



Covert and Technical Surveillance Measures and Investigation

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Abstract: The use of contemporary technological achievements in combating and preventing criminality, especially when it comes to discovering it and ensuring evidence, is considered imperative in contemporary conditions. In this process the undertaking of certain actions, with the necessary use of means and technological methods, there may be a conflict with the fundamental human rights and freedoms. In the public opinion, this is often interpreted as belonging to non-democratic societies and states when there is an abuse of authorizations with the aim of placing control over their citizens. In this case, the fact that every criminal offense represents a violation of human rights and fundamental freedom is neglected, whereas contemporary crime, and especially the organized crime, infringe upon not only the basis of the society but also all rights and freedoms. Therefore, there should be no presumption as to whether prosecution bodies should use technological achievements in combating crime. The overall view of the European Court is that the state has a “*positive obligation*” to prevent and investigate criminal offenses and to criminally prosecute the offenders. The measures undertaken with the purpose of detecting and preventing such offenses and which interfere with the private life of the person are usually acceptable, provided they are provided by law and in conformity with the constitution and international standards which allow the limitation of freedoms and of human rights in indispensable cases.

Keywords: Covert measures; human rights; interception; monitoring; controlled delivery; simulated purchase of an item

1. Introduction

Under contemporary conditions, covert and technical surveillance measures and investigation are considered as special means through which important facts can be ascertained and valuable material evidence can be obtained for the successful conduct of criminal proceedings. These measures, in accordance with paragraph 1 of Article 84 of the Criminal Procedure Code, are enforced or required to be

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enforced by the competent prosecutor and the pre-trial judge. Consequently, the state prosecutor or pre-trial judge is not required to have a reasonable suspicion on the **identity of the suspect or suspect who has committed, are committing or will soon commit a criminal offense. (Criminal Procedure Code, 04/L-123, dated 13.12.2012, which entered into force on 01.01.2013).**

1.1. Covert and Technical Surveillance Measure and Investigation

Under contemporary conditions, covert and technical surveillance measures and investigation are considered as having special weight through which important facts can be ascertained and valuable material evidence can be obtained for the successful conduct of criminal proceedings. (Prof. Azem Hajdari, Criminal Procedure Law – General Part, 2012, p. 160).

The covert and technical surveillance measures and investigation are relatively new and the application of these measures is due to the social necessity for increasing the procedural efficiency in combating serious crimes, organized crime and corruption and as well as for the protection of the injured parties, witnesses and cooperative witnesses (Prof. Ejup Sahiti and Rexhep Murati, Criminal Procedure Law, Prishtina, 2013, p. 211).

Organized crime strikes the highest ranked social values. In addition to this, the volume and the form of its appearance, as well as the linkage of organized crime with economic and political power holders make it difficult to recognize, detect and proving it and make it more dangerous than the danger caused by the worst classical offences. (Djurcic, V, Criminal Procedure Law, Special Part, Nis, 2006. p. 242)

The use of scientific and technological achievements in the prevention and combating of crimes is considered imperative in contemporary conditions. In the public opinion, this is often interpreted as an expression of non-democratic countries and societies, which abuse their powers in establishing control of the private life of their citizens. (Simović, M: Criminal procedural law, Bihać 2009, p. 448).

Communication via telephone and other means of telecommunication is a right of the individual to communicate freely, with all forms and tools of this technology, such as telephone conversations, faxes, telegrams, e-mails, etc. Any unlawful interference that violates this right by anyone, is an arbitrary act which is punitive. (Criminal Procedure, Commentary, Group of Authors, Tirana, 2003, p. 280).

Special observation is the criminal-tactical action of secret collection of information through the usage of the method of personal perception. This observation relates to the secret surveillance, supervision and interception of certain persons, vehicles, facilities and premises or spaces for the purpose of obtaining the appearance and gathering of information about the criminal state, activity and identification of those who are surveilled. (Criminology, Nedzat Korajlic and Driton Muharremi, Prishtina, 2009, p. 156).

2. Covert and Technical Surveillance Measures and Investigation - Notion and Legal Basis for Applying These Measures

Covert or technical surveillance measures and investigation (“measures under this chapter”) means each of the following measures: covert photographic or video surveillance; covert monitoring of conversations; search of postal items; interception of telecommunications and use of an International Mobile Service Identification “IMSI” Catcher; interception of communications by a computer network; controlled delivery of postal items; use of tracking or positioning devices; a simulated purchase of an item; a simulation of a corruption offence; an undercover investigation; metering of telephone-calls; and disclosure of financial data. (Article 81 of the Criminal Procedure Code of Kosovo).

3. Legal Basis for Applying these Measures According to Kosovo Legislation

These procedural measures are of the new era and were not familiar with the former laws that were applied in Kosovo. These measure were for the first time foreseen with UNMIK Regulation No. 2002/6 on Covert Technical Surveillance Measures and Investigation. (UNMIK Regulation no. 2002/6). Then it was foreseen with the Provisional Criminal Procedure Code of Kosovo (Kosovo Provisional Criminal Procedure Code, UNMIK/REG/2003/26, Article 339), and finally with the Criminal Procedure Code of Kosovo, 2012. (Criminal Procedure Code No. 04 / L-123, dated 13.12.2012, articles 85-100).

According to the provisions of UNMIK Regulation 2002, the covert measures were ordered based on the request of the public prosecutor, by the investigative judge, since until 2004 in Kosovo the investigation was conducted by the investigative. (cited regulation). According to the Provisional Criminal Procedure Code, some of

these measures such as: covert photographic or video surveillance in public places; Covert monitoring of conversations in public places; Covert investigation or interception of telecommunications were ordered by the public prosecutor, while the other measures were ordered by the pre-trial judge. (Cited the Provisional Code). According to the present Criminal Procedure Code of Kosovo, all of the measures from this chapter before the investigation can be ordered may be ordered by the state prosecutor, while after the initiation of the investigation it is the pre-trial judge (Cited the Criminal Procedure Code).

4. Covert Measures According to the Legislation in Some Countries in the Region

4.1. Republic of Albania

Republic of Albania, these measures has foreseen in Article 222 and has named them “interception” according to Article 222. par. 1. Upon the request of the prosecutor or the damaged party, the court authorizes interception following a reasoned decision for cases permitted by law when it is necessary for the continuation of the investigations initiated and when there is sufficient evidence to substantiate the indictment. When there are reasonable grounds for thinking that the delay may result in a serious endangering of the investigation, the prosecutor decides for the interception with a reasoned decision and notifies the court immediately, but no later than twenty-four hours. The court within 40 hours from the decision of the prosecutor makes the validation by a reasoned decision. When the validation is not done within the set time limit, the interception can not continue and its results can not be used. (Criminal Code of the Republic of Albania, Article 222. par. 1 and 2, of 2013).

4.2. Republic of Croatia

Republic of Croatia, this issue has regulated with the provision of Article 332 which states: “If it turns out that the data on the criminal offense cannot be applied in any other way or would have been possible but with great difficulty, upon a reasoned and written request of the state prosecutor, the investigative judge may against the person for whom there is a based suspicion that he or she has committed the criminal offense foreseen in Article 334, may order special procedural actions which temporarily limit the constitutional rights of the citizens. (Croatia's Criminal Procedure Code of year 2017, Article 332. par. 1). Exceptionally, if there is a risk of deferral and if the state prosecutor has reason to

believe that he will not be able to secure the order from the investigative judge in time, the order from paragraph 1. within 24 hours can be issued by the state prosecutor and shall be delivered to the investigative judge within eight (8) hours. (Cited the Code, Article 332. par. 2 and 4).

4.3. Republic of Montenegro

Republic of Montenegro, the issue of these measures has foreseen in chapter nine, in Article 157 and has named them as “*secret surveillance measures*” and according to this article “if there is a grounded suspicion that any person alone or in co-operation with others have committed, is committing or are preparing to commit the criminal offense under Article 158 of the LP of Montenegro, while with other means evidence can not be ensured or their ensurance would constitute an unacceptable risk or risk for the life of these people, against these persons can be applied secret surveillance measures (Criminal Law of Montenegro, 2009, Article 157. par. 1). According to Article 159 of the Criminal Law of Montenegro, such measures are ordered by the investigative judge with the justified request of the state prosecutor, while some of the measures from Article 157. par. 2 are ordered by the public prosecutor. (Cited the law, Article 159).

4.4. Republic of Macedonia

According to Article 252 of the Criminal Procedure Code of Macedonia, these measures have been named as “*special investigative measures*” and according to this article “when it is probable that the ensurance of certain data and evidence is necessary for the successful conduct of criminal proceedings and otherwise can not be provided for, special investigative measures may be applied. (Criminal Procedure Code of Macedonia, of 2010, Article 252).

The measures provided for in Article 252. par. 1, point 1, 2, 3, 4 and 5 of the CRPM, upon the justified request of the public prosecutor are decided by the pre-trial judge with a written order, while those from point 6, 7, 8, 9, 10, 11 and 12, of the said article shall be decided by the public prosecutor with a written order. (Cited Code, Article 256. par. 1).

4.5. Republic of Serbia

Republic of Serbia, the issue of these measures has foreseen in Article 161 and has named them as “*Special proving acts*” and according to this Article “if there is a grounded suspicion that a person himself or in cooperation with others has committed the criminal offense under Article 162 of the Criminal Code of Serbia,

while no other means can be used for ensuring the evidence or their insurance would be difficult. Special proving acts can be exceptionally also used against the person for whom there is a grounded suspicion that he is preparing any of the offenses under Article 162. par. 1. whereas the circumstances of the concrete case show that the offense can not be detected, hindered or proved or would cause unreasonable difficulties or great danger. (Criminal Code of the Republic of Serbia, 2012, Article 161). In addition to the order for the control of remittances and the controlled delivery of remittances is given by the public prosecutor, while for the other measures the order is given by the pre-trial judge. (Cited Law, Articles 161-182).

4.6. Republic of Bosnia and Hercegovina

The Republic of Bosnia and Herzegovina in Chapter IX has named these measures in Article 116 as “*special investigative measures and conditions for the implementation of these measures.*” Under this article, against a person for whom there is a grounded suspicion that a person himself or with other persons have participated in or participates in the commitment of criminal offenses under Article 117 of this Law may be decided special investigative actions, if evidence can not otherwise be ensured or their insurance is subject to incalculable difficulties. (Law on Criminal Procedure of Bosnia and Herzegovina, Article 116).

The measures referred to in Article 116 paragraph 2 shall be decided with the order of the pre-trial judge upon a reasoned proposal of the prosecutor. Exceptionally, if the written order can not be ensured on time and if there is a risk of deferral, the implementation of the measures referred to in Article 116 of this law can be decided upon even on the basis of an oral order of the pre-trial judge. The written order of the pre-trial judge must be ensured within 24 hours from the issuance of the oral order. (Cited Law, Article 118 (1) and (2)).

If a comparison is done with the Kosovo legislation and legislation of the countries of the region, it results that the Kosovo Criminal Procedure Code allows the possibility of implementing these measures without any limitation before the commencement of the investigation.

5. Restricting the Human Rights and Freedoms According to the Constitution and International Instruments

The European Union's practice allows the prosecutor to issue provisional orders for any of these measures, if then the court confirms that order within a short period of time (Jon Smibert, Guide for CPCK, 2013, p. 50).

Intercepting telephone calls and tracking other communications is undoubtedly sanctioned under Article 17 of the Political and Civil Rights Agreement (PCRA) and Article 18 of the European Convention on Human Rights (ECHR), but often the interference can be legitimate according to the criteria of Article 8 (2) of the Universal Declaration of Human Rights. (Gudmundur Alfredsson and Asbjorn Eide, translated by Nasire Bala-Rizaj and Naim Osmani p. 262).

The court may take a decision to reject the right to the secrecy of letters, telephone conversations and other means of communication only if there are reasons which are expressly provided in the Constitution, such as: 1. If it is necessary for the conduct of criminal proceedings; 2. If such denial is necessary for the protection of the site, in the manner provided by law. (Prof. Dr. Enver Hasani and Prof. Dr. Ivan Čukalović, Commentary of the Constitution of the Republic of Kosovo, p. 127.)”.

In any case, the European Court of Human Rights (ECtHR) (also national courts and other state bodies) must take into account the balance between the individual's right that his “personal world” is protected from interference of the state, but also the court's right to objectively evaluate this sphere and to prevent the misuse of the right to privacy, namely the use of these rights in violation of the purpose of their constitution (Mladen Vukčević, Commentary of the Constitution of the Republic of Montenegro, 2015, p. 134).

Everyone has the right to respect for his private and family life, his apartment and his correspondence. The public authority may not interfere in the exercise of this right except in the extent provided for by law and, where necessary, in a democratic society, in the interests of public security, public order, health or morals or for the protection of the rights (Article 8 of the ECHR).

In conclusion, special investigative methods needs always special attention especially in relation to the Human Rights and Freedoms. The European Court of Human Rights has recognised that there is a need for authorities to have recourse to special investigative methods for fighting organised crime and corruption cases. The use of special investigative methods does not in itself infringe for example the right to a fair trial but the use of special investigative methods must be kept within

clear limits. This is so because the rise of organised crime and its development requires the States to take appropriate measures. However, the use of these measures can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question. (Case Ramanuskas v. Lithuania, Application no. 74420/01, Judgment of 5 February 2008, Guide on Article 6 of the Convention – Right to a fair trial (criminal limb), Nuala Mole and Catharina Harby, The right to a fair trial – A guide to the implementation of Article 6 of the European Convention on Human Rights, Belgium 2006)

6. Each of the Covert Measures Individually

6.1. Covert photographic surveillance

The term “*covert photographic or video surveillance*” means the monitoring, observing, or recording of persons, their movements or their other activities by a duly authorized police officer by means of photographic or video devices, without the knowledge or consent of at least one of the persons subject to the measure.

6.2. Covert monitoring of conversations

The term “*covert monitoring of conversations*” means the monitoring, recording, or transcribing of conversations by a duly authorized police officer by technical means without the knowledge or consent of at least one of the persons subject to the measure.

6.3. Search of postal items

The term “*search of postal items*” means the search by a duly authorized police officer of letters and other postal items which may include the use of X-ray equipment.

6.4. Interception of telecommunications

The term “*Interception of telecommunications*” means the interception of voice communications, text communications or other communications through the fixed or mobile telephone networks. This shall include any similar technological device or system that carries information that is normally intended to be private.

6.5. Controlled delivery of postal items

The term “*controlled delivery of postal items*” means the delivery by a duly authorized police officer of letters and other postal materials.

6.6. Use of Tracking or Positioning Devices

The term “*use of tracking or positioning devices*” means the use by a duly authorized police officer of devices, which identify the location of the person or object to whom it is attached.

6.7. Simulated purchase of an item

The term “*a simulated purchase of an item*” means an act of buying from a person suspected of having committed a criminal offence an item which may serve as evidence in criminal proceedings or a person suspected to be a victim of the criminal offence of Trafficking in Persons, as defined in Article 170 of the Criminal Code.

6.8. Simulation of a Corruption Offence

The term “*a simulation of a corruption offence*” means an act, which is the same as a criminal offence related to corruption, except that it has been performed for the purpose of collecting information and evidence in a criminal investigation.

6.9. Undercover Investigation

The term “*an undercover investigation*” means the planned interaction of a duly authorized police officer or cooperative agent of the prosecution who is not identifiable as a duly authorized police officer or of a person acting under the supervision of a duly authorized police officer with persons suspected of having committed a criminal offence.

6.10. Metering of Telephone Calls

The term “*metering of telephone calls*” means obtaining a record of telephone calls made from a given telephone number.

6.11. Disclosure of Financial Data

The term “*disclosure of financial data*” means obtaining information from a bank or another financial institution on deposits, accounts or transactions. (Cited Article 81, paragraph 2-10 of CPCK).

7. Covert and Technical Surveillance Measures and Investigation Ordered by the State Prosecutor

The new Criminal Procedure Code, with the provisions of Article 84, has authorized the state prosecutor in certain situations to authorize each of the cover measures in accordance with Article 86-100 of this Code without the formal investigation against certain persons or identified persons being initiated, but also against unidentified persons when there is a suspicion that an offense will be committed in the future (not performed, is not being carried out), (Article 84 of the Criminal Procedure Code).

The Law on the Kosovo Intelligence Agency, when dealing with any of such measures, may be authorized only upon the order of an authorized judge of the Supreme Court by the President of the Supreme Court, but the evidence provided by these measures does not have an effect in the criminal proceedings (not admissible evidence) (Cited Article 28 of the Code).

8. Covert and Technical Surveillance Measures and Investigation Prior the Criminal Proceedings

Covert and technical surveillance measures and investigation may be authorized in accordance with Article 84 of the CPCK after the commencement of the criminal proceedings or at the same time as the state prosecutor's decision to initiate the preliminary procedure, the state prosecutor may require the pre-trial judge to authorize each of the covert or technical investigative measures in accordance with Articles 86-100 of this Code (Article 86, paragraph 2 of CPCK).

9. The Authorization of the Prosecutor to order the Covert Measures Also after the Investigative Procedure has been initiated in Emergency Cases

9.1. Evaluation of the Lawfulness of the Provisional Order of the Prosecutor

The judge, before confirming this order of the judge, ex officio assesses its legality, i.e. whether legal conditions have been met that the prosecutor should give an order for the implementation of such a measure - whether it is a criminal offense and there is a danger for the damage to the investigation or the life and security of the injured party, witness, informant or members of their family, if the legal conditions are not met, the judge is likely not to confirm this order, in which case the order

will remain ineffective (evidence provided by this order would be inadmissible evidence). If the judge evaluates that in the present case all the legal conditions for such an order existed, he would confirm the order, whereby the evidence provided by the covert measure ordered by the prosecutor will be legitimate for the criminal proceedings if criminal proceedings are initiated (Article 91, paragraph 2 of the CPCK).

10. Exceeding the Order for COvert and Technical Surveillance Measures and Investigation

The state prosecutor or competent judge may issue another written order for the extension of the order if the preconditions for ordering a measure continue to be valid and there is a reasonable explanation for failing to provide some or all of the information sought under the previous order. The order may be extended to a maximum of sixty (60) days, which may be renewed within a period of three hundred sixty (360) days from the date of issuance of the order. The order for covert photographic or video surveillance in private places or interception of telecommunications can be extended up to sixty (60) days, but can be renewed for another sixty (60) days. The continuation of an order for a measure ordered by a pre-trial judge may be ordered only upon the proposal of the state prosecutor (Article 94 (2) and (3) of the CPCK).

11. Admissibility of Evidence Obtained through Orders for Covert and Technical Surveillance Measures and Investigation

The evidence obtained through the measure from this chapter are inadmissible if the order for the measure and its implementation is unlawful. (Article 97 paragraph 2 of the CPCK).

12. Rights of Subjects of Orders

The state prosecutor shall promptly inform in writing by registered mail each subject of an order pursuant to paragraph 4 of this Article that he or she has been the subject of that order and has a right to file a suit to the competent court within six (6) months of being informed. (Article 96. par. 9 of the CPCK).

According to the provisions of the CPCK, persons who were subject to these measures could initiate proceedings before the competent court for the legality of these measures. When reviewing the appeal, the panel should be provided with oral documents and statements. When the Surveillance and Investigation Review Panel finds that the measure is unlawful or the order for such measure is unlawful, it may decide that: a) to cease the order if it is still in force; b) order the disposal of collected materials; and (c) compensate the person or persons subject to the order (Article 96 of the CPCK).

13. Conclusions

Despite the fact that in the drafting of the Criminal Code of Procedure of Kosovo of 2012, apart from local experts, experts from the Council of Europe and experts from the field of human rights and fundamental freedoms have also participated, unfortunately I consider that this Code, in the chapter regulating the issue of the application of the covert and technical measures of surveillance and investigation, is in conflict with the standards that regulate this field, because it permits without limitation the application of these measures even without reasonable suspicion, without knowing the identity of the person even if these information can be secured in another way, then all these measures can be ordered by the state prosecutor before the investigation is initiated, and that such a possibility does not exist in any of the analyzed laws of the region, but which has the support in international instruments. The European Convention on Human Rights and Fundamental Freedoms contains strict rules on the possible limitation of private life, provided that the requirements of paragraph 2 of Article 8 of the Convention are fulfilled. Accordingly, the temporary restriction of these rights to citizens is only possible if they meet the following conditions: 1. if other measures can not achieve the same purpose; 2. if there is a grounded suspicion that a person or other persons participated in or participated in the commission of criminal offenses, 3. if the order was issued by a court which retains the right to control the legality of these measures, while the prosecutor may only issue temporary orders in emergency situations, which should be confirmed by the court.

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