy and self-image. Hence, to assimilate its functionality to other measures limiting the rights recognised in Article 18 of the EC is to distort the terms in which its legitimate use must be assessed"*.

The importance of judicial control of the measure is underlined in FJ 2.1.2. It states that *"...the legitimacy of placing sound recording devices in the home of the person under investigation - the Chamber does not address the enhanced protection that this measure would require when it is a question of capturing images - it cannot be a mere ritual and formal analysis of the allegations offered by the Prosecutor or the agents of the authority in support of this measure. The investigating judge cannot become a body that serves solely to validate a governmental decision to invade the privacy of the person under investigation. And in compliance with the constitutional mandate, as the body responsible for protecting and guaranteeing fundamental rights, it must filter the request through the principles of proportionality and necessity referred to in art. 588.2.a of the LECrim. A literal reading of the conditions of legitimacy referred to in Art. 588.4.b could lead to the erroneous conclusion that, for example, the investigation of intentional crimes punishable by imprisonment with a maximum limit of at least three years' imprisonment would always and in any case allow the use of this type of investigation. This is not the case. Something else is needed. And this judgement of appropriateness must be made explicit in the enabling resolution.*

II.3. Content of the enabling judicial decision: the reinforced requirement of the principle of proportionality in the definition of homes subject to surveillance.

The content of the judicial decision authorising any image or sound recording measures is not exclusively deduced from art. 588.4.c, a provision whose wording seems to imply it. This article reads as follows:

"Article 588.4.c. Content of the judicial decision.

In addition to the requirements regulated by article 588 bis c, the judicial decision authorising the measure must contain specific mention of the place or premises to be placed under surveillance, as well as the meetings of the person under investigation to be placed under surveillance".

The order by which the investigating judge authorises the recording of oral conversations or the image of the person under investigation must contain an explicit statement justifying how the constitutional requirements for the legitimacy of the measure are met (Art. 588 bis b). It is therefore a question of an integrating motivation, that expresses the result of weighing up and possible infringement of the principles and rights that converge when adopting a measure of this nature. Specifically, the placement of recording devices in the home of the person concerned must be subject to a reinforced statement of the reasons why the measure is essential and proportionate.

The law does not expressly prohibit the capture or recording of sound or images in any of the rooms of the home or enclosed area where the investigation is to take place. Some comparative models include, with striking casuistry, a list of places where interference would not be legal under any circumstances. Our system leaves it up to the judge to define the scope of the measure. Hence the importance, we insist, of reacting to a misunderstood pragmatism that makes judicial control a routine act. It is easy to imagine places in any home where it would be very difficult, if not impossible, to justify the interference of the public authorities. Consequently, whether or not the legislator has specified the places where access is prohibited, the principle of proportionality must operate as a defining instrument of unwritten limits, but whose violation can invalidate evidence.

The content of the authorising judicial decision must also specify the meeting or meetings to be recorded. The importance of a clear definition of this aspect has a great influence when setting of a time limit for the measure. It must also specify the oversight mechanisms that make judicial supervision of the implementation of the measure possible. Both issues are dealt with in the following sections.

II.4. Control of the measure

The role attributed to the investigating judge in the reform goes beyond the examination of the enabling conditions, and includes verification that the police request can be filtered through the constitutional principles referred to in art. 588.2.a. The judge is also responsible for monitoring the circumstances governing the execution of the measure.

Art. 588.4.d provides:

"In compliance with the provisions of article 588.2.g, the judicial police shall provide the judicial authority with the original media or an authentic electronic copy of the recordings and images, which must be accompanied by a transcription of the conversations it considers to be of interest.

The report shall identify all actors involved in the implementation and monitoring of the measure".

This precept must be interpreted as a minimum precept. The examining judge may add any other control measures they deem appropriate. This is authorised by Art. 588.2.g, which is included among the *common provisions* of Chapter IV and therefore fully applicable to this type of interference. The legislator is concerned with the authenticity of the media on which conversations or images have been recorded. If the original is not provided it requires the electronic copy to be sealed in some way so that there is no doubt as to its integrity.

The identity of the agents involved in the investigation is a mandatory means of control which also makes it possible to identify those who may be summoned to the plenary session at some time, in order to convert the investigation into real evidence, subject to the principle of contradiction.

The reform has not considered it appropriate to include a provision similar to the one that regulates the parties' access to the recordings, when the interception of telephone or telematic communications is involved (art. 588.3.i). The fact that, as we have been pointing out, the recording of the sound or image referred to in art. 588.4.a is only contemplated as an *ad hoc* investigative measure, conceived for one or several specific and determined encounters, should not lead us to rule out the convenience of a content selection file, inspired by art. 588.3.i, especially in cases where whilst the restrictive measure is in force, conversations have taken place that are not conducive to the success of the investigation.

II.5. Duration

As we have been insisting, the substantial identification between the investigative measures contemplated in art. 588.4.a and the interception of telephone or telematic communications can lead to unacceptable results. One of them, for example, relates to the duration of the measure. Indeed, unlike the measures contained regarding interception of communications, there is no time limit set in the provisions in Chapter VI, unlike what happens with the interception of communications (Art. 588.3.g). The temptation to set time limits on the basis of an analogical integration of this precept is not acceptable. The legislator's silence cannot be interpreted as an oversight. On the contrary, it defines a special rule that leads to the restriction of the general time limit set for the interception of telephone and telematic communications and which is obtained from the very nature of the exceptional nature of the investigative measure we are analysing. Finally, it is a matter of reinforcing the idea that the authorisation of the recording of conversations or images of the person under investigation is only meaningful when related to foreseeable encounters of which the investigators have become aware. It cannot be an ongoing measure. It cannot set out to record encounters with the expectation that one of them, after filtering, will

provide information of interest to the investigation. Hence the repeated reference to the specific *nature* of the meetings and their predictability.

In STS 718/2021, 28 December, the Criminal Chamber of the Supreme Court ruled on the interpretation of the absence of a specific time limit for the duration of the measure: *"...the setting by the examining judge of a time limit for the validity of the measure cannot deviate from the spirit and the wording of art. 588.4.b. It is true that this precept does not make express reference to a time limit - as occurs in relation to the rest of the investigative measures that affect the rights of Art.18 of the EC - but it does establish a irrevocable guideline for defining the time limits to authorisation. Indeed, the use of these devices "...must be linked to communications that may take place in one or more specific encounters of the person under investigation with other persons, the foreseeability of which is indicated by the investigation"*.

The lack of a specified time limit for the duration of the measure cannot be interpreted as an invitation to jurisdictional decisions with open-ended time limits that can be successively extended. When determining the period of validity, there is no room for an analogical integration with the provisions for other invasive measures of the right to privacy, in respect of which the legislator has seen fit to set an express time limit. For the legitimacy of an investigative measure with such an impact on the public sphere of exclusion of third parties, it is essential that the authorising resolution should not lose sight of the constitutional meaning of the measure authorised by art. 588.4.a of the LECrim, which is none other than to allow the recording of conversations - exceptionally, with the inclusion of images - which it is foreseeable will take place in a specific meeting between the persons under investigation. The state's ability to enter any citizen's home - even if he or she is suspected of a criminal offence - cannot aspire to be prolonged in time. The use of recording and listening devices in the person under investigation's home must be considered a procedural act of maximum interference in the inviolability of the home and, in general, of privacy and, therefore, of minimum duration. Art. 588.4.a of the LECrim does not authorise investigating judges to remove the constitutional protection of these rights for an unspecified period of time in the hope that something will be heard while the measure is in force. The police officers' request can only be accepted if it contains and describes one or more encounters of the persons under investigation with each other or with third parties that may be decisive to clarify the facts with the precision that the state of the investigation allows. This is the only way to argue the proportionality, necessity and exceptionality of the measure.

The installation of sound and image recording devices - in the present case, only sound - may not be authorised for "...a period of thirty calendar days, after which it shall cease if the facts under investigation are not proven or discovered, unless an extension is necessary, following a reasoned request to that effect". We have already noted above how this chronological reference cannot be drawn from the legislative provision for other types of proceedings. Indeed, if one acts according to this integration criterion, the constitutional breach becomes far more patent. It should be noted that the investigating judge has deemed it appropriate to establish a 30-day duration for the interference, which is the same as that provided for in Art. 588.7.c for the remote search of mass storage devices. This provision states that the maximum duration of this measure shall be one month. And it adds that this period may be extended "...for equal periods up to a maximum of three months". A comparison between the constitutional impact of a measure of remote and telematic analysis of the person under investigation's computer (art. 588.7.a and the

recording of what happens in the suspect's home (art. 588.4.a is sufficient to conclude that there is a functional difference between both procedural acts of investigation that prevents the assimilation of their period of validity)".

The Supreme Court goes on to reason that "*...of course, situations in which the foreseeability of such an encounter cannot be established with the desired accuracy cannot be excluded. In such cases - and only in such cases - it will be possible to fix a short period of time during which the encounter can take place. But a chronological arc of one month is the best evidence that there is insufficient data to justify violating home privacy. And, of course, the court decision granting the measure cannot generally be extended for equal periods. It will be essential to justify information about a new meeting or a more specific date to justify the interference. This is clear from art. 588.4.d of the LECrim.*

The judgement we have been referring to, citing STS 655/2020, 3 December, recalls that "*...the need for individualised treatment of the duration of the installation of recording devices inside the investigated person's home has recently been referred to by this Chamber. In Legal Ground 5, section 5.5 of the STS 655/2020, 3 December, it is reasoned in the following terms: "...two of the persons under investigation - a married couple - reside in a common home, and the third - their common son - in another nearby home, so it is not acceptable to authorise the recording of conversations between them in the first home for a month, which could not be classified as specific meetings, a disproportionate measure, whose reasonableness should refer to those held with third parties, who enter the home to meet with either of them and it can be foreseen that the use of listening devices will provide essential data of evidential relevance" (cfr. Legal Grounds 5 to 11)".*

The case law created by both decisions of the Supreme Court has been qualified by the Constitutional Court which, in its decision STC 99/2021, 10 May, has allowed greater flexibility in setting a time limit for the limitation of the measure.

II.6. Termination of the measure

The rules governing cessation of the measure is in line with this idea of the absence of a generic time limit, expressing an open-ended authorisation, subject only to the concurrence of a time limit. This is not the legislator's idea, among other reasons because it is not tolerated by the nature of the investigative measure under discussion.

Art. 588.4.e provides as follows:

"Once the measure has been terminated for one of the reasons provided for in Article 588.2.j, conversations recorded during other meetings and the recording of images of such moments shall require a new judicial authorisation.

The legislator wants to emphasise the need to renew the judicial authorisation whenever a new sound or image recording is necessary. It is therefore a question of stressing that, under the protection of Art. 588.4.a, there is no room for open, generic resolutions with no other limitations than the passage of time.

In accordance with this idea, the reference to the causes foreseen in Art. 588.2.j is disturbing. It provides that "*the judge shall order the cessation of the measure when the*

circumstances that justified its adoption disappear or it is evident that the intended results are not being obtained through it, and, in any case, when the period for which it was authorised has elapsed” in the framework of the measure of interception of telephone or telematic communications. Under no circumstances can this reference be used to support an interpretation that weakens the framework of guarantees and restrictions that derive from the heavy interference of recording sound and images, even in the home of the person under investigation. It is clear that the investigating judge, having been informed of the foreseeable likelihood of meetings from which information of interest to the investigators will emerge, can set a maximum time limit for the duration of the measure. But this time limit is only understood and justified as an additional guarantee of the anticipated knowledge of a precise, foreseeable contact, the existence of which is close and for which relevant evidence can be provided.

The destruction of image or sound files complies with the general provisions laid down in Art. 588.2.k.