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SECRET MONITORING OF COMMUNICATION AS A SPECIAL INVESTIGATION TECHNIQUE IN FOCUS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This paper is focused on several important issues that deal with the secret monitoring of communication as a special investigation technique. The main perspective of the analysis is based on the ECtHR case law on this issue but also on the need to prescribe detailed rules and conditions that regulate whether is possible to secretly monitor communication of third parties in order to prevent, investigate and/or collect evidence of crime. Both perspectives are results of the two parallel processes: On the one side, intensive ICT development enables various modern techniques and methods of crime investigation but also resulted in some new types of crime that could be committed using ICT; On the other hand, expansion of the fundamental rights and their protection, especially in Europe, raised global awareness on the right on the privacy and the need to protect it. Having that in mind it seems that the main question that should be answered by legislator is: Where is the border line between the right on the privacy and the public interest to investigate or prevent crime and collect evidence. A special attention should be paid on the right of the person whose communication was monitored to be informed on the secret monitoring that had been conducted.*

Keywords: *the right on the privacy, secret monitoring of communication, special investigation techniques, ECtHR.*

1. Introduction: European and comparative law standards

European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) in the Article 8 prescribes that everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the 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

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crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. There are many aspects of the Article 8, like Roma travelers' issues, termination of pregnancy, euthanasia etc. (Banović and Turanjanin, 2014; Banović, Turanjanin and Miloradović, 2017; Turanjanin and Mihajlovic, 2014) that make case-law regarding Article 8 very comprehensive (Hert, 2005: 73).

Interception of communications is very complex issue, which also falls under the Article 8.[237] As we can see, this provision is divided into four categories: private life, family life, home and correspondence (Schabas, 2015: 366). Articles 8-11 are subject to restriction for a number of "legitimate purposes" found, although not uniformly, in the second paragraphs (Greer, 2006: 257). Rights protected by Article 8 can be limited only according to the law and based on democratic society needs[238] (Jakšić, 2006: 261) and Convention organs have developed a flexible methodology for the interpretation and application of paragraph 2 (Schabas, 2015: 40).

According to the Human Rights Committee, integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto* and it should be delivered without interception and without being opened or otherwise read (Committee 1988). In addition, surveillance, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited (Committee 1988). However, in the development of the sophisticated technology, arises a need for the better fight against serious crime and many countries implemented in its legislations secret surveillance measures. The old methods of investigation in the modern time are not efficient for successful criminal prosecution (Fenyyvesi, 2006: 183). So, the challenge is how to balance the right to privacy with the need to intercept communications for the prevention and investigation of crimes (Esen, 2012: 164; Moonen, 2010: 98). Tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on law that is particularly precise (Jayawickrama, 2002: 629). This

[237] According to Weyembergh and de Biolley, there are four main reasons this is complex issue. First is that the identification of the specific subject area is far from easy. The second, which explains the complexity of the subject is the fact that the interception of telecommunications is a particularly intrusive technique and thereby extremely sensitive in the context of the protection of fundamental rights. Third, the situation is all the more complex, as the internal legal systems of the different States remain widely divergent, although a certain approximation has been carried out by different sources. And fourth, mutual legal assistance is far from the simple matter (Weyembergh and Biolley, 2007: 285-287).

[238] The Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions (Silver and Others v. the United Kingdom, 1983: § 97).

is, in addition, very sensitive area due to the protection of the data (Norris, et al, 2017). So, societies directed by the rule of law consider that governments should only gather information about us when it is useful to reach a goal more important than our personal right to be manager of what gets know about us (Moonen, 2010: 98).

From the Convention's provision itself, it's obvious that combating crime has been recognized as legitimate base to interfere with the right on privacy. More precisely, border lines for this type of interference have been defined in several Council of Europe (hereinafter: CoE) recommendations. E.g. Recommendation R(95)13[239] emphasizes, in its introductory part, the consequences that the ICT development has on the structure and types crime but also on the ICT use in crime investigation and proving. Recommendation R(96)8[240] in the Preamble underlines changes in the European economy and market arising from crushing totalitarian regimes that are also reflected in the structure of criminal and types of crime and therefore require adequate reaction of individual states but also a new European policies of crime combating. Additionally, par.1-2 insist on reaction on crime which is in line with rule of law and protection of human rights regardless of seriousness of situation regarding criminal in individual society. In the Section C, the Recommendation explains prerequisites for successful combating crime and strictly prescribes that tapping of telephone of direct communication should be regulated as mean of combating organized crime (par. 26).

Significant contribution in this field arising from the European Court of Human Rights (hereinafter: Court, ECtHR) standpoint (more than 20 years old) that legislator should clearly recognize circle of subjects who could be exposed to this measure but also the nature (types) of crime where it is applicable; time limitations of its application; conditions for taking record on the measure; methods of controlling these records and reasons for destroying collected material (Huvig v. France, 1990; Kruslin v. France, 1990). These standpoints could be seen as the steps towards the unification, which is the milestone and essential starting point of the idea to establish a united Europe (Kolaković-Bojović, 2016: 193). The Court has, from the *Leander* case onwards, always moved towards a progressive extension of the scope of Article 8 (Sicurella and Scalia, 2013: 434-435). As Lagerwall points out, the Court's case-law is relatively rich in terms

[239] Recommendation No. R (95) 13 of the Committee of Ministers to Member States Concerning Problems of Criminal Procedure Law Connected with Information Technology (Adopted by the Committee of Ministers on 11 September 1995 at the 543 meeting of the Ministers' Deputies)

[240] Recommendation Rec(1996)8 of the Committee of Ministers to Member States on Europe in a time of change: crime policy and criminal law (Adopted by the Committee of Ministers on 5 September 1996, at the 572nd meeting of the Ministers' Deputies

of its consideration of secret surveillance measures, such as signals intelligence and individual wire-tapping (Lagerwall, 2008: 19). So, when we speak on secret surveillance measures, the key article is Article 8 of the Convention. One of the points of the Article 8 is not simply protecting people from the embarrassment of external scrutiny of their personal situations but also respecting their dignity and sense of being valued (Feldman, 2002: 702; Marshall, 2009: 70).

In the first place, the Court in the famous judgment *Klass and Others v. Germany* emphasized that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (Klass and Others v. Germany, 1978: 41).[241] It was repeated in the *Malone v. The United Kingdom* (Malone v. The United Kingdom, 1984: 64).[242]

2. Secret monitoring of communication: general principles

As earlier mentioned, the Court in the numerous judgments emphasized that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 (for example: Klass and Others v. Germany, 1978: § 41; Malone v. The United Kingdom, 1984: § 64; Lambert and Others v. France, 2014: § 21). Such an inerference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (Lüdi v. Switzerland, 1992: § 39; Kvasnica v. Slovakia, 2009: § 77). The phrase "in accordance with the law" implies conditions which go beyond the existence of a

[241] The Court stated: "Although telephone conversations are not expressly mentioned in paragraph 1 of Article 8, the Court considers, as did Commission, that such conversations are covered by the notions of of „private life“ and „correspondence“... Furthemore, in the mere existence of the legisaltion itself there is involved, for all those to whom the legislation could be applied, a menance of surveillance; this menace strikes at freedom of communication between users of the postal and telecommunication services and thereby consitutes an „intererence by a public authority“ with the exercise of the applicants' right to respect for private life and for correspondence (Klass and Others v. Germany, 1978,: § 41).

[242] It is interesting example of the UK where secret surveillance was traditionally used as method of discovering but not of proving organized crime. Considering this, it had not been regulated by law since 1985 with exception of post service related issues. The trigger for change was the ECtHR decision from 1984 in Malone case (Malone v. The United Kingdom 1984), where the Court concluded that the UK brakes provisions of the art. 8 of the Convention. That resulted in adoption of the Interception of Communications Act 198511 which kept existed concept of the secret surveillance as a measure for prevention and discovering crime but also in additional appeals to the ECtHR. In 1997 the Court rendered decision in the Halford case and confirmed that Interception of Communications Act does not provide for necessary guaranties in line with art. 8 of the Convention. By adoption of the Human Rights Act in 1998, the ECHR became integral part of the UK internal legal system but more precise regulations in the field were adopted as part of the Regulation of Investigatory Powers Act 2000 (RIPA, see more in (Addis and Morrow 2005, 57-60)).

legal basis in domestic law and requires that the legal basis be “accesible” and “foreseeable” (Amann v. Switzerland, 2000: § 55).

2.1 In accordance with the law

In general, the Court has defined in its practice meaning of the expression “in accordance with the law”. According to Court, that implies *that the impugned measure should have some basis in domestic law but it also refers to the quality of the law in question, requiring that it should be compatible with the rule of law and accessible to the person concerned who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law* (Kruslin v. France, 1990: § 27; Lambert v. France, 1998: § 23; Huvig v. France 1990: § 26; Kopp v. Switzerland, 1998: § 55; Perry v. the United Kingdom, 2003: § 45; Dumitru Popescu v. Romania[243] (No. 2), 2007: § 61; Liberty and Others v. the United Kingdom, 2008: § 59). There must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 of Article 8 (Malone v. The United Kingdom, 1984: § 67). In addition, the Court emphaseized the fact that the risks of arbirariness are evident especially where a power of the executive is exercised in secret (Klass and Others v. Germany, 1978: §§ 42, 49).

2.2 Foreseeability

The requirements of the Convention, *notably in regard to foreseeability cannot be exactly the same in the special context of interception of communications for the puroposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of the individuals* (Malone v. The United Kingdom, 1984: § 67). The Court in *Kvasnica* stated that *the requirement of legal “foreseeability” in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly* (Kvasnica v. Slovakia, 2009: § 79). This standard is, between the others,

[243] In order to comply with the rules established by the Court, the Romanian new Code of Criminal Procedure establishes and defines interception of conversations and communications; video, audio surveillance or by photographing in private areas; location or GPS tracking or by other technical surveillance means; obtaining the list of telephone conversations; retention, delivery or searches of postal correspondence; monitoring the financial transactions and the disclosure of financial data; use of undercover investigators; finding corruption offence, or the conclusion of an agreement; supervised delivery; identification of the subscriber, the owner or the user of a telecommunication system or an access point to a computer (Boroi, 2013: 58-59).

repeated in the *Weber and Saravia v. Germany* (Weber and Saravia v. Germany, 2006: § 93) or in the similarly in *Leander v. Sweeden*: *...the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. Thus, it cannot mean that individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security* (Leander v. Sweeden, 1987: § 51). *However, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (to his secret and potentially dangerous inerference with the right to respect for private life and correspondence* (Kvasnica v. Slovakia, 2009: § 79; Huvig v. France, 1990: § 29; Malone v. The United Kingdom, 1984: § 67; Kopp v. Switzerland, 1998: § 64; Valenzuela Contreras v. Spain, 1998: § 46). The Court has also stressed the need for safeguards in this connection. *In its case-law on secret measures of surveillance, it has described an overview of the minimum safeguards that should be set out in statute law in order to avoid abuses of power* (Kvasnica v. Slovakia, 2009: § 79).

In the context of secret measures of surveillance or interception by public authorities it is essential to have clear, detailed rules on interceptions of telephone conversations, especially as the technology available for the use is continually becoming more sophisticated (Valenzuela Contreras v. Spain, 1998: § 67; Kopp v. Switzerland, 1998: § 72). In a case when no domestic law regulates the use of covert listening devices at the relevant time, the interference is not “in accordance with the law” (P. G. and J. H. v. the United Kingdom, 2001: § 39). Then, in the numerous judgments the Court stated that, *since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned of the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to the judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercie with sufficient clarity to give the individual adequate protection against arbitrary interference* (Weber and Saravia v. Germany, 2006: § 46; Malone v. The United Kingdom, 1984: § 68; Leander v. Sweeden, 1987: § 51; Huvig v. France, 1990: § 29; Bykov v. Russia, 2009: § 78).

In the *Weber and Saravia* the Court reminded to the minimum safeguards that should be set out in the statute in order to avoid abuses of power: a definition of categories of people liable to have their telephones tapped by judicial order; the nature of offences

which may give rise to such an order; a limit on the duration of telephone tapping; the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible interception by the judge and by the defence and the circumstances in which recording may or must be erased or the tapes destroyed, in particular where an accused has been discharged by the investigating judge or acquitted by a court (Weber and Saravia v. Germany, 2006: § 46). Deficiency in the determining the nature of offences which might give rise to such an order, fixing limits on the duration of telephone aping and specifying the procedure for drawing up summary reports containing intercepted communications lead to the violation of Article 8 (Prado Bugallo v. Spain, 2003).[244]

In the Serbian law, secret monitoring of communication is ruled as a special investigative measure (see generally: Turanjanin, Voštinić and Žarković, 2016) and Serbian legislator followed abovementioned instructions defined by ECtHR. The Court also stresses that in a case when the scope of the measures of secret surveillance could include virtually anyone, there will be violation of Article 8 (Szabó and Vissy v. Hungary, 2016: § 89). As the Court emphasized, the length of the measure is very important. So, if a law does not say anything about the length of the measure or the reasons that might warrant it, did not satisfy the requirements of the Article 8 (Domenichini v. Italy, 1996: § 30). For the existence of the violation, it is necessary that the law in force in the moment of alleged violation had shortcomings. Regardless to the legislation changes between violation and judgment, the Court will appreciate State's efforts, but also will find violation of the article 8. For example, the Court considers that, to this extent, during the relevant period of applicant's detention, the impugned surveillance measures, insofar as they may have been applied to him, did not meet the requirements of Article 8 of the Convention as elucidated in the Court's case-law (R. E. v. the United Kingdom, 2015: § 142).

2.3 Purpose and necessity of the interferences

In the *Weber and Saravia* the Court reiterates that *when balancing the interest of the respondent State in protecting its national security through secret surveillance measures against the seriousness of the interference with an applicant's right to respect for his or her private life, it has consistently recognised that the national authorities*

[244] Spanish legislator after judgments against her did not completly changed legisaltion in this sphere (Winter, 2007: 14; see additionally Ferro, 2010).

enjoy a fairly wide margin of appreciation in choosing the means for achieving the legitimate aim of protecting national security (see also Klass and Others v. Germany, 1978: § 49). *In view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law* (Weber and Saravia v. Germany, 2006: § 106). In *Dragojević v. Croatia* the Court again draws attention to the question whether an interference was "necessary in democratic society" *in pursuit of a legitimate aim, since the Court has held that powers instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions* (see also Kennedy v. the United Kingdom, 2010: § 153). *In assesing the existence and extent of such necessity the Contracting States enjoy a certain margin of appeciation but this margin is subject to European supervision.* In Barfod v. Denmark the Court added here embracing both the legislation and the decision applying it, even those given by an indenpendent court (Barfod v. Denmark, 1989: § 28). Then, *the Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in democratic society". In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 paragraph 2, are not exceeded* (Dragojević v. Croatia, 2015: § 84; Lambert v. France, 1998: § 31; Kvasnica v. Slovakia, 2009: § 80).

In *Klass* and *Malone*, the Court stated that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of the secret measures, without having to allege that such measures were in fact applied to him. However, this case-law cannot be interpreted so broadly as to encompass every person who fears that the security service may have compiled information about him. It is sufficient that the existence of the practices permitting secret surveillance be established and that there is a reasonable likelihood that the security service has compiled and retained information concerning his private life (Hewitt and Harman v. the United Kingdom, 1993).

3. Order for secret surveillance

The Court have dealt with the same issues in several occasions. Firstly, one of the fundamental issues in this sphere is whether the secret surveillance was necessary. The Court in the last few years brought several judgments against the Croatia. The most important is probably Dragojević v. Croatia where the Court has also emphasised that *verification by the authority empowered to authorise the use of secret surveillance, inter alia, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, commiting or having commited certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration. It is therefore important that the authorising authority – the investigating judge in the instant case – determines whether there is compelling justification for authorising measures of secret surveillance. In the instant case the four secret surveillence orders issued by the investigating judge of the Zagreb County Court in respect of the applicant were essentially based only a statement referring to the existence of the OSCOC's request for the use of secret surveillance and the statutory phrase that „investigating could not be conducted by the other means or that it would be extremely difficult“. No actual details were provided based on the specific facts of the case and particular circumstances indicating a probable cause to believe that the offences had been committed and that the investigation could not be conducted by other, less intruisive, means* (Dragojević v. Croatia, 2015: §§ 94-95).

Croatian Supreme Court and Constitutional Court took a view that *in a case of a lack of the reasons in the secret surveillance orders that couls be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the proceedings by the court being requested to exclude the evidence thus obtained from the case file.* So, the Court concludes that *it follows from the foregoing that whereas the Code of Criminal Procedure expressly envisaged prior judicial scrutiny and detailed reasons when authorizing secret surveillance orders, in order for such measures to be put in place, the national courts introduced the possibility of retrospective justification of their use, even where the statutory requirement of prior judicial scrutiny and detailed reasons in the authorization was not complied with.* In an area, as sensitive as the use of secret surveillance, which is tolerable under the Convention only in so far strictly necessary for safeguarding the democratic institutions, the Court has difficulty in accepting this situation created by the national courts. It suggests that *the practice of*

administration of law, which is in itself not sufficiently clear given the two contradictory positions adopted by both the Constitutional Court and the Supreme Court, conflicts with the clear wording of the legislation limiting the exercise of the discretion conferred on the public authorities in the use of covert surveillance. Moreover, the Court considers that *in a situation where the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law. This is particularly true in cases where the only effective possibility for an individual subjected to covert surveillance in the context of criminal proceedings is to challenge the lawfulness of the use of such measures before the criminal courts during the criminal proceedings against him or her. The Court has already held that although the courts could, in the criminal proceedings, consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint* (Dragojević v. Croatia, 2015: §§ 98-99). The similar situation can be found in *Goranova-Karaeneva v. Bulgaria* (Goranova-Karaeneva v. Bulgaria, 2011). This can accordingly be observed in the present case, where the competent criminal courts limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant's Article 8 rights (Dragojević v. Croatia, 2015: § 100).

In this case, based on the abovementioned reasons, the Court found violation of the Article 8. Simply, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the requirement of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was „necessary in democratic society“. This was a basis for the next two judgments against Croatia, where existed, in this field, an identical situation (Bašić v. Croatia, 2016; Matanović v. Croatia, 2017). The Court here just recalls the previous judgment. This is especially important for the Serbian judges, because it is not a rarity that such orders lack the reasoning. However, it does not seem to problem only in the Western Balkan

countries. In the decision *Mustafa Sezgin Tanrikulu v. Turkey*, the Court observes that when the impugned decision did not include any explanation as to why and what way more lenient measures would have been ineffective for the aims sought to be achieved and when no actual details were provided based on the specific facts of the case and the particular circumstances indicating a probable cause to believe that the aims in question could not be achieved by other, less intrusive, means, there will be violation of the Article 8 (Mustafa Sezgin Tanrikulu v. Turkey, 2017: § 59).[245]

According to Serbian Code of Criminal Procedure (hereinafter: CPC) the secret surveillance is applicable if exists reasonable suspicion that someone committed the crime listed in the article 162[246] of CPC but only if collecting of evidence is impossible or hardly feasible in other way. Exceptionally, this measure is applicable to the person who is under suspicion for preparing some of offences from the article 162 but only if the circumstances of the case indicate that discovering, prevention or proving the crime and perpetuator would not be possible without this measure or it will result in disproportionate difficulties or serious danger.

According to the jurisprudence of the ECtHR, under the Convention's protection fall: listing of phone calls (Copland v. the United Kingdom, 2013) facsimile, e-mail and data communications (Leander v. Sweeden, 1987: § 42), as well as pager communications (Taylor-Sabori v. the United Kingdom, 2002: § 17). Similarly, in the sphere should fall every kind of the SMS messages. In *Van Vondel v. Netherlands* the Court took a position that a recording of private (telephone) conversations by a conversation partner and the private use of such recordings does not *per se* offend against Aricle 8 if this is done with private mehanism but that by its very nature this is to be distinguished from the covert of and for the benefit of an official inquiry – criminal or otherwise – and with the connivance and technical assistance of public investigation authorities (Van Vondel v. Netherlands, 2008: § 49).

However, the Court in the Roman *Zakharov v. Russia* emphasized the lack of the provision that provides discontinuation of secret surveillance measures when it is no longer necessary, which does not provide sufficient guarantees against arbitrary interference (Roman Zakharov v. Russia, 2015: § 302). Considering maximal length of the secret surveillance according to Serbian CPC, it is limited, depending from the type

[245] According to Serbian CPC that also needs to be assessed and reasoned by competent authority in criminal proceeding but that’s not always the case in the practice.

[246] This list is comprehensive and include more than 30 serious crimes (see art. 162 of the CPC)

of crime (general, organized crime or war crimes). For general crime maximal length of the secret surveillance is three months, with possibility for the court to extent measure for additional three months, while for the organized crime and war crimes the initial but also additional permitted length is doubled. Serbian CPC does not contain provisions on discontinuation and it's obvious that needs to be amended in this part.

The Court also took the position that is very important existence of a body or official that is either external to the services deploying the means of surveillance or at least required to have certain qualifications ensuring his independence and adherence to the rule of law (Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, 2007: § 85). The Court made improvements since *Kennedy*, because it demands *ex post* control (McIntryre, 2016: 154). Serbian CPC entitles police, Security Information Agency and Military Security Agency for application of the secret surveillance[247] while post services and other communication services are obliged to enable them surveillance and recording as well as to deliver them letters and other mails. This provision is in line with par. 13 of the Recommendation R(95)13. Daily reports on the surveillance must be delivered to the investigation judge and prosecutor upon their request.

4. Notification of surveillance measures and handling unnecessary materials

Very important issue in this field is the question of notification of surveillance measures, which is inextricably linked to the effectiveness of remedies before the court[248] and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised on the measures taken without his/her knowledge and thus able to challenge their legality retrospectively (Klass and Others v. Germany, 1978: § 57; Weber and Saravia v. Germany, 2006: § 135). The Court used *Klass* as an opportunity to stipulate basic principles balancing the state's secret surveillance powers against the rights of targeted individuals, in particular the rights to be informed on the surveillance measures and the possibility of having

[247] About the role of the police in the new Serbian Criminal procedure Code see Čvorović and Turanjanin, 2016.

[248] Effectiveness of remedies is linked with the notification. However, the issue of remedies is related to retroactive application of remedies after the surveillance, because the subject of surveillance should have a right to examine the legality of the secret measure of surveillance. The Article 13 analysis in Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria is the most complete analysis in the case-law regarding the issue of subsequent notification (Murphy, 2016: 296).

recourse to the courts after termination of such measures (Boehm, 2012: 34). In *Klass*, the Court did not directly require the notification of the person concerned, but in recent cases the Court increasingly insists on the notification duty (Boehm and Hert, 2012), started with the Association for European Integration and Human Rights and *Ekimdzhiev v. Bulgaria*.

However, the fact that persons concerned by secret surveillance are not subsequently notified once surveillance has ceased cannot by itself warrant the conclusion that the interference was not "necessary in democratic society", as it is the very absence of knowledge of surveillance which ensures the efficacy of the interference. Indeed, such notification might reveal the working methods and fields of operation. As soon as notification can be carried out without jeopardizing the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned (Klass and Others v. Germany, 1978: § 58; Weber and Saravia v. Germany, 2006: § 135; Leander v. Sweeden 1987: § 66; Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, 2007: § 90). In *Szabó and Vissy v. Hungary* there also wasn't obligation for the notification, and for that reason, between the others, the Court found violation of the Article 8. Romanian legislator implemented the provision that prosecutor would inform in writing as soon as possible every subject of the warrant on the technical surveillance measure which has been taken in his case (Boroi, 2013: 59).

The ECtHR has not dealt with issues of collecting of so called "accidental findings" but this scenario is ruled by Serbian CPC. In case that application of special investigation techniques resulted in collection of material referring to crime or offender other than this/these one(s) specified in decision on application of the special investigation techniques, this material could be used in the further procedure only if it concerns crime from the article 162 of the CPC.

Article 163 of the CPC rules cases where public prosecutor decided not to render decision on initiation of criminal proceeding within six months from receiving materials collected through application of secret surveillance or not to use this material in further procedure. In these cases, investigation judge rendering decision on destruction of the materials. In parallel, the judge may notify persons concerned by secret surveillance if his/her identity is known and notification does not put under the risk conducting further procedure.

5. Conclusion

The interception of communications is a complex subject matter worldwide. In the Serbian law, it is a special investigative measure titled secret monitoring of communications. It deeply affects fundamental human rights, which are protected, in this sense, by the Article 8 of the ECHR. The Court, in its extensive practice, took numerous standards in this sphere, and accordingly, set up many requirements. We need to emphasize the fact that misunderstanding of the requirements imposed by the Court may give rise to serious consequences for the rule of law, as Boroi pointed out (Boroi, 2013, 69). In addition, we could say that the Court makes two types of requirements, where the first are linked for the necessary changes in the legislation, while the other type is linked to the properly application of the existing legal rules. Serbian legislation mostly follows the Court's standards, but it could also be improved in some parts. However, some of the existing provisions should be applied on the better way. In this way, Serbia will avoid the negative experiences of the other countries when it comes to the violation of the human rights.

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POSEBNA DOKAZNA RADNJA TAJNI NADZOR KOMUNIKACIJA POD LUPOM EVROPSKOG SUDA ZA LJUDSKA PRAVA

Apstrakt: *Autori se u radu bave posebnom dokaznom radnjom tajni nadzor komunikacija, pri čemu je akcenat stavljen na stavove Evropskog suda za ljudska prava u pogledu predmetne materije. Aktuelizacija potrebe za preciznim regulisanjem uslova pod kojima je moguće tajno nadzirati komunikacije trećih lica u svrhu sprečavanja, otkrivanja i dokazivanja krivičnih dela, uslovljena je, u poslednjih pedesetak godina, činjenicom da su paralelno tekla dva intenzivna procesa: Najpre, ovaj period obeležen je intenzivnim tehnološkim razvojem koji je sa sobom, s jedne strane, doneo nove oblike kriminala i to naročito organizovanog, ali je paralelno otvorio i značajne mogućnosti na polju korišćenja produkata tog razvoja u svrhu sprečavanja, otkrivanja i dokazivanja krivičnih dela. Istovremeno, na globalnom planu, a naročito na području Evrope, tekla je ekspanzija u oblasti razvoja zaštite ljudskih prava, pri čemu je naročito, za ovo pitanje od značaja pravo na privatnost. U tom smislu, ključno pitanje koje determiniše sva zakonska rešenja u ovoj oblasti, jeste u kojoj meri je dozvoljeno zadiranje u privatnost komunikacija zarad prevencije i suzbijanja kriminala. Posebno značajno jeste pitanje obaveštavanja osumnjičenog lica nakon izvršene posebne dokazne radnje o radnji koja je sprovedena nad njim.*

Ključne reči: *tajni nadzor komunikacije, posebne dokazne radnje, Evropski sud, osumnjičeni, obaveštenje*

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