BENCHBOOK

ON SPECIAL INVESTIGATIVE MEASURES

DCAF Geneva Centre for Security Sector Governance
20TH ANNIVERSARY

BOSNA I HERCEGOVINA•БОСНА И ХЕРЦЕГОВИНА•BOSNIA AND HERZEGOVINA

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Sarajevo, December 2020

Benchbook on Special Investigative Measures

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PROJECT BACKGROUND AND ACKNOWLEDGEMENTS

Special Investigative Measures (SIM) are used across European countries to fight serious crime, terrorism, and avert dangers to state security. They are performed in secrecy, without the knowledge of the target, and when improperly used they endanger fundamental human rights, including the right to privacy (Art. 8 of the European Convention for Human Rights - ECHR), the freedom of information and expression (Art. 10), the right to a fair trial (Art. 6) and freedom of religion (Art. 9). These rights are cornerstones of democracy; their infringement undermines the rule of law and the citizens' trust in the state. For these reasons, democratic countries require their police and security services to obtain judicial warrants before using SIM. A rapidly growing jurisprudence of the European Court of Human Rights (ECtHR) sets high standards as regards the duty of Courts to scrutinize the use of secret surveillance by state authorities and to strike a fair balance between two competing state responsibilities: ensuring public safety and protecting individual rights and liberties.

In Bosnia Herzegovina's complex judicial system, there are four Criminal Procedure Codes and 67 Courts mandated to authorize SIM. The role of judges and prosecutors in guaranteeing the rule of law was stressed in 2017 by the BiH Constitutional Court decisions that declared unconstitutional a number of legal provisions regulating judicial authorization of SIM. The Parliament's delay in amending relevant legislation has left in the sole hands of the judiciary the responsibility to correct law deficiencies, through a judicial practice that observes the standards entailed by ECtHR case law and other European good practice.

With this background and following a series of consultations with BiH judicial institutions in 2016 and 2017, the Geneva Centre for Security Sector Governance (DCAF) has launched in September 2018 a project aimed to enhance judicial capacity for independent supervision of the use of SIM. The Banja Luka Judicial Forum held on 14-15 November 2018, the Prosecutors Conference and the Judicial Roundtable held in Sarajevo on 12 and 13 February 2019, were organised by DCAF and its partners to provide opportunities for a large number of justice practitioners to analyze differences in regulation, procedure and practice existing across BiH jurisdictions, and to acknowledge the paramount role of judicial authorization in preventing misuse and abuse of SIM.

The idea to develop a Benchbook that could guide local practitioners in different procedural stages of SIM authorization emerged very quickly as a priority for the project. Together with the Centers for Judicial and Prosecutorial Training from FBIH and RS, and with the full support of the Constitutional Court of BiH, the Court of BIH and the High Judicial Prosecutorial Council of BiH, in May 2019 our project assembled a Working Group composed of 20 judges, prosecutors and judicial experts willing to engage in a sustained and structured dialogue on SIM and contribute to the creation of a new knowledge product. *What* exactly to create and *how*, were questions without straightforward responses. It took consistent discussions of local regulations, procedure and practice, and in-depth analysis of landmark decisions of ECtHR and the BiH Constitutional Court in order to decide on the detailed outline of the Benchbook.

The writing of the Benchbook was a genuinely participative process. What is remarkable, given the professional responsibilities and the hectic agendas of the people involved in the Working Group, is how much time and effort they invested in this project. They took complete ownership of the writing process. The outline and the content were exclusively *decided on* and *drafted by* them, based on their own knowledge, expertise, research

efforts and time. No parts of the Benchbook were outsourced to external consultants. The Benchbook writing and review process was sustained with patience and professionalism over the course of 18 months. We trust that the authors' long-term participation in this project has empowered and inspired them to act as agents of change, who raise the standards of performance to a higher level, influencing the entire judicial system.

Professor Hajrija Sijerčić-Čolić was elected by the Working Group as editor of the Benchbook. Steering the work of twenty different authors, from a range of institutions and perspectives, was surely not an easy task. It is with a great debt of gratitude that DCAF wishes to extend a heartfelt thank you to Professor Sijerčić-Čolić. It is her wisdom, hard work, perseverance and leadership that made this publication possible.

Five coordinators have led five drafting-teams that undertook the writing of the five chapters that compose the Benchbook. The chapters have been submitted to a meticulous cross-team internal review process, which led to successive, ever improved drafts. Šejla Drpljanin, Ljiljana Filipović, Diana Kajmaković, Mirza Hukeljić, Minka Kreho, Slavko Marić, Srđan Nedić and professor Hajrija Sijerčić-Čolić have been team coordinators and/or lead-reviewers of the five chapters, in different stages of their development. They completed their roles admirably and invested substantial individual and collective effort into this project. Their dedication, enthusiasm and substantive input have been the engines that transformed the Benchbook from an idea into a palpable reality.

The first integrated draft of the Benchbook was completed in September 2020, and submitted to the external peer-review of two well respected judges. Aleš Zalar from Slovenia read the text with eyes well versed in the latest European developments in criminal justice and human rights law. Judge Damjan Kaurinović from the Appellate Court of Brčko District BiH brought in the viewpoint of an experienced practitioner who knows well Bosnia Herzegovina's legal system, with its conceptual and practical challenges. The peer reviewers shared perspectives from which a great deal was learned. The Benchbook is surely better due to their rigorous scrutiny.

DCAF could not have implemented this project without the valuable support of several other institutions. First, we must give credit to the Centers for Judicial and Prosecutorial Training from FBIH and RS. They have been DCAF's partner from the very early stages of the project. They helped us reach out to the right institutions and people and, with every workshop and discussion we organized together in this project, made sure the Benchbook is a product designed for and tuned to the learning needs of Bosnia Herzegovina's judges and prosecutors. In the months following the Benchbook publication, the Training Centers will take the lead in making the Benchbook a standard training resource for their courses, and they will expand the training opportunities on topics related with the judicial authorization of SIM. We sincerely hope that this will be a long-term engagement that will generate better awareness and understanding of the opportunities members of the judiciary have to act with professionalism, integrity, and in the spirit of separation of powers – thus contributing to improved independence of the judiciary.

The OSCE Mission to BiH, through their Rule of Law team, have provided strategic advice through different stages of the project development, ensuring that our efforts are aligned with and complementary to the OSCE Mission's objectives and goals. We thank them for accompanying us a very long way, and always sharing from their rich experience in BiH judicial reform.

The Sarajevo Center for Security Studies (CSS) have been DCAF's long-term partner in a number of projects in Bosnia Herzegovina. We are grateful for their diligent and professional assistance in the conceptualization, planning and implementation of this project. Ever since the end of 2016 when we jointly organized in Sarajevo a first multi-stakeholder roundtable discussion on the use of SIM, the CSS research capacity was instrumental

in monitoring and analyzing legal, judicial and political developments relevant for the use of SIM in BIH and the Western Balkans' region. We hope our collaboration will continue producing fruitful results.

DCAF justice adviser in Sarajevo, Ermin Sarajlija, has ensured the command center of the Benchbook development. He coordinated communications within the Working Group and between the project team and external partners, provided review and editorial support, and ensured that none of those involved in the project forget what our timelines and goals are.

In Geneva, our colleague Jennia Jin was responsible for the organization of financial, logistics and publication activities, whose impeccable execution was key to the completion of the Benchbook.

Finally, we would also like to express our gratitude to the project donor, the Norwegian Ministry of Foreign Affairs, who made the project and the Benchbook on SIM possible.

Dr. Teodora Fuior, Project Coordinator, DCAF
Geneva, December 2020

FOREWORD

Special Investigative Measures are generally recognized as particularly useful mechanism in the fight against the most serious forms of crime and the protection of state security. However, the standards of the European Court for Human Rights allow for interference with an individual's right to privacy only to the extent necessary to preserve democratic institutions. Legislators and law enforcement agencies in each country have a certain degree of discretion in applying these standards, but the requirement of necessity must be complied with.

Already an important and complex issue, special investigative measures came into the focus of the professional community, as well as the general public, after the decision of the Constitutional Court of BiH in the case U 5/16 U of 1 June 2017 and the resulting amendments to the laws. The practitioners needed guidance and, as far as possible, consistent opinions and answers to emerging questions resulting from the amendments. In this regard, the initiative of the Geneva Center for Security Sector Governance (DCAF) and the Sarajevo Center for Security Studies (CSS) to take steps in this direction was adequate and timely, and as such unreservedly supported by the Judicial and Prosecutorial Training Centers of FBiH and RS.

As a first step, through the coordination of these institutions and organizations, a working group of 20 members was assembled. It comprised primarily of judges and prosecutors from all regions and all levels of the judiciary of Bosnia and Herzegovina, eminent representatives of academia specializing in criminal law, as well as legal experts with interest and experience in the field of defining and applying the instrument of special investigative measures.

Since May 2019, this working group held six meetings, maintained constant communication and dedicated individual work which everyone can be proud of, primarily members of the judicial community, as well as the academia. With the help of exceptional logistical and organizational assistance provided by DCAF, this publication is a domestic product primarily intended for use in Bosnia and Herzegovina. However, due to the global relevance of its subject matter, elaborate references to international sources, adequate methodology and, above all, the vast experience and knowledge of the authors reflected on each page, it will certainly be noticed and read beyond our borders. Therefore, this Benchbook, which has been reviewed and properly cataloged, has also been translated into English.

DCAF and the Judicial and Prosecutorial Training Centers of FBiH and RS are already planning a series of activities for the dissemination and promotion of the Benchbook, which will also be an integral part of the training resources in this area.

Dr.sc. Arben Murtezic, Director of the FBiH Judicial and Prosecutorial Training Center
Sarajevo, December 2020

1.

Special investigative measures - national and international contexts*

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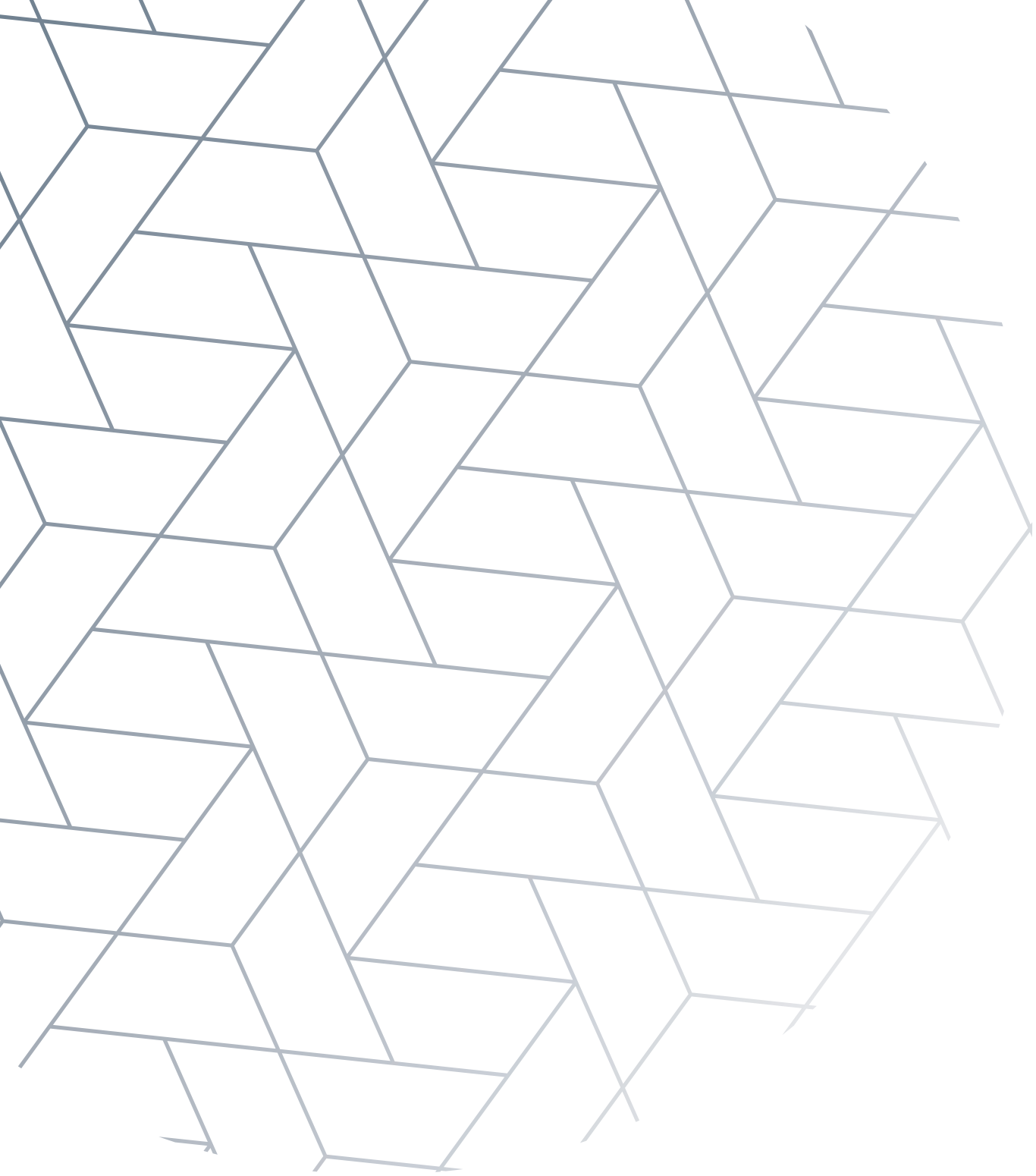

I. 1. General overview of the principles and standards stemming from the significant decisions of the Constitutional Court of BiH

The instrument of special investigative measures has been regulated by the applicable Criminal Procedure Codes in Bosnia and Herzegovina (BiH) at all levels (state, entities and the Brčko District of BiH). The name of this instrument and its status as a separate concept (a dedicated chapter in the Criminal Procedure Codes), after the provisions on actions aimed at obtaining evidence, speaks of its special treatment in terms of seeking, ordering and enforcement. As with other actions aimed at obtaining evidence, the ultimate purpose of special investigative measures is to gather evidence against suspects. It is evident from the wording of the relevant provisions of the Criminal Procedure Code, however, that such measures are used in exceptional cases. As the Criminal Procedure Code prescribes, special investigative measures are used "if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties". In addition to this requirement, Criminal Procedure Code sets forth that the use of special investigative measures is allowed only in relation to the investigations and detection of specific criminal offenses; their duration is limited and may be extended in exceptional cases for a limited period of time, meaning that they have a limited maximum duration; they are subject to judicial authorization and control of their use; they require the existence of grounds for suspicion that an individual, alone or with others, participated or participates in the commission of the criminal offense; and the person in relation to whom special investigative measures were used must be informed thereof, after their completion. It should further be underlined that this instrument exists in other legal systems in other jurisdictions, and that the European Court of Human Rights (European Court or ECtHR) adjudicated in many cases citing violations of human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention and ECHR) in relation to the use of special investigative measures. The claims concerned the violations of Articles 6 and 8 of the European Convention.

Extensive case law of the European Court on this issue shows that allegations of the violation of Article 6 of the European Convention in the context of the use of special investigative measures are usually related to the issue of admissibility, or legality of evidence obtained in this manner. Relevant to this is the general position of the European Court *"that it is not its task to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Convention".* In addition, the case law of the European Court shows that *"it is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair." (Dragojević v. Croatia*, 15 January 2015, paras 127 and 128). It must be examined whether the rights of the defense were respected, and in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. The quality of evidence must be taken into consideration (*Dragojević v. Croatia*, para 129). This practice has been upheld by the Constitutional Court of BiH (Constitutional Court); decisions on admissibility and merits: AP- 3225/07 of 14 April 2010, AP-1158/11 of 25 June 2013, AP-5746/10 of 15 January 2014, AP-2400/11 of 24 April 2014, AP-1655/11 of 25 June 2014, AP-1274/13 of 20 July 2014, AP- 4393/11 of 17 September 2014, AP-2079/13 of 20 April 2016, AP-762/17 of 10 April 2019, and AP-3586/17 of 11 June 2019).

I. 1. 1. Right to respect for private and family life, home and correspondence

On the other hand, in the context of examining the allegations of the violation of Article 8 of the European Convention, the European Court and Constitutional Court have found in numerous decisions that the use of special investigative measures constitutes interference with the right to "private and family life, home and correspondence" of the applicant, enshrined in Article 8 of the European Convention. Paragraph 1 of this article reads: "Everyone has the right to respect for his private and family life, his home and his correspondence". Corresponding to this provision are the guarantees in Article II3.f) of the Constitution of BiH. It should be emphasized that this falls into the category of qualified rights under the Convention (including also the rights guaranteed in articles 9, 10 and 11 of the European Convention) which can be restricted under certain conditions. This means that the state can interfere with these rights in specific circumstances. Paragraph 2 of the cited article thus explicitly provides as follows: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." This practice has been upheld by the Constitutional Court of BiH (decisions on admissibility and merits: AP-1758/15 of 30 June 2015, AP-3236/18 of 11 October 2018 AP- 2980/16 of 6 November 2018, and AP-4935/16 of 19 December 2018). In this context, it bears mentioning that the Constitutional Court, in its decision number U-5/16 of 1 June 2017, which was rendered in the procedure of abstract judicial review of constitutionality of certain provisions of the Criminal Procedure Code of BiH regulating special investigative measures (Article 117 item d), and Article 118 paragraph 3), found that these provisions were not compliant with the Constitution of BiH and ordered the Parliamentary Assembly of BiH to align them with Article I/2 in conjunction with Article II/3.f of the Constitution of BiH.

This leads to the conclusion that the state can interfere with this right under the conditions provided for in Article 8 paragraph 2 of the European Convention. Thus, interference is justified only if it:

1) is in accordance with the law,
2) pursues one or several legitimate goals identified in this paragraph (in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others),
3) if the interference with the right of the individual is necessary in a democratic society.

I. 1. 2. In accordance with the law

In order to answer the question whether the interference with the individual's rights is "in accordance with the law", it should be verified whether the national legislation foresees the measure in question. The quality of the legislation should also be examined. It should be compatible with the rule of law and accessible to the person concerned, who must be able to foresee its consequences for him (inter alia, *Dragojević v. Croatia,* para 80). In the context of the special investigative measures, this absolutely does not imply that the individuals concerned should be able to foresee when the competent authorities would undertake these measures. However, since the competent authorities usually enforce these measures secretly, the potential risk of arbitrariness is evident. Thus, the law providing for these measures must be sufficiently clear in its terms to give individuals an indication as to *"the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures"* (para 81 *Dragojević v. Croatia*). In accordance with the case law of the European Court and the

Constitutional Court, seeing as the use of these measures is not open to scrutiny by the individuals concerned or the public at large, the law regulating the use of such measures must with sufficient clarity define the discretionary powers of the competent authorities in seeking, ordering and enforcing these measures, in order to safeguard the persons affected by them from arbitrary interference. In other words, rather than abstract and illusory, the guarantees provided by the law should be adequate and effective. The European Court has developed in its case law the following minimum safeguards that the law should prescribe, in order to prevent the abuse of powers entrusted: the nature of the offence for which the measure of interception can be ordered; categories of persons who can be the subject of telephone interception measures; reasons for the ordering of measures; time limit on the measure of interception; procedures to be followed in analyzing, using and storing the data obtained; precautions to be taken when communicating data to other parties and circumstances in which the recordings can or must be deleted or the tapes destroyed (*Prado Bugallo v. Spain*, No. 58496/00, § 30, 18 February 2003; *Apostu v. Romania,* 22765/12, 3 February 2015).

Article II/2. of the Constitution of BiH provides that the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law. This provision has established a constitutional obligation to apply human rights and fundamental freedoms standards in proceedings and decisions. The Constitutional Court has referred to this obligation in a number of its judgments, such as the Decision on Admissibility and Merits number AP 3184/16 of 10 October 2016. In this Decision, the Constitutional Court found a violation of the right under Article II/3.d) and m) of the Constitution of BiH and Article 5 paragraph 3 of the European Convention and Article 2 of the Protocol No. 4 to the European Convention, because "in the specific circumstances of this case, the Court imposed prohibiting measures on the appellants who had not been brought before the judge and could not provide statements about the circumstances due to which the measures were sought. Whether the Criminal Procedure Code of the Federation of Bosnia and Herzegovina strictly provides for such action is not decisive in this case. Pursuant to the Constitution of Bosnia and Herzegovina, the provisions of the European Convention have priority over all other laws and must be applied directly".

I. 1. 3. Necessary in a democratic society

It must clearly follow from the circumstances of each case that the interference with the right of the individual is necessary in a democratic society, or serves a legitimate purpose (in this case, the purpose is crime prevention). According to the standards set by the European Court and the Constitutional Court, interference with the rights of the individual is allowed only in so far as it is necessary to preserve democratic institutions. Undoubtedly, public authorities, or state parties, have a certain margin of appreciation in assessment, however, their discretion must not exceed that "what is necessary". In the context of establishing necessity, it is particularly important to determine whether the powers to use special investigative measures have been subjected to previous judicial review, both in terms of their necessity and their scope and duration.

Since the implementation of such measures interferes with the very core of the human rights guaranteed, it is upon the competent authorities in every specific case to fully observe the legal procedure and standards of the European Court and the Constitutional Court when seeking, ordering and enforcing special investigative measures (with respect to the legality of interference, review of legitimate purpose of such measures and the determination whether they are "necessary in a democratic society"; *Szabo and Vissy v. Hungary*, number 37138/14, 2016).

I. 2. General overview of the principles and standards deriving from the significant decisions of the European Court of Human Rights

Pursuant to Article 46 paragraph 1 of the ECHR, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Even though the ECtHR case law evolves in line with social and legal developments, the Court is bound to consider the positions from some of its earlier cases when deciding on later cases. That is why the case law of the ECtHR, or the positions taken in its judgments, affect not only the legislation and case law of the countries parties to these judgments, but also the legislation and case law of all contracting parties.

For these reasons, the following factors should be considered in regulating special investigative measures and applying domestic laws in BiH regulating special investigative measures:

I. 2. 1. Private life, home and correspondence

The European Court finds that telephone conversations are covered by the notions of "private life" and "correspondence" pursuant to Article 8 of the European Convention and that their supervision constitutes interference with the individual's rights under Article 8 of the ECHR.[1]

Interference of the public authorities with the rights of the individual protected by Article 8 paragraph 1 of the ECHR is justified pursuant to paragraph 2 of this article 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.[2]

I. 2. 2. In accordance with the law

In many of its decisions, the ECtHR has emphasized that in addition to the requirement that the measure applied has foundation in the national law, the phrase "in accordance with the law" also implies requirements regarding the quality of that law. In short, the national legislation providing for such interference *"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"*.[3] This does not mean that *"an individual should be able to foresee when the authorities*

1 *Malone v. the United Kingdom*, of 2 August 1984, application No. 8691/79, § 64.; *Dragojević v. Croatia* of 15 January 2015, application no. 68955/11, § 78. In relation to office space cf. *Huvig v. France* of 24 April 1990; *Halford v. the United Kingdom* of 25 June 1997; *Niemetz v. Germany* of 16 December 1992. In relation to a hotel room as home, see *O'Rourke v. the United Kingdom* of 26 June 2001. Is the ownership of the intercepted device relevant or not, see *Lambert v. France* of 24 August 1998; *Hewitt and others v. the United Kingdom* of 19 May 1989. Collecting and storing data pertaining to emails and personal internet use at the workplace (*Copland v. the United Kingdom*, No. 62617/00, ECHR 2007-I). Storing of personal data by a public authority, regardless of the subsequent use of the data stored (*Amman v. Switzerland*, No. 27798/95, ECHR 2000-II). Storing of public data (*Rotaru v. Romania*, No. 28341/95, ECHR 2015-V).

2 *Dragojević v. Croatia*, § 79.

3 *Dragojević v. Croatia,* § 80; *Zakharov v. Russia* of 4 December 2015, application no. 47143/06, § 228; Kruslin *v. France* of 24 April 1990, application no. 11801/85, § 27.

are likely to intercept his communications so that he can adapt his conduct accordingly."[4] However, the ECtHR underlines that since these powers are exercised in secret, the risks of arbitrariness are evident. Thus, 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".*[5]

ECtHR case law insists that the law must prescribe "*the scope of (...) discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference*".[6] ECHR requires that guarantees against abuse be *"adequate and effective"* and that the assessment thereof *"depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law."*[7] In *Roman Zakharov v. Russia*, the ECtHR specified that it developed the following minimum safeguards that should be listed in the law in order to prevent abuse of powers: *"the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed".*[8]

In the same case, the Court accepted that the requirement of prior judicial authorization constitutes an important safeguard against arbitrariness.[9] In relation to the scope of review in deciding to issue such authorization, the ECtHR has emphasized that the Court *"must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measure. It must also ascertain whether the requested interception meets the requirement of "necessity in a democratic society", as provided by Article 8 § 2 of the Convention, including whether it is proportionate to the legitimate aims pursued, by verifying, for example, whether it is possible to achieve the aims by less restrictive means."*[10]

ECtHR has also underlined the benefits of the requirement to show an interception authorization to the communications service provider before obtaining access to a person's communications, finding it to be *"one of the important safeguards against abuse by the law-enforcement authorities, ensuring that proper authorisation is obtained in all cases of interception."*[11]

In relation to the contents of the interception authorization, the ECtHR insists that it must *"clearly identify a specific person to be placed under surveillance or a single set of premises as the premises*

4 *Dragojević v. Croatia*, § 81.

5 *Dragojević v. Croatia,* § 81; *Malone v. the United Kingdom*, § 67; *Huvig v. France* of 24 April 1990, application no. 11105/84, § 29; *Valenzuela Contreras v. Spain* of 30 July 1998, application no. 58/1997/842/1048, § 46; *Weber and Saravia v. Germany* of 29 June 2006, application no. 54934/00, § 93, and *Bykov v. Russia* of 10 March 2009, application no. 4378/02, § 76.

6 *Dragojević v. Croatia,* § 82; *Zakharov v. Russia*, § 229; *Bykov v. Russia* § 78.

7 *Dragojević v. Croatia*, § 83: *Klass and others v. Germany* of 6 September 1978, application no. 5029/71, § 50.

8 *Zakharov v. Russia,* § 231.

9 *Ibid.,* § 249.

10 *Ibid.,* § 260.

11 *Ibid.,* § 269.

in respect of which the authorisation is ordered" and explains that such identification may be made *"by names, addresses, telephone numbers or other relevant information."*[12]

I. 2. 3. Necessary in a democratic society

Applying the relevant provision of the Convention, the ECtHR emphasizes in its decisions that *"the powers to instruct secret surveillance of citizens are only tolerated under Article 8 to the extent that they are strictly necessary for safeguarding democratic institutions."*[13] Even though the state parties have a certain margin of appreciation in determining whether this requirement was met, the ECtHR underlines that this margin is subject to European supervision. *"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 a democratic society".*[14]

The requirements for acceptable interference of the public authorities with the right to privacy of an individual, as prescribed in the ECHR and interpreted in the decisions of the ECtHR lead to the conclusion that the ECtHR, when considering if the requirements have been met, *"must first ascertain whether the interference complained of was "in accordance with the law"* and *"it must assess the relevant domestic law in force at the time in relation to the requirements of the fundamental principle of the rule of law."*[15] In line with the allegations stated in the application, the ECtHR considered not only if the specific interference with the rights of the individual had basis in the law, but also *"whether the relevant domestic law, including the way in which it was interpreted by the domestic courts, indicated with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities, and in particular whether the domestic system of secret surveillance, as applied by the domestic authorities, afforded adequate safeguards against various possible abuses."*[16]

In its decisions, the ECtHR also reflected on the potential consequences of incompliance with the applicable national law. The Court has underlined 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 (...) opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law."*[17] In *Dragojević v. Croatia* the ECtHR found that *"the lack of the reasoning of the order of the investigative judge, together with the practice of national courts to circumvent this requirement by retrospective justification of the use of secret surveillance, was not compliant with the relevant national law and failed to ensure appropriate safeguards from potential abuse. The Court therefore found that such practice was not shown to have fully complied with the requirements 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 a democratic society".*[18] In *Bosak and others v. Croatia* and in *Dragojević v. Croatia*, the ECtHR found that the orders of the

12 *Ibid.,* § 264.

13 *Dragojević v. Croatia,* § 84; *Kennedy v. the United Kingdom* of 18 May 2010, application no. 26839/05, § 153. In its decisions, the ECtHR dealt with this assessment, and identified elements of this test (e.g. *Silver v. the United Kingdom* of 25 March 1983; *S.A.S. v. France* no. 43835/11, ECHR 2014). In relation to the mass surveillance and national security see *Szabo and Vissy v. Hungary* of 12 January 2016; *Kennedy v. the United Kingdom* of 18 May 2010.

14 *Dragojević v. Croatia*, § 84.

15 *Ibid.,* § 86.

16 *Ibid.,* § 89.

17 *Ibid.,* § 98.

18 *Bosak and others v. Croatia* of 6 June 2019, application no. 40429/14, § 43.

investigative judge ordering the measure of secret surveillance *"were based on the submission that there was the motion of the relevant prosecutor to use secret surveillance and the statutory formulation that "investigation cannot be conducted otherwise" ... And that they "did not provide an adequate reasoning on special circumstances of the case, and especially the reasons why the investigation could not be conducted using other, less intrusive means"*,[19] and that this constituted a violation of Article 8 of the ECHR.

In its decisions, the ECtHR also examined the so-called "accidental findings", or cases of intercepting and recording telephone conversations of individuals who were not subject to the orders of competent public authorities for surveillance and technical recording of telecommunications. In *Bosak and others v. Croatia*, the ECtHR found no violation of Article 8 of the ECHR in relation to the second and third applicants, who were not subject of the order, but whose telephone conversations had been intercepted and recorded pursuant to the orders for secret surveillance which were lawfully issued in relation to the first applicant with whom they were in contact. ECtHR referred to the explanation of national courts stating that *"since"* the second and third applicants *"participated in the criminal activities of the first applicant, who was under secret surveillance, activities which amounted to the criminal offence proscribed under Article 181 of the Code of Criminal Procedure of the Republic of Croatia (...), the evidence so obtained could be used in the criminal proceedings against them."*[20]

The ECtHR also examined the issue of notification of interception of communications and noted that the issue is *"inextricably linked to the effectiveness of remedies before the courts"*.[21] Even though it emphasizes that subsequent notification may not be feasible in practice in all cases, the ECtHR emphasizes that *"as soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned"*.[22]

The ECtHR treated the issues of the use of undercover investigators and informants (agent provocateur), and simulated bribery and simulated purchase as types of special investigative measures, in particular in relation to applicants' allegations that their right to a fair trial pursuant to Article 6 paragraph 1 was violated by incitement to commit criminal offences.[23]

Applying the criteria specified in *Bannikova v. Russia,* the consideration of the allegations of incitement to commit criminal offences involved two tests: substantive test of incitement and the procedural test of incitement.[24]

According to the findings in *Matanović v. Croatia*, the substantive test of incitement entails determining, based on materials available, whether the criminal offence would have been committed without the intervention of the authorities, or in other words, whether the investigation was *"essentially passive"*. In order to reach that finding, the ECtHR examines on the one hand *"the reasons underlying the covert operation, in particular, whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed*

19 *Ibid.,* § 45.

20 *Ibid.,* § 66.

21 *Zakharov v. Russia,* § 286.

22 *Ibid.,* § 287.

23 For more on the use of undercover investigators and informants, see: Special investigative measures - Relevant provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights. Seminar for prosecutors. Sarajevo, 2019 The Aire Centre, p. 44 onwards. Also, Judicial Forum BiH. ECTHR and CEU Case Law on Special Investigative Measures. Banja Luka, 2018. The Aire Centre, p. 57 onwards.

24 *Bannikova v. Russia* of 4 November 2011, application No. 18757/06, § 37-65.

to commit a criminal offence" and, on the other hand, *"the conduct of the authorities carrying it out, specifically whether the authorities exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution."*[25]

The procedural test of incitement entails the examination of the way *"the domestic courts dealt with the applicant's plea of incitement"*.[26] The ECtHR requires that such plea be examined in an *"adversarial, thorough, comprehensive and conclusive"* procedure.[27] *"The principles of adversarial proceedings and equality of arms are indispensable in the determination of an agent provocateur claim, as well as the procedural guarantees related to the disclosure of evidence and questioning of the undercover agents and other witnesses who could testify on the issue of incitement."*[28] ECtHR also points out that *"it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable."*[29] In conclusion, *"the proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence for which he or she was convicted and the domestic courts did not address appropriately the allegations of incitement."*[30]

In relation to an operation technique involving the arrangement of multiple illicit transactions with a suspect by the state authorities, the ECtHR considers that *"a recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise."* The Court's case law shows that *"such an operation technique may be aimed at gaining trust with an individual with the aim of establishing the scope of his or her criminal activity or working up to a larger source of criminal enterprise, namely to disclose a larger crime circle."*[31] However, *"in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement. Accordingly, when the State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of agents provocateurs. In each transaction, the police's conduct must be consistent with the proper use of governmental power."*[32] It also follows from the above that in cases concerning recourse to an operational technique involving the arrangement by state authorities of multiple illicit transactions with a suspect, *"any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime."*[33]

25 *Matanović v. Croatia* of 4 April 2017, application No. 2742/12, § 123.

26 *Ibid.*, § 125; *Bannikova v. Russia*, § 51-65.

27 *Matanović v. Croatia*, § 126.

28 *Ibid.*, § 129; *Bannikova v. Russia*, § 58-65.

29 *Matanović v. Croatia*, § 130.

30 *Ibid.,* § 135.

31 *Grba v. Croatia* of 23 November 2017, application No. 47074/12, § 99.

32 *Ibid.,* § 100.

33 *Ibid.,* § 101.

The ECtHR has also emphasized in relation to these special investigative measures the need for a clear and foreseeable procedure for authorizing investigative measures, as well as for their proper supervision, in order to reduce the risk of arbitrariness and police entrapment. It has considered judicial supervision as the most appropriate means to that end.[34] *"The execution of the simulated purchases performed by an undercover officer or informant must be particularly well justified, be subject to a stringent authorisation procedure, and be documented in a way that allows a subsequent independent scrutiny of the actors' conduct."*[35]

Accordingly, the ECtHR found *"that the decision-making procedure leading to the applicant's more serious sentencing for multiple uttering of counterfeit currency failed to comply with the requirements of fairness"*[36] because, inter alia, *"the investigating judge failed to scrutinise adequately the police's request to extend the use of the simulated purchase model by requesting documents, recordings and other details that would have supported the general assertion by the police that further undercover work was needed in order to identify and arrest all those involved in the uttering of the counterfeit banknotes and to collect evidence concerning the offence at issue."* Instead, *"the investigating judge merely accepted the police's application for an extension of the use of the simulated purchase model, finding that there were no new circumstances warranting a discontinuation of the use of the special investigative measures..."* and therefore the ECtHR was not satisfied *"that a proper supervision of the further use of simulated purchases was exercised by the investigating judge"*.[37] The ECtHR further based this conclusion on the finding *"that the domestic courts failed to comply with their obligation to examine effectively the applicant's plea of entrapment in respect of the multiple illicit transactions of counterfeit currency, as required under the procedural test of incitement under Article 6 § 1 of the Convention"* even though they based their sentencing of the applicant on the *"continuing criminal activity related to his multiple illicit transactions with the police agents."*[38]

1. 2. 4. Use of evidence obtained by special investigative measures

ECtHR has also examined allegations of the violation of Article 6 paragraph 1 of the ECHR by the use of evidence obtained by special investigative measures. In its decisions, the ECtHR emphasized that in the context of the use of evidence obtained by special investigative measures, *"regard must be had to whether the rights of the defence were respected... in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use."* In addition, *"the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy."*[39]

Finally, in relation to non-disclosure of evidence obtained by special investigative measures, the ECtHR noted that *"the entitlement to disclosure of relevant evidence is not an absolute right"* because in any criminal proceedings *"there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the*

34 *Matanović v. Croatia*, § 124; *Furcht v. Germany* of 23 October 2014, application No. 54648/09, § 53; *Bannikova v. Russia*, § 37-50.

35 *Matanović v. Croatia*, § 124.

36 *Grba v. Croatia*, § 125.

37 *Ibid.*, § 113.

38 *Ibid.*, § 124.

39 *Matanović v. Croatia*, § 150.

rights of the accused."[40] It is necessary to examine *"whether the non-disclosure was counterbalanced by adequate procedural guarantees."*[41] In making that assessment it is necessary to have regard to *"the importance of the undisclosed material and its use in the trial."*[42] The ECtHR emphasizes that the right to a fair trial also implies the right to access to the case file and that *"unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial."*[43]

40 Ibid., § 152.; *Doorson v. The Netherlands* of 26 March 1996, application no. 20524/92, § 70.

41 *Matanović v. Croatia*, § 154; *Jasper v. the United Kingdom* of 16 February 2000, application No. 27052/95, § 53 onwards.

42 *Matanović v. Croatia*, § 155; *Jasper v. the United Kingdom*, § 54-55.

43 *Matanović v. Croatia*, Judgment, § 159.

I. 3. Types of special investigative measures in the criminal procedure codes in Bosnia and Herzegovina

Criminal procedure codes provide for a list of undercover investigative measures which limit human rights and freedoms provisionally for the purpose of crime prevention. The list includes the following: surveillance and technical recording of telecommunications; access to the computer systems and computerized data processing; surveillance and technical recording of premises; covert following and technical recording of individuals and objects; use of undercover investigators and informants; simulated purchase of certain objects and simulated bribery; and supervised transport and delivery of objects of criminal offense (Article 116 paragraph 2 of the CPC of BiH[44]).[45]

As pointed out above, special investigative measures entail interference with the protected fundamental rights and freedoms of the individual. For that reason, the regulations pertaining to these measures place particular emphasis on the following aspects: all actions and measures must be explicitly foreseen by the law, covert investigative measures are used only if the same aim cannot be achieved by different means, or if there are no more lenient means to achieve the same aim, they can be applied only in relation to predefined criminal offences, the existence of a certain degree of suspicion that a person has committed the criminal offence of the required gravity, or that the person participated with another individual (or individuals) in the commission of such criminal offence, they are applied only upon the previous judicial authorization and are enforced only under judicial scrutiny, law enforcement authorities cannot use covert investigative measures in relation to the conversations between the suspect and their defense counsel, time limits of special investigative measures are set forth in the law, procedural sanctions for illegal evidence are set forth in the law. These main characteristics of covert investigative measures support the principles which guarantee protection against arbitrariness.

Criminal Procedure Codes in BiH explicitly prescribe the following special investigative measures:

a) Surveillance and technical recording of telecommunications limits the right to inviolability of "telephone communications" and the right to privacy and respect for private life. This special investigative measure entails secret surveillance and technical recording of telephone conversations, surveillance of the use of other technical devices for remote communication and the recording of conversations over such devices. The type of the device used for remote communication of messages is irrelevant. In other words, surveillance and technical recording of telecommunications encompasses all devices (e.g. stationary, mobile, digital, audio, visual, etc.) used through a telecommunication service provider. This investigative measure includes electronic mail (email) and other forms of computer assisted communication and communication using other IT systems. Accordingly, the surveillance and technical recording of telecommunications is considered to apply to the surveillance of computer assisted communications as well.

44 Criminal Procedure Code of BiH (Official Gazette of BiH, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, and 65/18).

45 Article 116 paragraph 2 of the Criminal Procedure Code of the Brčko District of BiH (CPC of the BD BiH; Official Gazette of the Brčko District of BiH, 33/13 – consolidated text, 27/14, and 3/19). Article 130 paragraph 2 of the Criminal Procedure Code of the Federation of BiH (CPC of FBiH, Official Gazette of the Federation of BiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09 12/10, 8/13, and 59/14). Article 234 paragraph 2 of the Criminal Procedure Code of the Republika Srpska (CPC of RS; Official Gazette of RS, 53/12, 91/17 and 66/18).

This special investigative measure infringes on the right to privacy of not only the suspect, but also, indirectly, of every third party whom the suspect contacts using telecommunication devices. This measure can also be ordered for a third party in relation to whom there are grounds for suspicion that they are conveying information about the criminal offence to or from the perpetrator of the criminal offence, or that the perpetrator uses their telecommunications device. Covert investigative measures cannot be used in relation to the conversations between the suspect and their defense counsel. In order to protect the right to defense and free communication between the suspect and their defense counsel, such communication cannot be subject to surveillance and technical recording of telecommunications and secret recording of premises and persons. ECtHR case law also supports communication between the suspect and defense counsel free from surveillance, or presence of third parties, and underlines this as one of the main factors of the fair proceedings.[46]

ECtHR requires the existence of a legal framework providing safeguards against arbitrary use of the special investigative measure of surveillance and technical recording of telecommunications, in particular in relation to the following issues: whose phones and other communication devices can be intercepted, in relation to which criminal offences and for how long, how will the results of these measures be used, what entitlements does the defense have in terms of disclosure of such results, what happens with the materials collected after the completion of the criminal proceedings. Thus, the ECtHR found that *"the law must define with sufficient clarity the scope and manner of execution of phone conversation interception, obeying the legitimacy of the desired outcome of the measures, so that the individual is guaranteed protection against arbitrariness."*[47]

Pursuant to the Law on Communications,[48] telecommunication services are services usually provided with a charge, and comprised entirely or partially of signal transfer over telecommunication networks, including, but not limited to, landlines and mobile networks, as well as data transfer network (Article 2 paragraph 2 item s) of the Law on Communications). Pursuant to the provisions of this law, telecommunications network also includes mobile systems in cases where that is applicable, equipment for communication and directing of calls, and other means enabling signal transfer by wire, optical cable, radio or any other electromagnetic path, including, but not limited to, satellite networks and terrestrial landlines and mobile networks (Article 2 paragraph 2 item q) of the Law on Communications).

Surveillance and technical recording of telecommunications for the needs of the criminal procedure should be differentiated from other measures employed to protect national interests and security pursuant to the Law on Intelligence and Security Agency of BiH[49]. Similarly, the Law on Police Officials of BiH[50] provides for audio and video recording in public spaces with the aim of preventing criminal offences or preserving law and order, provided that audio and video recording devices are installed in public spaces so as to be clearly visible to members of the public (Article 26 of the Law on Police Officials of BiH).

46 *S. v. Switzerland*, 1991 Series A no. 220

47 *Güzel v. Turkey*, 2017, application No. 35285/08, in particular in the context of the violation of the right to effective remedy (Article 13 of the ECHR) and the violation of the right to privacy by interception of telephone conversations (Article 8 of the ECHR).

48 Law on Communications, Official Gazette of BiH, 31/03, 75/06, 32/10, and 98/12.

49 Law on Intelligence and Security Agency of BiH, Official Gazette of BiH, 12/04, 20/04, 56/06, 32/07, 12/09.

50 Law on Police Officials of BiH, Official Gazette of BiH, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 63/08, 35/09, 7/12.

Order to telecommunications operator to deliver data on the use of telecommunications services (Article 72a of the CPC of BiH) should be distinguished from the special investigative measure of surveillance and technical recording of telecommunications.[51] In relation to the surveillance and checks of the internet access line and the question whether that constitutes a violation of the confidentiality of the service users (telephone service provision and its payment by the user is conditioned by access to telephone logs, as the calculation of the service charge requires identification of calls made and the duration of each call), see the Decision of the Constitutional Court of BiH, AP 3330/07 of 12 January 2010.

b) Access to the computer systems and computerized data processing interferes with the security and confidentiality of personal data, as one of the fundamental human rights. In line with international standards, personal data can be collected, processed and used only under the conditions prescribed by the law.[52] Access to computer systems and computerized data processing encompass cross-referencing of personal data of citizens recorded in appropriate data bases to the data and registers maintained by the police in their records. Intelligence on the person concerned available in a register of personal data is cross-referenced to other data bases in which the suspect may be recorded.[53] This facilitates the identification of the perpetrator of the criminal offence. Owing to the development of information technologies, this allows for a quick and efficient processing and cross-referencing of different citizens' data recorded in some data bases and records (e.g. data on border crossings, involvement in traffic accidents, involvement in social welfare programs, etc.). In other jurisdictions this measure is used in relation to criminal offences of tax evasion, as well as in detecting and proving other criminal offences (e.g. money laundering).

This special investigative measure is called raster search, "raster" meaning a control attribute. Positive raster search is used to establish a circle of suspect individuals, starting from some registered attributes. Negative raster search excludes from further search the individual who is not suspect.

c) Special investigative measure of surveillance and technical recording of premises interferes with one of the fundamental human rights - the right to privacy, respect for private life and other related rights. Even though this measure can be used only in relation to a suspect, it infringes on the right to privacy of other persons contacting the suspect, regardless of their potential involvement in the instant criminal offence. The surveillance and technical recording of premises includes video and audio recording of a particular space, and the activities taking place in it (e.g. the space where illicit trafficking in narcotic drugs takes place, or the space in which the perpetrators of a criminal offence and their accomplices meet).

d) Covert following and technical recording of individuals, vehicles and items related to them is considered observation in the context of criminal science. This covert investigative measure may be ordered only in relation to the person for whom there are grounds for suspicion that they participated or participate, alone or with others, in the commission of one or several criminal offences in relation to which the law foresees the use of special investigative measures. However, similarly to the surveillance and technical recording of premises, this measure can also cover third parties. The aim of this covert measure is to determine the movement patterns of persons, vehicles and items related to them, which are secretly followed and

51 Article 72a of the CPC of BD BiH, Article 86a of the CPC of BD BiH, Article 137 of the CPC of RS.

52 The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981 and 1999 with the Protocol thereto. EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

53 Modern states have connected police, customs, tax, criminal intelligence and other computerized information systems and registers.

recorded; the identification of contacts established or made by the person under surveillance, and data gathering on the use of certain items.

According to the rules of criminal investigation tactics, covert following and technical recording of individuals and items can be stationary (observation and surveillance of an individual, facility used by the suspect) and mobile (if the authorized official follows the individual in an appropriate manner).

e) The use of undercover investigators and informants is allowed for the collecting of information and evidence on important facts. The undercover investigator is a police official investigating and acting under a changed identity. They can work either as a standard covert associate, or as an undercover agent especially trained for long-term complex missions. Undercover investigators can participate in legal transactions using the changed identity. If necessary to establish and preserve the changed identity, appropriate documents can be produced, modified or used. The use of undercover investigators is a complex and demanding activity, requiring special training of personnel working undercover. As a rule, this activity is used in complex cases and cases where the measure is expected to be applied over a longer time period. While on a mission, the undercover investigator must not step into the zone of criminal activity. This means that the undercover investigator must not undertake activities constituting incitement to commit a criminal offence. If such activities were undertaken, the incited person cannot be prosecuted for the criminal offence resulting from them. This is characteristic of the European countries and upheld by the case law of the ECtHR. In *Teixeira de Castra v. Portugal* (of 9 June 1998), the ECtHR resolved the issue of admissibility of testimony of two undercover investigators in relation to the conviction of the person charged with illicit sale of narcotic drugs. In this case, the ECtHR found that *"the two police officers did not confine themselves to investigating the criminal activity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence"*. Applying this conclusion, the ECtHR took the position strengthening the protection of human rights and freedoms, despite the indisputable requirement to apply appropriate measures due to the rise in organized crime. Therefore, the Court found that *"the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience"*. The ECtHR further found that *"The public interest cannot justify the use of evidence obtained as a result of police incitement"*. Informant is not a police official. In terms of criminal investigation tactics, the informant is a person whom the police secretly use from time to time, or constantly, to gather information on the criminal offence or the perpetrator of the offence. As with the undercover investigator, the informant works in line with the same statutory requirements and operates in the criminal environment.

The law prescribes explicitly that the undercover investigator and informant can testify as witnesses or protected witnesses in relation to the implementation of activities or other relevant circumstances (Article 122 of the CPC of BiH).[54] If they have to appear at the main trial as witnesses, their identity must be duly protected. Provisions on the protection of witnesses, anonymous testifying, hearing from a separate room using audio and video equipment, so that the parties and defense counsel can examine the witness who is not in the courtroom, can apply.

f) Simulated purchase of certain objects and simulated bribery are measures applied in cases of specific criminal offences which are difficult to detect (e.g. criminal offences of corruption, trafficking in drugs, humans, weapons, etc.). In cases of simulated and controlled purchase, the police agency or another

[54] Article 122 of the CPC of BD BiH, Article 136 of the CPC of FBiH, Article 240 of the CPC of RS.

person who has been appropriately trained by a police official, buys items obtained as a result of the criminal offence or used for the commission of the criminal offence. Simulated bribery is used to prove criminal acts of corruption, for example. The police agent or another person undertaking these activities is not held criminally liable if their actions are within the limits of the order of the preliminary proceedings judge. Incitement of the suspect to commit a criminal offence, as part of these activities, is not allowed.[55] This covert activity is not considered to infringe on the fundamental rights and freedoms, as other special investigative measures do (e.g. surveillance and technical recording of telecommunications or premises, or secret following of persons and items, or undercover investigation). During the implementation of one of the forms of this measure, the suspect has free will, and their other rights and freedoms are unaffected. As is the case with the undercover investigator and informant, Criminal Procedure Codes explicitly provide that persons who implemented this covert investigative measure can be heard as witnesses, or protected witnesses in relation to the implementation of activities or other important circumstances.

The measure of simulated purchase of items and simulated bribery does not include the right to search premises or persons, which requires a separate court order.

g) Supervised transport and delivery of objects of criminal offense is used as covert investigative measure in particular in relation to the criminal offences of illicit trafficking in narcotic drugs, transport of waste, etc. The measure entails the surveillance of the items related to the criminal offence, with the aim of detecting the perpetrators of the criminal offence and other persons implicated in certain criminal activities. Police agencies enforcing this measure are not held responsible for the failure to report the criminal offence. The measure is enforced even if the person subject to the measure is not a particular individual (in that case, other elements or circumstances related to the application of this measure in the specific case should be elaborated, and other requirements must be met, such as the existence of the grounds for suspicion that the commission of a criminal offence is prepared, etc.). Some jurisdictions have provisions allowing that the measure of supervised transport and delivery of objects of criminal offence be ordered in relation to the object of the criminal offence, if there is no information on the identity of the persons involved in the criminal offence.

55 On "simulated purchase of items" and legitimate interests of the injured party "to discover the perpetrator of the criminal offence by all means possible", see decisions of the Supreme Court of FBiH No. 070-0-Kž-07-000047 of 27 March 2007, and the Constitutional Court of BiH, No. AP 1635/07.

I. 4. Criminal offences in relation to which special investigative measures can be ordered pursuant to the applicable criminal legislation in Bosnia and Herzegovina

Given their nature and methods of implementation, special investigative measures are used for efficient detecting, investigating and proving of criminal offences where prosecution cannot be secured by standard criminal investigative actions, or where prosecution would at least be made considerably harder. The efficiency of these measures comes at a cost, as they require deviation from the generally accepted standards of human rights protection, in particular the right to privacy, when such deviation is justified by the interests of society in general, and requirements of criminal justice in particular. The European Court reflected on this necessity back in 1978 in *Klass v. Germany*, stating the following in relation to the secret surveillance and its implications on the system of the rule of law: *"...are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security and for the prevention of disorder or crime..."*.[56]

In modern times, efficient investigation into criminal offences is impossible without the use of this type of investigative measures. Seeing as the use of special investigative measures can cause infringement on some of the guaranteed rights and freedoms in a democratic society, their use is subject to very strict formal framework, including among other important considerations, the specifications of the criminal offences providing justified grounds for the use of this type of investigative measures, provided that other procedural requirements have been met as well. Therefore, seeking and enforcing special investigative measures is allowed only in relation to illegal activities that constitute serious criminal offences due to the protected object of the offence, degree of risk or violation, or manner of commission or another characteristic. Special investigative measures cannot be implemented to detect, investigate or prove all criminal offences, even though that would probably make the investigative activities of law enforcement authorities much easier. Rather, these measures can be used only in relation to the criminal offences involving the risk to or violation of a protected object of higher value or broader scope, which thus justifies the infringement on the rights and freedoms of individuals and groups suspected of the commission of such criminal activities.

The four formally separate criminal jurisdictions in BiH have not taken the same approach to listing the criminal offences allowing for the use of special investigative measures. The primary reason for different approaches lies in the subjects of legal protection, which are not identical at the level of the state, the entities and Brčko District of BiH. This makes different arrangements expected. It should be noted that the issue of listing of criminal offences allowing the use of special investigative measures for investigation and evidentiary purposes was also considered by the Constitutional Court, among other issues related to this type of procedural actions, in the case No. U-5/16 of 1 June 2017. Amendments to procedural laws adopted after the Decision of the Constitutional Court have resulted in inconsistent lists of criminal offences in relation to which special investigative measures can be ordered on the one hand, and differing new legal arrangements, on the other. The amended provisions are significantly more restrictive, particularly in terms of the requirement of the minimum prescribed sentence, which was raised from three to five years of imprisonment, and the general statutory requirement that special investigative measures cannot be used, if the criminal offence is not explicitly prescribed by its legal qualification as the offence in relation

[56] *Klass and others v. Germany* § 68.

to which these measures can be used. New provisions also allow the use of special investigative measures in cases of criminal offences (their less serious or aggravated forms), which carry a more lenient sentence. These include accepting and giving gifts or other forms of benefits, money laundering, tax evasion or fraud and other criminal offences. The law makers took into consideration the difficulties in detecting and proving these criminal offences by standard investigative methods. Similarly, some special investigative measures have been specifically developed for the purpose of detecting and proving specific criminal offences. The lack of their use would put in question the purpose of provisions on certain special investigative measures in the criminal legislation. One of such examples is simulated bribery in relation to the criminal offence of accepting gifts or other forms of benefit. Finally, the use of special investigative measures is not questioned by any provision of the law in the context of detecting, investigating and proving the criminal offences against humanity and international law, terrorism, and other most serious criminal offences.

In BiH, these criminal offences are prescribed in four criminal jurisdictions – at the level of the state, two entities and the Brčko District of BiH respectively. The list of criminal offences allowing for the use of special investigative measures, subject to other legal requirements, at the state level is provided for in the CPC of BiH. These are the criminal offences under Article 117 item d), to wit: a) criminal offenses against the integrity of Bosnia and Herzegovina; b) criminal offenses against humanity and values protected under international law; c) criminal offenses of terrorism; d) criminal offenses of Inciting national, racial and religious hatred, discord or hostility; Unlawful deprivation of freedom; Unauthorized eavesdropping and audio or video recording; Violating the free decision-making of voters; Counterfeiting of money; Counterfeiting of securities; Money laundering; Tax evasion or fraud; Smuggling; Organizing a group or association for smuggling or distribution of goods on which duties were not paid; Customs fraud; Accepting gifts and forms of benefit; Giving gifts and other forms of benefit; Accepting reward or other forms of benefits for illegal interceding; Giving reward or other forms of benefit for illegal interceding; Abuse of office or authority, Unlawful release of a detainee; Accessory after the fact; Accessory to a person indicted by the International Criminal Tribunal; Tampering with evidence; Revealing of identity of a protected witness; Obstruction of justice; Associating for the purpose of perpetrating criminal offences; Organized crime, e) other criminal offences carrying the sentence of imprisonment of five years or more.

In the Brčko District of BiH, the criminal offences in relation to which special investigative measures can be ordered are prescribed in Article 117 of the CPC of BD. These are the following: a) Criminal offences against the state (Chapter XV), b) terrorism (Chapter XVIII), c) kidnapping (Article 177), abuse of a child juvenile for pornography (Article 208); illicit production and distribution of narcotic drugs (Article 232); money laundering (Article 265); associating for the purpose of committing criminal offences (334); organized crime (336); accepting gifts and other forms of benefits (Article 374); giving gifts and other forms of benefits (Article 375); accepting reward or other form of benefits for illegal interceding (Article 376); giving reward or other forms of benefits for illegal interceding (Article 376a); abuse of office or authority (Article 377); illegal facilitation (377a); damaging computer data and programs (387); computer fraud (389) and computer sabotage (392) and d) criminal offences carrying the sentence of imprisonment of at least five years or more.

In the Federation of BiH, pursuant to Article 131 of the Criminal Procedure Code of the Federation of BiH[57], special investigative measures may be ordered in relation to the following criminal offences: a) importing hazardous material into the federation (Article 160); inciting national, racial or religious hatred, discord or hostility (Article 163); unlawful deprivation of freedom (Article 179); unauthorized tapping and sound recording (Article 188);

[57] Criminal Procedure Code of BiH (Official Gazette of BiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14, 74/20)

unauthorized optical recording (Article 189); violating the free decision-making of voters (Article 195); abduction of a child or juvenile (Article 217); illicit transplantation of human body parts (Article 231); damage, destruction and illicit export of cultural monuments and protected natural objects (Article 322); associating for the purpose of perpetrating criminal offences (Article 340); coercion towards a person holding judicial office (Article 359a); destruction or concealment of archival materials (Article 368), giving gifts and other forms of benefits (Article 381); damaging computer data and programs (Article 393); computer forgery (Article 394); computer fraud (Article 395); disturbing the work of the electronic data processing system and network (Article 396); unauthorized access to the electronic data processing protected system and network (Article 397); b) other criminal offences carrying the sentence of imprisonment of five years or more.

The list of these criminal offences in Republika Srpska is provided for in Article 235 of the CPC of RS and it includes the following offences: a) against constitutional order and security of Republika Srpska, b) against humanity and values protected by the international law, c) terrorism and d) offences carrying the sentence of imprisonment of 5 years or more pursuant to the Criminal Code.

The analysis of the structure of the foregoing lists, taking into consideration the discrepancies in the subjects of protection in different criminal jurisdictions at the state, entity and district levels, as elaborated above, leads to the following observations:

1. One of the explicit criteria for legality of special investigative measures at all legislative levels in BiH is the minimum prescribed sentence of imprisonment of five years or more. In this manner, the use of special investigative measures is limited only to serious criminal offences.
2. The degree of violation or infringement on individual and collective values in case of certain criminal offences is so high, that the law makers included some offences on the list of offences in relation to which special investigative measures can be used, even though they already meet other requirements, such as particularly stringent sentences of imprisonment of five years or more. The criminal offences of crimes against humanity and values protected by international law, criminal offences of terrorism and other criminal offences are an example of such practice.
3. A special group of criminal offences on these lists are separately defined criminal offences (or their less serious forms) which carry the sentences below the statutory minimum of five years, but entail a subject of protection, manner of commission, means of commission, serious consequences and other characteristics, due to which special investigative measures must be used to detect and prove them. There are many offences of this type included in the foregoing lists, with the exception of the list in the CPC of RS. It should be emphasized that this group encompasses the criminal offences of corruption, as well as criminal offences related to organized crime, which, due to the difficulties in their detection and proving, were the original reason for integration of special investigative measures in the criminal justice system of BiH in 2003.

2.

Prosecutor's reasoned motion to order special investigative measures*

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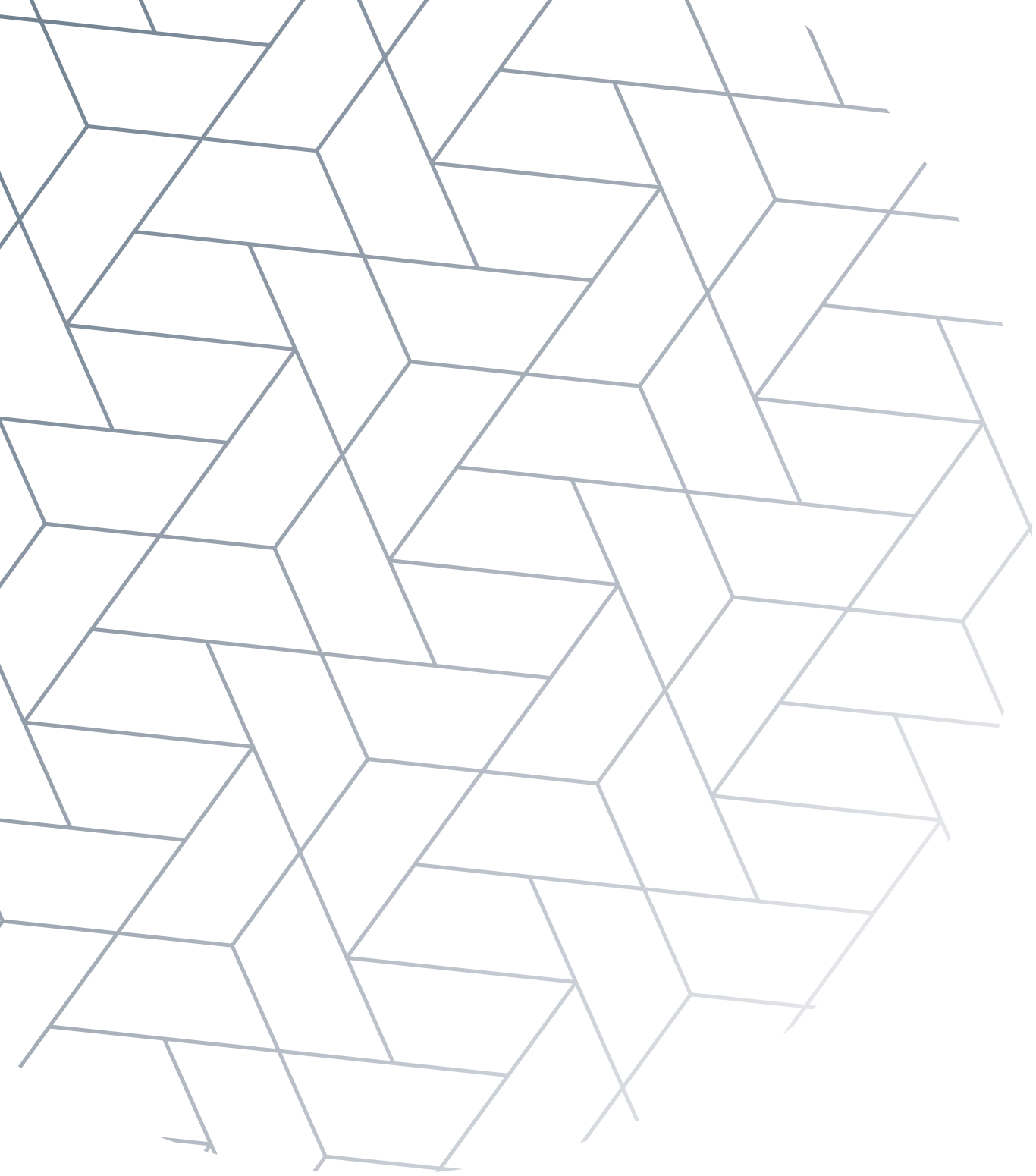


II. 1. Legal requirements for filing reasoned motion to order special investigative measures

Special investigative measures may be ordered against a suspect against whom there are **grounds for suspicion** that they alone or with others committed a criminal offence for which special investigative measures may be ordered (see I. 4) and against a suspect for whom there are grounds for suspicion that together with others they are taking part in the commission of a criminal offence for which special investigative measures may be ordered. The grounds for suspicion that a person alone or with others took part or is taking part in the commission of a criminal offence must be established before ordering any of the special investigative measures foreseen in the law. Special investigative measures may be ordered also against a person for whom there are grounds for suspicion that they are conveying information related to the criminal offence to the suspect or receiving such information from the suspect, or allowing the suspect to use their telecommunication devices.

Grounds for suspicion must refer to a specific person who is an alleged perpetrator of the criminal offence. As such, they are a source of information about the facts that give rise to the probability or suspicion that the person committed a criminal offence for which special investigative measures may be ordered under the law. The prosecutor determines the existence of grounds for suspicion based on the results of actions and measures undertaken pursuant to Article 218 and 219 of the CPC BiH[58]. Accordingly, the conclusion on the existence of the grounds for suspicion is based on the results of inquiries into the facts pertaining to the suspect as the perpetrator of the criminal offence.

Before filing the motion to order special investigative measures, the prosecutor issues an order to conduct investigation based on the results of earlier measures that indicate the existence of the grounds for suspicion that a criminal offence has been committed. The order to conduct investigation should contain a clear description of the criminal acts alleged against the suspect. The order may be amended or expanded upon discovery of additional perpetrators, facts or evidence as well as other criminal offences not included in the initial order. In the complex cases of organized crime in which special investigative measures may be implemented, the prosecutor prepares a plan of investigation and assembles a team to work on the case comprised of the prosecutor and investigators from the agency implementing the special investigative measures.

The second general requirement for ordering special investigative measures is deemed to be fulfilled only **if evidence cannot be obtained by other means or if gathering of evidence would be accompanied by disproportional difficulties**. It is clear that the properly reasoned motion to order special investigative measures should cite the reasons that prevented the gathering of evidence by other means, and other investigative measures undertaken to gather evidence before filing the motion to order special investigative measures.

Failing to fulfill any of the requirements is a major impediment to ordering special investigative measures. The prosecutor is obliged to submit a properly reasoned motion to the preliminary proceedings judge and thus provide the court with all statutory elements required for ordering special investigative measures, while the court is obliged to inspect these elements. The order of the preliminary proceedings judge contains the same data as

[58] The same is stipulated under Article 218 and 219 of the CPC BDBiH, Article 233 and 234 of the CPC FBiH, and Article 224 and 225 of the CPC RS.

those featured in the prosecutor's motion and determines the duration of the ordered measure. Unlawful conduct in ordering and implementing special investigative measures may cause evidence to be declared unlawful (see discussion below, specifically in II. 2. 2).

Prior to filing their reasoned motion with the court, the prosecutor should determine which special investigative measures would be necessary and most likely deliver results so as to avoid implementation of measures that cannot deliver and unnecessary investment of material and human resources. If the prosecutor intends to propose the ordering of one or several special investigative measures, they have to present the important circumstances that warrant the ordering of those measures and specify the scope and the manner of their implantation.

The prosecutor and the authorized official persons must cooperate closely before the motion to order SIMs is filed to ensure that the motion is properly written and corroborated with evidence indicating the grounds for suspicion that the suspect committed the criminal offence with an explanation that all other options for obtaining evidence by ordering and implementing other statutory measures were exhausted.

Prosecutor's reasoned motion to order special investigative measures must contain a specification of the grounds for suspicion that the suspect committed the criminal offence. Namely, it is not sufficient to only state that there is information that a person committed a criminal offence (see discussion below, in particular II. 2. 2). It is inacceptable to generally refer to legal provisions governing the content of the prosecutor's reasoned motion without explaining specific and objective reasons related to the grounds for suspicion and impossibility of gathering evidence by other means or disproportional difficulties that would undermine the gathering of evidence by other means. Accordingly, the motion must contain the following: factual description of the acts of perpetration by the suspect(s) and list of available corroborating evidence; all data on the suspects; reference to the connection between the suspects in the perpetration of the criminal offence; reference to the fact that the suspects are using mobile phones (telecommunication services of telecom operators and/or other software mobile applications to communicate) to collude and commit the criminal offence; description of other ways and acts of perpetration of the criminal offence and their dynamics; degree of likelihood that the suspect would continue using specific means of communication for which surveillance measures are sought; description of the degree of threat to public safety with the aim of preventing crime, and other related information.

It is important, before filing the motion to order special investigative measures, that the prosecutor inquiries with the police authorities and companies in charge of execution and technical implementation of the special investigative measures whether such measures are implementable and technically feasible.

When considering special investigative measures, care must be taken to ensure that these measures are proportionate to the gravity of the criminal offence committed, and the basic human rights that will be violated with the implementation of special investigative measures, all in the interests of public safety and the protection of individual's rights in a democratic society. Implementation of special investigative measures is subject to generally accepted principles foreseen, *inter alia*, in the Resolution of the 16th International Congress of Penal Law held in 1999 in Budapest, namely, that the intelligence and results obtained through special investigative measures may be used as evidence in the criminal proceedings only if such measures were implemented in accordance with the principles of legality, subsidiarity, proportionality and judicial supervision (see discussion in I. 3).

II. 2. Contents of reasoned motion to order special investigative measures

Special investigative measures as specific means of gathering evidence against the suspect(s) committing criminal offence(s) depart from the standard investigative measures or actions aimed at gathering evidence. As such they should be applied with particular caution to avoid jeopardizing the goal of the investigation.

The authorized official person, therefore, has to determine the secrecy of the data by assigning specific classification degrees to the data, as provided for under the Law on Protection of Secret Data of BiH ("restricted", "confidential, "secret", and "top secret")[59]. Prosecutors at all levels in BiH are authorized to designate degrees of classification "restricted", "confidential" and "secret".

When designating the classification degree, the prosecutor must assess a potential security threat if the data in question remains available to unauthorized persons, and accordingly designate the classification degree of the data. This assessment is prepared in writing. Depending on the classification degree assigned to the data, the documents containing the data are accessed and disposed of in line with the procedures further elaborated in the Law on the Protection of Secret Data of BiH and special rulebooks of the responsible and authorized institutions governing the procedure and the manner of secret data processing that each institution processing such data must adopt.

This procedure is binding for all persons involved in the implementation of the special investigative measures. The content of such documents is an official secret and its unauthorized disclosure is punishable under criminal law.

The properly reasoned motion, in this context, has to contain an accurate list of all documents corroborating the motion. The motion is delivered in a tamper proof envelope bearing the official seal of the institution submitting the motion. The motion is produced in one copy for the court, but the order authorizing special investigative measures should be produced in sufficient number of copies for the prosecutor's office, police agencies implementing the SIMs, and telecom operators providing telecommunication service to ensure lawful enforcement of the court's order in line with the method, the scope and duration specified in the order.

The content of the properly reasoned motion to order special investigative measures is prescribed in Article 118, paragraph 1 of the CPC BiH[60]. In line with this provision, a properly reasoned motion shall contain: the data on the person against whom the measure is to be applied, the grounds for suspicion referred to in Paragraphs 1 or 3

59 Pursuant to Article 8 of the Law on Protection of Secret Data of BiH (Official Gazette of BiH, No. 54/05): "Data shall be considered secret if their disclosure to an unauthorized person, media, organization, institution, authority or other state and/or authority of other state could pose a threat to the integrity of Bosnia and Herzegovina, in particular in the following areas: a) public security, b) defence, c) foreign affairs and interests, d) intelligence and security interests of Bosnia and Herzegovina, e) communication and other systems important for state interests, judiciary, projects and plans significant for defence and intelligence-security activities, and f) scientific, research, technological, economic and financial operations significant for the safe functioning of BiH institutions and/or security structures at all levels of the state organization".

60 The same content is prescribed under Article 118, paragraph 1 of the CPC BDBiH, Article 132, paragraph 1 of the CPC FBiH, and Article 236, paragraph 1 of the CPC RS.

of Article 116 of this Code[61], the reasons for its undertaking and other important circumstances necessitating the application of the measure, the reference to the type of required measure and the method of its implementation, and the extent of duration of the measure.

II. 2. 1. Data on person against whom measure is to be applied

The motion must contain the data on the person against whom there are grounds for suspicion that they are committing a criminal offence and against whom the motion to order special investigative measures is submitted, to wit all available data on that person up to the moment of filing the motion, including but not limited to the first and last name, nickname, date of birth, data on the parents, place of birth, address of the permanent/temporary residence, personal identity number, and data in the personal documents.

It may happen that the agencies in charge of implementing special investigative measures could not obtain all the data on the suspect and that some other identification information or personal characteristics are available which may help determine the identity of the person committing the criminal offence according to the grounds for suspicion.

This is especially the case with multiple criminal offences committed by major criminal groups with extensive membership. The purpose of special investigative measures is to determine the identity of all persons involved, to gather intelligence on the functioning of the organization, its internal hierarchy, and the manner of communication between its members. In such situations, and in line with the objectives of the investigation, it would be necessary to indicate specific characteristics of that person, to ensure that the motion pertains to the person who may be identified by other means. These characteristics, for example, may refer to the fact that the person is using a specific telephone number that is to be placed under surveillance and technical recording, the person's nickname, the suspect's physical appearance or details about the vehicle that the suspect is driving. This approach must be an exception and the duration of the special investigative measure must be limited to the shortest time possible, ensuring all the time that other measures to determine the identity of the person are being undertaken and that the measure is ultimately applied against an identified person[62].

II. 2. 2. Grounds for suspicion that person is taking part or has taken part in the commission of a criminal offence

The grounds for suspicion under Paragraphs 1 or 3 of Article 116 of the CPC BiH refer to a specific degree of suspicion that a person is taking part in the commission of a criminal offence based on the intelligence obtained by the police agencies about the criminal activities of that person, which has led to the investigation of an event. Accordingly, the grounds for suspicion must rely on the data or information whose source and content suggest their accuracy. The grounds for suspicion must be thoroughly explained and all allegations and contentions

61 The same content is prescribed under Article 116, paragraph 1 and 3 of the CPC BDBiH, Article 130 of the CPC FBiH, and Article 234 of the CPC RS.

62 For example, in the case before the Court of BiH (No. X-Kž-07/486 of 20 October 2009), the Court ruled that the appeal was founded in the part referring to the omission by the Court in ordering special investigative measures against several unknown persons. "(...) the grounds for suspicion must refer to a specific person as an alleged perpetrator of the criminal offence, in the sense that they represent a source of information about the facts that give rise to the probability or suspicion that a person committed a criminal offence for which special investigative measures may be ordered. The appeal of the accused B is therefore founded in the part referring to a clear omission on the part the Court in ordering special investigative measures against several unknown persons, as such measures may be ordered only and exclusively against a known person or a person who is identifiable based on their specific features."

must be corroborated to ensure that the court is provided with all available and gathered information about the perpetrator and their criminal conduct.

The grounds for suspicion are corroborated in practice by police intelligence presented in the official notes about the suspect, their activities and movements, their socializing with the persons from criminal circles, inquiries carried out about the suspect, information about the suspect's habits, their lifestyle, financial standing, property and other facts that may be of interest in relation to the person against whom the prosecutor intents do file a motion to order SIMs.

The prosecutor would often seek to gather relevant information from the persons who may have information about the perpetrator, their activities, affiliation with other persons, their behavior during criminal activities such as their level of caution and increased control over movement. These persons are operative liaisons and police assets. They cooperate with the police agencies conscientiously, willingly and secretly and they offer information about the criminal offence, the perpetrators, manner of perpetration, location of potential evidence, etc. It should be noted that these persons do not have the status of an informant which may be granted only by the court. If it is determined that these persons can offer useful information about the perpetrator of the criminal offence, the group they organized to commit the offence, enable access to the organized group, and substantially contribute to the investigation, the prosecutor may move the court to grant them informant status, in which case the data and information about these persons are submitted to the court in a separate casefile.

II. 2. 3. Reasons to order special investigative measures and other important circumstances necessitating application of measure

Reasons to order special investigative measures and other important circumstances necessitating their application imply a detailed explanation of the circumstances that prevented the gathering of evidence by other means, or of disproportional difficulties that would have accompanied the gathering of evidence by other means. This detailed reasoning ensures that the necessity of SIMs has been reviewed and their justification verified by the court who examines whether evidence could be obtained by other means, whether all other options for gathering evidence under the law have been exhausted, and whether special investigative measures are needed, as well as the extent in which the public authorities may interfere with the individual's privacy to achieve one of the legitimate goals.

In that context, the prosecutor's office and the police agencies must closely cooperate before the motion to order special investigative measures is submitted, to ensure that all other, regular measures aimed at gathering evidence have been ordered and implemented, including examination of witnesses, search of apartments and premises, and potential suspects, temporary seizure of items, gathering of telecommunication data from the authorized telecommunication operators, search of persons connected to the suspects, etc. If evidence could not be obtained by these means, and after all regular actions to gather evidence have been undertaken, the acting prosecutor may file a motion with the court to order special investigative measures and specify in the motion the regular investigative actions undertaken, the results and evidence thus obtained and why they were insufficient for proving the suspect's criminal liability, including the measures sought and obligatory explanation of the necessity of interference of the public authorities with the basic rights and freedoms of the individual.

This course of action is supported by the case law. For illustrative purposes, in the case before the Court of BiH No. S1 2 K 010234 14 Kkž of 16th April 2015 (paragraph 30, 33 and 34), the Court ruled as follows: "(...) the

orders do not contain even the minimum required explanation of the grounds for suspicion due to which SIMs were ordered against the suspects... Mere reference to the grounds for suspicion in the introductory part of the order is insufficient without specific evidence that give rise to presented conclusions...The same applies to the fulfilment of the second requirement... that evidence could not be obtained otherwise or that gathering of evidence would be accompanied by disproportional difficulties. (...) The orders authorizing special investigative measures against the suspect were not specific enough in terms of the factual basis and evidence based on which the preliminary proceedings judge determined the existence of the grounds for suspicion. The orders did not contain any arguments justifying the ordering of SIMs...there was no reference to any attempts to gather evidence through other investigative measures. (...) In that regard, it should be noted that the prosecutor's motions which preceded the orders did not meet the standard of necessary specification and explanation ...as defined by the European Court of Human Rights. (...)

Such deficient orders of the preliminary proceedings judge, based on which special investigative measures were carried out, did not meet the criteria and the standards of necessary specification and explanation referred to in the decision of the European Court of Human Rights ...rendering all evidence gathered under such deficient orders the fruit of the poisonous tree."

The jurisprudence of the European Court of Human Rights and domestic courts alike has been confirmed with other decisions as well. Therefore, it is necessary, when drafting the motion to order SIMs, to pay attention to the proper reasoning of the basic elements foreseen in the law for ordering measures of covert surveillance.

II. 2. 4. Citing measure sought

When drafting a reasoned motion, it is necessary that the prosecutor clearly and unequivocally identifies the measure they intend to implement. It is also recommended that the prosecutor explains why they are seeking this particular investigative measure, the circumstances indicating that this measure would deliver results, the evidence that the prosecutor intends to gather through this measure (with as little possible encroachment on the right to privacy of the individual while trying to achieve the best possible result in gathering evidence).

When analyzing the facts that will inform their decision on the type of the special investigative measure needed, the prosecutor should take into account the above-mentioned recommendations and be mindful of the technical feasibility of the measure and the availability of human resources to implement the measure (see discussion in II. 2. 5).

II. 2. 5. Method of implementation and scope of special investigative measure

The method of implementation of a special investigative measure means describing the actions to be taken without disclosing tactical and technical methods and ways of carrying out certain actions, which are prescribed by the law enforcement agencies in their internal procedures and protected from unauthorized disclosure. It is required, in order to comply with the principle of legality, to describe the manner of implementation of the measure.

Ordering the special investigative measure of *surveillance and technical recording of telecommunications* entails temporary interception and recording of telecommunications, recording of telephone conversations using the equipment for legal interception and recording, daily recording and listing of incoming and outgoing calls, SMS messages, IMEI numbers of mobile phones using a subscriber card of a specific number, including surveillance and

listing of checked base stations through which the suspects communicate using mobile phones. For example, in their motion to order SIMs of surveillance and technical recording, the prosecutors should explain to the court that the suspect is using communication devices (mobile phone, landline phone, laptop, etc.) to contact other persons for the purpose of committing a criminal offence, that the suspect is thus colluding with others, for example, to arrange the place and time of delivery of narcotic drugs, the people and vehicles to be present at the contact point, and other important circumstances. This manner of implementation of special investigative measures should not be regarded as a rule for every case. Depending on the needs and objectives of the investigation, the quality of the evidentiary material gathered, it may be of importance, for example, to determine IMEI numbers of mobile phones that use a subscriber card. This can be very useful because in practice the suspects often change subscriber cards and mobile phones, making the gathering of evidence much more difficult. Checking base stations may be instrumental for successful application of special investigative measure of covert following and technical recording of persons, means of transport and objects related to them, when the case involves a suspect who plans to meet with someone to commit a crime. The moment the suspect makes contact by phone, the base station of the telecom operator records his signal and determines the area in which the suspect is indisputably located. It should be noted that surveillance and technical recording of telecommunications does not apply only to mobile and landline phones, but to all other devices used for communication and/or which enable other forms of communication. For example, in the motion to order this special investigative measure, the prosecutor may propose surveillance of access to online content and interception and recording of the suspect's entire online traffic by surveilling the suspect's user account with the assistance of an authorized internet service provider using a system for telecommunication interception (see the Judgment of the European Court of Human Rights in the case *Copland v. United Kingdom*, Appeal No. 62617/00 of 3 April 2007).

When describing the method of implementation of the special investigative measure of *access to computer systems and computerized data processing*, the prosecutor must indicate and provide specific information about the computer system and the data to be accessed, and the type of computerized data processing sought through raster search (data search using a specific, predetermined search term that can include various information, from medical history to tax records, bank account balance, money flow, etc.) and collection and recording of such data search. This measure very much depends on the person's use of computers, computer programs and systems. However, this special investigative measure has never been applied in practice thus far due to insufficient technical capacities of police agencies and insufficient knowledge about these types of objects and possible ways of implementing this measure.

Implementation of the special investigative measure of *surveillance and technical recording of premises* involves issuance of authorization to official persons in the police agencies to enter the premises used by the suspect, including the suspect's private space, home and other spaces and official premises used by the suspect and install technical devices for surveillance, recording and transmission of audio-video signal, provided that there is a suspicion that the suspect is using these spaces to meet up with certain persons and collude to commit a criminal offence or prepare for the commission of a criminal offence or undertake actions to perpetrate a criminal offence and that upon expiry and termination of this measure, they remove the installed devices as authorized.

Covert following and technical recording of individuals, means of transport and objects related to them implies direct technical recording and photographing using devices for movement tracking, surveillance, transmission and recording of audio and video signal. In addition to authorized police agencies, this measure is often implemented by undercover investigators who are in contact with the suspects. Prosecutors often seek from the court to authorize covert following and technical recording of persons, means of transport and objects

related to them, and the court tends to order these measures for the period of 30 days. However, the effective time spent on covert following is seven days, given the objective capacities, while the remainder of the time authorized under the order is inefficiently spent without any active interference with the individual's right. Therefore, it is recommended that prosecutors move the court to order this measure for the period of several days, that is, to specify in their motions the number of days required to efficiently implement covert following, which can be then carried out within the period of one month as of the day of the issuance of the order.

Likewise, in situations when the suspect is never leaving their private space and there is no need for actual following of that person, implementation of this measure would represent inefficient use of human resources.

Use of informants, as a special investigative measure, is implemented by granting the status of an informant to a person to enable them to maintain contact with the suspects and other persons against whom there are grounds for suspicion that together with the suspects they are taking part in the commission of a criminal offence. The informant will gather information about the collusion between the suspect and other persons in the activities that give rise to the grounds for suspicion that the criminal offence, for which the order of the court is sought, is being prepared or committed. This SIM is implemented by the informant of the police agency in charge that has assigned a code name to the informant and registered them in the logbook of informants, under the supervision of the authorized police officials overseeing the informant, using the available equipment of the police agency for implementation of the SIM in order to document informant's actions. Before this measure can be implemented, the prosecutor needs to collect the data about the person who will be used as an informant. This data is then submitted to the court in a separate casefile. All information that the informant acquires, they have to convey to the authorized official person overseeing their work. This is summarized in the official report, which can be corroborated with audio and video recordings as evidentiary material gathered through the implementation of this SIM and the covert following and technical recording of the person. Before implementing this SIM, the prosecutor has to ask the court for its authorization and authorization of other SIMs that enable its implementation. This approach allows for a comprehensive and efficient control and eliminates potential abuse.

Use of undercover investigators as specially trained police officials implies their engagement in specific activities and actions aimed at gathering evidence. Undercover investigators are authorized to maintain direct contact with the suspect and other persons against whom there are grounds for suspicion that together with the suspect they are taking part in the commission of the criminal offence. The undercover investigator will collect information and evidence about the collusion between the suspects and other persons in the preparation and perpetration of the offence for which the order is sought. Before this measure can be implemented, it is necessary first to obtain the data about the authorized official person who will be used as an undercover investigator, and submit this information to the court in a separate casefile to protect the identity of the undercover investigator and for security and other reasons.

Simulated and controlled purchase of objects and simulated bribery are measures carried out by undercover investigators or informants. These measures are implemented as a single act whereby the undercover investigator or an informant are given authorization to execute simulated and controlled purchase of objects for which there are grounds for suspicion that they represents proceeds of crime and which are offered to them by the suspects or other persons against whom there are grounds for suspicion that they are taking part with the suspects in the commission of the criminal offence or to give simulated bribe to the suspect which the suspect previously demanded. In the latter case, the bribe money will be registered, photographed and marked and then handed over to the suspect. This measure is implemented by special means and objects belonging to the police agencies.

Special investigative measure of *supervised transport and delivery of objects of criminal offense* is implemented by asking the court to authorize the police agency to use technical devices for surveillance, recording and storing and to track the transport and delivery of objects of criminal offence. The prosecutor will clearly specify the means of transport to be surveilled and the identity of the person operating these vehicles, if possible, the expected route of transport, the objects of the criminal offence transported, and the location of delivery of these objects. If this SIM is implemented based on the request from other states, it is implemented in the same manner on the territory of Bosnia and Herzegovina. The suspect and the vehicle transporting illicit objects may be given free passage, whereupon the gathered material is forwarded to the country that filed the request.

II. 2. 6. Duration of special investigative measure

Duration of special investigative measures is clearly and unequivocally foreseen in the criminal procedure codes in Bosnia and Herzegovina. It should be reiterated that the Constitutional Court of BiH in its decision No. U 5/16 of 1 July 2017 declared unconstitutional provisions governing duration of special investigative measures, specifically in the part concerning the extension of SIMs, and the scope and application of discretionary right of public authorities and ensuring that the extension of SIMs is proportional to the nature of the criminal offence for which SIMs were ordered. The Constitutional Court of BiH has ruled that "(...) it is indisputable that special investigative measures require longer duration if their purpose is to gather evidence about the criminal offences of terrorism, corruption, organized crime, and trafficking in human beings and weapons, since these criminal offences may be perpetrated over a longer period of time. (...) it is unclear how the nature and gravity of the criminal offence punishable by a term of imprisonment of up to three or up to five years, for example, objectively justifies the possibility of ordering these measures for the longest duration possible as in the case of the criminal offence punishable by a term of imprisonment of up to twenty years... The Constitutional Court finds that the legislator was not mindful of the proportionality between the restrictions imposed on human rights and the gravity of criminal offences when prescribing duration of special investigative measures..."

Criminal procedure codes in BiH were amended in line with this decision of the Constitutional Court of BiH to ensure compliance with its requirements.

Article 118, paragraph 3 of the CPC BiH thus prescribes that special investigative measures under Article 116, paragraph 2, items a), b), c), d) and g) may be carried out for the maximum of one month in total. If the measures are yielding results and there is a reason to continue applying them to gather evidence, they may be extended for another month following a reasoned motion of the prosecutor, whereby the measures under items a) through c) may last in total for the maximum of six months for the criminal offences punishable by a term of imprisonment of five years or a more severe punishment, and the total of four months for other criminal offences. Measures under items d) and g) may last in total for the maximum of three months for the criminal offences punishable by a term of imprisonment of five years or a more severe punishment, and the total of two months for all other criminal offences. Exceptionally, in relation to the criminal offences of organized crime and terrorism, the legislator has prescribed that these measures may be extended for an additional period of up to three months, provided that the measures have produced results and that there is a reason to continue with their application in order to gather evidence. The motion to order special investigative measures referred to in Article 116, paragraph 2, item f) of this Code may refer only to a single act and motions for each subsequent act against the same person must list the reasons justifying its application. (If there is a need to implement this measure again, a new motion must be drafted. Consequently, there is a dilemma in practice as to the number of times that the prosecutor can file a

motion to order simulated purchase or simulated bribe against the same suspect and the court order/authorize these measures. In other words, what are the limits to applying this measure).

The CPC BiH does not foresee a timeframe for implementation of the covert measure referred to in Article 116, paragraph 2, item e), because imposing time constraints on this measure may significantly impede its successful implementation.

Duration of special investigative measures is governed by other three procedural codes as well. The amendments to the CPC BDBiH prescribe stricter requirements in terms of the foreseen punishment and duration (criminal offence punishable by a term of imprisonment of at least five years or a more severe punishment). Accordingly, the special investigative measure involving the use of informants and undercover investigators may last up to one year for the criminal offences punishable by a term of imprisonment of at least five years, and up to six months for other criminal offences under this Code. The Law on Amendments to the CPC FBiH foresees the same provisions as the CPC BiH. The amendments to the CPC RS did not amend procedural provisions governing the duration of special investigative measures, but only provisions governing their extension.

It has become accepted as good practice that the prosecutor should, by all means, analyze the evidence and material obtained through special investigative measures and provide clear explanation of the results of these measures achieved within the deadline for their implementation granted by the order. The motion to extend special investigative measures should be corroborated with the evidence that has yielded results and is confirming the grounds for suspicion based on which the special investigative measures were initially ordered, and also provide an explanation as to the necessity of their extension for further gathering of evidence.

In order to meet the above-mentioned standards, the prosecutor should order the police authorities implementing special investigative measures to notify them on the actions undertaken, at least once every week in a form of a written report and every day in a form of verbal updates. This has proven to be a very useful practice. The prosecutor will thus be fully informed about the implementation of the measure and the evidence gathered within the deadline specified in the order and will be able to instruct authorized official persons about the further course of action on daily basis. Ultimately, this approach makes it easier for the prosecutor to decide if they want to propose new extension of SIMs and to reason their position. Such reports which contain all evidence and information collected up to that point should be submitted to the preliminary proceedings judge together with the motion to extend SIMs.

It has often been the case that entire intercepted conversations and communications are copied into the motion to extend special investigative measures. The motion thus consists of dozens of pages of an extensive and cumbersome text, without an explanation as to the relevant conversations related to the individual acts that constitute important elements of the criminal offence and individual suspects. The motion to extend special investigative measures should indicate the continuity of established facts and gathered evidence as well as the reasons justifying the extension. For example, in cases of organized crime involving illicit trade in narcotic drugs and several suspects under investigation, the prosecutor should specify in the reasoning of the motion to extend special investigative measures the results of these measures achieved within the deadline of the initial order, including communications the suspects had, which were intercepted through surveillance of telecommunication (communication with the buyers of narcotics), put them in the context of evidence obtained through other measures aimed at gathering evidence (search of persons, premises, on-site investigation, expert analysis, confiscation of items) and thus determine the connection between the members of the group and, if possible, their connection with the group organizer.

Accordingly, good liaising and cooperation between authorized official persons and the prosecutor is instrumental in achieving a twofold objective- ensuring that special investigative measures are implemented in compliance with the legal framework and standards of the Constitutional Court of BiH and the European Court of Human Rights, and that these measures are used to gather evidence about serious and complex criminal offences of organized crime, economic crime and corruption.

II. 2. 7. Notifying the court about implemented special investigative measures

Article 119[63] of the CPC BiH foresees the duty of police authorities to deliver to the prosecutor all information, data and objects gathered through application of special investigative measures, and the report thereto, upon the completion of measures. The prosecutor has a duty to file a written report to the preliminary proceedings judge on the special investigative measures implemented, based on which the preliminary proceedings judge verifies compliance with their order.

This means that the police agencies will deliver to the prosecutor the entire material gathered through the application of special investigative measures, including DVDs of the telecommunication surveillance, DVDs with photographs and video recordings of surveillance and technical recording of persons, USBs with audio and video material collected by the undercover investigator with detailed reports on the targets/surveillance subjects, the duration of implementation, and the basis for implementation. The prosecutor will review the material and prepare a written report summarizing information on the court orders, surveillance targets (suspects), phone card numbers, IMEI numbers of telephone devices, covert following, simulated purchase, use of informants and undercover investigators, duration of measures and gathered material. The prosecutor shall notify the preliminary proceedings judge if the data and information gathered through ordered SIMs are needed for the criminal proceedings and if they are not, this material shall be destroyed under the supervision of the preliminary proceedings judge, of which event the judge shall make separate records. In practice this means that the prosecutor submits the entire material gathered through the application of special investigative measures to the preliminary proceedings judge with the accompanying report and the judge reviews the legality of enforcement of the court orders. If special investigative measures were implemented without the order of the preliminary proceedings judge or contrary to their order, the court will not be able to base its decision on the evidence thus gathered.

Only after the prosecutor has evaluated the evidentiary material and determined that the information and data gathered through authorized special investigative measures are not needed for the criminal proceedings, this material can be destroyed. It is necessary to accurately and clearly list the material gathered and material to be destroyed, specify the manner of destruction, designate persons who shall destroy the material, list the persons attending the destruction of material, and specify the time and date of destruction. This procedure is documented in the record, which is signed by the preliminary proceedings judge, the prosecutor and the persons attending the destruction of the material and/or destroying the material (usually these persons are expert associates, record-takers, and authorized persons from the IT service of the judicial institution).

It is very important to emphasize that the prosecutor bears great responsibility in the investigation for the implementation of special investigative measures, both in terms of overseeing the work of authorized official persons and the use of evidence gathered through these measures.

63 The same provisions are foreseen in Article 119 of the CPC BDBiH, Article 133 of the CPC FBiH, and Article 237 of the CPC RS.

II. 3. Examples of prosecutorial practice

II. 3. 1. Motion to order special investigative measures

Number:

Sarajevo, dd/mm/yyyy

Classification degree: [Subject]
Institution: Prosecutor's Office of BiH
Classification assigned by:
Date of classification:
Manner of termination: Prosecutor's decision
To be delivered by: courier
Number of pages:
Number of copies:

COURT OF BOSNIA AND HERZEGOVINA
- Preliminary Proceedings Judge –
S A R A J E V O

M O T I O N

to order special investigative measures

(Article 116, paragraph 2, items a), c), d), e) and g):

- Surveillance and technical recording of telecommunications,
- Surveillance and technical recording of premises,
- Covert following and technical recording of persons, means of transport and objects related to them,
- Use of undercover investigators,
- Supervised transport and delivery of objects of the criminal offence.

AGAINST:

1.
2.
3.

due to the existence of the grounds for suspicion:

that _____, _____, _____, as members of an organized group under Article 1, paragraph 22 of the Criminal Code of Bosnia and Herzegovina, which was organized for the purpose of transferring and selling large quantities of the narcotic drug cocaine, classified as a narcotic drug under the Convention on Psychotropic Substances of 1971 that may be traded only under the permission of the responsible authority in line the Law on Prevention and Suppression of Abuse of Narcotic Drugs of BiH, from the territory of the Republic of Serbia and the Republic of Montenegro to the territory of Bosnia and Herzegovina, for the purpose of further sale on the territory of Bosnia and Herzegovina and transfer and sale in the territory of the Republic of Croatia and the Republic of Slovenia, whereby the suspects on the territory of the Republic of Montenegro and the Republic of Serbia, from persons known to them, organized purchase for further sale of the narcotic drug cocaine, whereafter, with unidentified persons, but known to them, they organized the transfer of the narcotic drug cocaine

from the Republic of Serbia and the Republic of Montenegro to Bosnia and Herzegovina, Sarajevo, all for the purpose of further sale of this narcotic drug to buyers in Bosnia and Herzegovina, the Republic of Croatia and the Republic of Slovenia,

by doing which they committed:

the criminal offence of organized crime under Article 250 of the Criminal Code of Bosnia and Herzegovina, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the Criminal Code of Bosnia and Herzegovina, wherefore

I move the court

1. To **order** the special investigative measure referred to in Article 116, paragraph 2, item a) of the Criminal Procedure Code of Bosnia and Herzegovina – surveillance and technical recording of telecommunications (interception and recording of conversations with the equipment for interception and recording, daily listing of incoming and outgoing calls, incoming and outgoing messages, IMEI numbers of mobile phone devices and surveillance of base stations enabling communication between the mentioned mobile phones), used by the suspect _____, to wit: user number _____, and telephone device with the IMEI number to be determined through surveillance of the user number, and place these under surveillance and technical recording, in order to detect the suspects in the preparation and perpetration of the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH, and detect and identify other members of the organized group in the preparation and perpetration of these criminal offences.

2. To **order** the special investigative measure referred to in Article 116, paragraph 2, item c) of the Criminal Procedure Code of Bosnia and Herzegovina – surveillance and technical recording of premises and facilities (recording the premises and facilities with the photo camera and camera, wiretapping premises and facilities and recording conversations in the facilities and premises with audio and video equipment) used by the suspects_____, namely the apartment at the address _____, located on the 4th floor, which may also be used by other persons affiliated with the suspect to arrange the purchase, sale and transfer of the narcotic drug, in order to detect the suspects in the preparation and perpetration of the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH, and detect and identify other members of the organized group in the preparation and perpetration of these criminal offences.

3. To **order** the special investigative measure referred to in Article 116, paragraph 2, item d) of the Criminal Procedure Code of Bosnia and Herzegovina – covert following and technical recording of persons, means of transport and objects (recording of persons, objects and vehicles with a photo camera and camera, wiretapping vehicles, recording conversations in the vehicles using audio and video equipment), to wit: the suspect _____ who, according to available data, is residing at the address _____, passenger vehicle make _____, license plates number _____, undercover investigator using the code name _____, passenger vehicle make _____, license plates number _____ used by the undercover investigator, wiretapping of the undercover investigator, recording with audio and video equipment all conversations of the undercover investigator with the suspects and other persons who may be involved in the arrangement of purchase, sale and transfer of the narcotic drug cocaine, in order to detect the suspects in the preparation and perpetration of the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH, and detect and identify other members of the organized group in the preparation and perpetration of these criminal offences.

4. To **order** the special investigative measure referred to in Article 116, paragraph 1, item e) – use of undercover investigator with the code name_____, whereby the undercover investigator will contact the suspect and other persons against whom there are grounds for suspicion that they are taking part in the commission of the criminal offence, introduced to the undercover investigator by the suspect _____, and gather information and evidence of collusion between the suspect and other persons in the purchase, sale and transfer of narcotic drugs, infiltrate the organized group, take part with the suspect and other persons introduced to him by the suspect in the arrangement of purchase, sale and transfer of narcotic drugs and gather evidence about

the purchase sale and transfer of narcotic drugs, in order to detect the suspect in the preparation and preparation of the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH, and detect and identify other members of the organized group in the preparation and perpetration of these criminal offences.

5. To **order** the special investigative measures referred to in Article 116, paragraph 2, item g) – supervised transport and delivery of objects of the criminal offence, the narcotic drug cocaine, or other narcotic drugs transported, transferred, held, sold, procured or otherwise traded by the suspects, and thus allow the undercover investigator and other authorized official persons to carry out activities in the territory of Bosnia and Herzegovina and supervise the transport and delivery of objects of the criminal offence, to wit the passenger vehicle make _____, license plates number _____, the narcotic drug cocaine and other narcotic drugs transported, in order to detect the suspects in the preparation and perpetration of the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH, and detect and identify other members of the organized group in the preparation and perpetration of these criminal offences.

The order of the Court of Bosnia and Herzegovina will be enforced by the police agencies in Bosnia and Herzegovina designated by the Prosecutor's Office of BiH to apply special investigative measures. The Prosecutor's Office of BiH will oversee the work of these agencies and provide them with necessary instructions on the enforcement of the court's order.

I move the Court of Bosnia and Herzegovina to authorize the police agencies, departments and members of individual police agencies, as designated by the Prosecutor's Office of Bosnia and Herzegovina, for the purpose of implementing special investigative measures and enforcing court orders, to provide operative and/or technical support to the State Investigation and Protection Agency of BiH, and other departments and members of other police agencies, as designated by the Prosecutor's Office of BiH.

I move the Court of Bosnia and Herzegovina to designate as undercover investigators the authorized official persons under the pseudonyms _____, whose protected identity information shall be delivered to the Court of BiH in a sealed enveloped placed in a separate casefile.

I move the Court of Bosnia and Herzegovina to authorize the police agencies, as designated by the Prosecutor's Office of BiH, in the territory of BiH, for the purpose of implementing special investigative measures and enforcing court orders, to undertake activities in the territory of Bosnia and Herzegovina, secretly and without notifying police authorities in the territory where special investigative measures will be implemented, in order to prevent detection of special investigative measures by the perpetrators of criminal offences.

I move the Court of Bosnia and Herzegovina to order the deadline of 30 days for the implementation of the special investigative measures sought and the enforcement of the order authorizing these measures.

Explanation

The Ministry of the Interior of the Republic of Serbia, Crime Police Administration, Organized Crime Unit, Narcotics Department informed the State Investigation and Protection Agency of BiH on _____ that the suspects _____, _____, and _____, from the territory of the Republic of Serbia and the Republic of Montenegro, in cooperation with the suspects from the territory of BiH, to wit _____, _____, _____, acting as an organized crime group are buying, packing and transporting the narcotic drug cocaine in special vehicles to the territory of Bosnia and Herzegovina, where this narcotic drug is repacked into bigger parcels and transported to the territory of the Republic of Croatia and the Republic of Slovenia, where it is marketed and sold in greater quantities with the assistance of persons from those territories.

According to the information delivered, high ranking members of the mentioned criminal organization and persons actively involved in the organization of smuggling of the narcotic drugs are _____, residing at _____, and _____, residing at_____, citizens of Bosnia and Herzegovina.

It follows from the documents delivered by the Republic of Serbia that the one _____ is organizing international trade in narcotic drugs by hiring the individual named _____ in the way that through _____, and other persons in the territory of Serbia and Montenegro, he is buying narcotic drugs, whereupon they are transporting the narcotic drug cocaine in the vehicles specially built for this purpose, to the territory of Bosnia and Herzegovina, Sarajevo, from where it is further transported to the EU countries, Croatia and Slovenia. This follows from the Record of Examination of the Witness _____ number_____, report with photo documentation of the Narcotics Department in Belgrade_____ depicting the area where the narcotic drug was stored, the quantity of the narcotic drug and the labels on the packaging of the narcotic drug according to the witness, and other information.

Pursuant to the information obtained from the responsible police agencies in Montenegro and Serbia, the organized criminal group headed by _____, is using vehicles rented from rent-a-car agencies in that area for illicit transport of narcotic drugs, which is confirmed by the reply of the rent-a-car agencies specifying the time when the vehicles were rented, and the identity of persons who rented them.

After inquiries were made into the identity of the persons _____, _____, _____, who are citizens of Bosnia and Herzegovina, their full identity was established, including their residence, and it was ascertained that on the day of _____, at the location use by the persons _____, a search of the passenger vehicle make _____ was carried out by the Ministry of the Interior of the Sarajevo Canton due to the suspicion of illicit trade in narcotic drugs, on which occasion the labels were recovered with writings and a "star" symbol, but the narcotic drug was not found. These actions were documented in the Record of Search number _____.

In addition, it has been confirmed through engagement of the police agencies that the organized group is carrying out activities related to smuggling of a substantive quantity of cocaine and that on the territory of _____ they also keep a large quantity of the narcotic drug marihuana, which is hidden in a location known to them, in a rented house at the banks of the Sava River, which they plan in the upcoming period to smuggle to the EU countries, namely Croatia and Slovenia, as outlined in the official report of the State Investigation and Protection Agency of BiH about the contact with the operative liaison _____. Further on, it has been confirmed that the suspects _____, _____, on the day of _____were present in the territory of Trebinje, where they met with the persons known to them (who are known to the police for selling narcotic drugs), to arrange the smuggling and the transport of a large quantity of the narcotic drugs marihuana and cocaine, as outlined in the official report of the police agency _____ documenting the control of vehicle driven by _____ with passengers _____, _____.

Taking into consideration the information and evidence gathered thus far which is insufficient to finalize the investigation, the fact that successful prosecution of the mentioned persons for **the criminal offence of organized crime under Article 250 of the CC BiH, in conjunction with the criminal offence of illicit trafficking in narcotic drugs under Article 195 of the CC BiH** requires gathering of the material evidence (narcotic drugs), and that this is an organized crime group with international elements whose members are buying, transferring, transporting, hiding, selling and disposing of the objects constituting the mentioned criminal offence in a highly organized manner, we submit that the proving of their criminal liability and identification of other persons involved in the criminal offence with them requires special investigative measures sought herein. Also, taking into consideration their sophisticated organization and connections with other persons from the neighboring countries as well as the difficulties that accompany the gathering of evidence, we submit that it would be impossible to gather evidence through other measures. The evidence gathered up to this point indicates that the individual named _____was searched and that narcotic drugs were not found in his possession. It is obvious that the evidence about the manner of organization and perpetration of the alleged criminal offences by the suspect and others cannot be gathered through other regular measures because this highly organized group is active in the territory of Serbia, Montenegro, Bosnia and Herzegovina, Croatia and Slovenia, which makes their organized criminal network complex and makes it difficult to locate them, collect evidence and prosecute them.

We submit that this motion is fully justified and based on the law for all the reasons elaborate herein.

PROSECUTOR
OF THE PROSECUTOR'S OFFICE OF BiH

_____

Annex- copies of:

- Request of the SIPA BiH to apply special investigative measures number: _____,
- Official notes number _____,
- Sealed envelopes containing information about the identity of the undercover investigator,
- Report of the Republic of Serbia Ministry of the Interior number _____
- Record of examination of the witness _____
- Record of search carried out by the Sarajevo Canton Ministry of the Interior _____
- Report with attached photo documentation _____
- Letter from the Ministry of the Interior of the Republic of Croatia _____
- Minutes from the meeting _____
- and other.

II. 3. 2. Report on implementation of special investigative measures

Bosna i Hercegovina		**Босна и Херцеговина**
Brčko distrikt Bosne i Hercegovine		**Брчко дистрикт Босне и Херцеговине**
TUŽILAŠTVO/TUŽITELJSTVO		**ТУЖИЛАШТВО**
BRČKO DISTRIKTA BiH		**БРЧКО ДИСТРИКТА БиХ**

Trg pravde 10, 76100 Brčko distrikt Bosne i Hercegovine; tel: 049/217-227; fax: 049/219-088; mail: jtbd@jtbd.ba

Number: T18 0 KT
Brčko, on the _____

BASIC COURT
OF THE BRČKO DISTRICT OF BiH
Attn: Judge
Number:

Pursuant to Article 119, paragraph 1 of the Criminal Procedure Code of the Brčko District of BiH (Official Gazette of the Brčko District of BiH number 33/13, 27/14), in the criminal case number T18 0 KT 000 against _____for the criminal offence of – illicit manufacturing and trafficking of narcotic drugs – foreseen in Article 232, paragraph 1 of the Criminal Code of the Brčko District of BiH, on the day of _____, I file the following:

REPORT

on implementation of special investigative measures

The Prosecutor's Office of Brčko District of BiH is conducting an investigation against_____ in the criminal case number T18 0 KT 000 000000000 for the grounds for suspicion that they have committed the criminal offence of illicit manufacturing and trafficking of narcotic drugs, foreseen in Article 232, paragraph 1 of the Criminal Code of the Brčko District of BiH.

Considering that the investigation was initiated due to the suspicion that a criminal offence punishable by a term of imprisonment of up to three years was committed and considering that the gathering of evidence was accompanied by disproportional difficulties, special investigative measures were implemented in line with the court order _____, as proposed by the Prosecutor's Office of the Brčko District of BiH.

The court has issued the following orders in the course of the proceedings _____:

1) Order authorizing special investigative measures number 00000000000Kpp of 25 August 2019,

2) Order authorizing special investigative measures number 000000000000 Kpp 2 of 24 September 2019,

3) Order authorizing and extending special investigative measures number 000000000000 Kpp 3 of 22 October 2019,

4) Order extending special investigative measures number 000000000000 Kpp 4 of 25 November 2019.

Special investigative measures of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) and covert following and technical recording of persons, means of transport and objects related to them, referred to in Article 116, paragraph 2, item d) of the CPC BDBiH were authorized under the mentioned orders.

Special investigative measure – **Surveillance and technical recording of telecommunications** – referred to in Article 116, paragraph 2, item a) of the CPC BDBiH was implemented as follows:

1) In line with the order authorizing special investigative measures number 000000000000 Kpp of 25 August 2019, in the period from 18:00 hours of 25 August 2019 until 24 September 2019, surveillance was performed of the communication with:

- the user number 387 0000000000, used by the suspect _____

2) In line with the order authorizing special investigative measures number 00000000000000 Kpp 2 of 24 September 2019, in the period from 25 September 2019 at 00:00 hours until 24 October 2019 at 23:59 hours, surveillance was performed of the communication with:

- the user number 387 00000000000 and the telephone device with the IMEI number 000000000000000, used by the suspect _____,
- the user numbers 387 00000000 and 387 000000000, used by the suspect _____
- the user numbers 387 0000000 and 387 000000000, used by the suspect _____

3) In line with the order authorizing and extending special investigative measures number 00000000000 Kpp 3 of 22 October 2019, in the period between 00:00 hours of 25 October 2019 and 23:59 hours of 24 November 2019, surveillance was performed of the communications with:

- the user number 387 000000000 and the telephone device with IMEI number 000000000000, used by the suspect_____,
- the user numbers 387 000000000, 387 00000000, 387 00000000, 387 0000000 and the telephone device with IMEI number 00000000000, used by the suspect _____,
- the user numbers 387 000000000, 387 00000000 and the telephone device with IMEI number 0000000000, used by the suspect _____,
- the user number 387 000000000, used by the suspect _____,
- the user numbers 387 00000000, 387 00000000, 387 0000000, 387 0000000, 387 0000000, used by the suspect _____,

4) In line with the order extending special investigative measures number 0000000000 Kpp 4 of 25 November 2019 in the period between 21:00 hours of 25 November 2019 until 23:59 hours of 24 December 2019, surveillance was performed of the communications with:

- the user numbers 387 000000000, 387 00000000, 387 000000000, 387 00000000 and the telephone devices with IMEI numbers 354 0000000000, 358 000000000, 359 000000000, 356 00000000 and 354 00000000, used by the suspect _____,
- the user number 387 62 00000000 387, used by the suspect _____.

The following has been established during the implementation of the special investigative measure against the listed persons:

- _____ (target code name **"_____"**) had the total of 4,105 communications from the user numbers surveilled.
- _____ (target code name **"_____"**) had the total of 1,179 communications from the user numbers surveilled.
- _____ (target code name **"_____"**) had the total of 2,380 communications from the user numbers surveilled.
- _____ (target code name **"_____"**) had the total of 201 communications from the user number surveilled.
- _____ (target code name **"_____"**) had the total of 5,313 communications from the user numbers surveilled.
- _____ (target code name **"_____"**) had the total of 1,211 communications from the user numbers surveilled.

Surveillance of telecommunications during the specified period was carried out by the police officials of the Police _____using the system for legal interception of telecommunications of the Ministry of Security of BiH.

After the activities were undertaken in line with the plan of telecommunication surveillance. All documented conversations, the total of 14,389 communications, are stored on the CD media labelled as follows:

1) CD labelled _____

2) CD labelled _____

3) CD labelled _____

4) CD labelled _____

5) CD labelled _____

6) CD labelled _____

7) CD labelled _____

8) CD labelled _____.

Total of **eight (8) CDs.**

To ensure efficiency of the proceedings, the material gathered through surveillance and technical recording of telecommunications assessed as "relevant"- pertains exclusively to the communication the suspects had about the purchase and sale of the narcotic drug- has been stored on separate CDs for each of the targets. The relevant content is stored on the CDs labeled with the corresponding targets' code names, to wit ''_____", ''_____'' _____", ''_____', ' _____" and ''_____', and produced in three copies, which makes up the total of 18 (eighteen) CDs. The relevant material will be retained by the Prosecutor's Office _____for further conduct of the proceedings.

Special investigative measure – **Covert following and technical recording of persons, means of transport and objects related to them** – referred to in Article 116, paragraph 2, item d) of the CPC BDBiH was implemented:

- In line with the order authorizing special investigative measures number 00000000000000000 Kpp of 25 August 2019 against 000000000000000 in the period from 25 August until 24 September 2019,
- In line with the order authorizing special investigative measures number 0000000000 Kpp 2 of 24 September 2019 against _____, _____ and _____ in the period from 25 September until 24 October 2019,
- In line with the order authorizing and extending special investigative measures number 0000000000 Kpp 3 of 22 October 2019 against _____, _____, _____, _____, and _____, in the period from 25 October until 24 November 2019,
- In line with the order extending special investigative measures number 000000000000000 Kpp 4 of 25 November 2019 against _____ in the period from 25 November until 17 December 2019.

The following material was generated through measures implemented in accordance with the plan of covert following and technical recording of persons, means of transport and objects related to them:

1) CD labelled "Photo Video 04.09.2019" (3x)

2) CD labelled "Photo Video 05.09.2019" (3x)

3) CD labelled "Photo Video 07.09.2019" (3x)

4) CD labelled "Photo Video 09.10.2019'' (3x)

5) CD labelled "Photo Video 12.11.2019" (3x).

The referenced report, compiled on the basis of the Report of the BDBiH Police number T-_____/14 of 12 December 2019 with attached material evidence, the Prosecutor's Office _____ submits for the purpose of further legal action and determination that the special investigative measures were implemented in compliance with the court orders, and that the measures were applied only against the persons specified in the court orders and within the authorized deadline.

As specified above, the entire material generated during the surveillance of the suspects' telecommunications is stored on 8 (eight) CDs described in the referenced Report. In order to enable the court to review the legality of the implementation of the special investigative measures ordered by the court, attached to the referenced Report are 8 (eight) CDs containing all recorded communications and 5 (five) CDs with audio and photo files generated during the covert following and technical recording of targets. Attached is also the copy of the Report of the BDBiH Police number 0000000000 of 12 December 2019.

PROSECUTOR

Annex:

1) CD labelled _____ (1x)

2) CD labelled _____ (1x)

3) CD labelled _____ (1x)

4) CD labelled _____ 3-3 (1x)

5) CD labelled _____ 3-2 (1x)

6) CD labelled _____ 4-1 (1x)

7) CD labelled _____ 5-11, _____ 5-8, _____ 5-1, _____5-5 (1x)

8) CD labelled _____ 6-1 (1x)

9) CD labelled "Photo Video 04.09.2019." (1x)

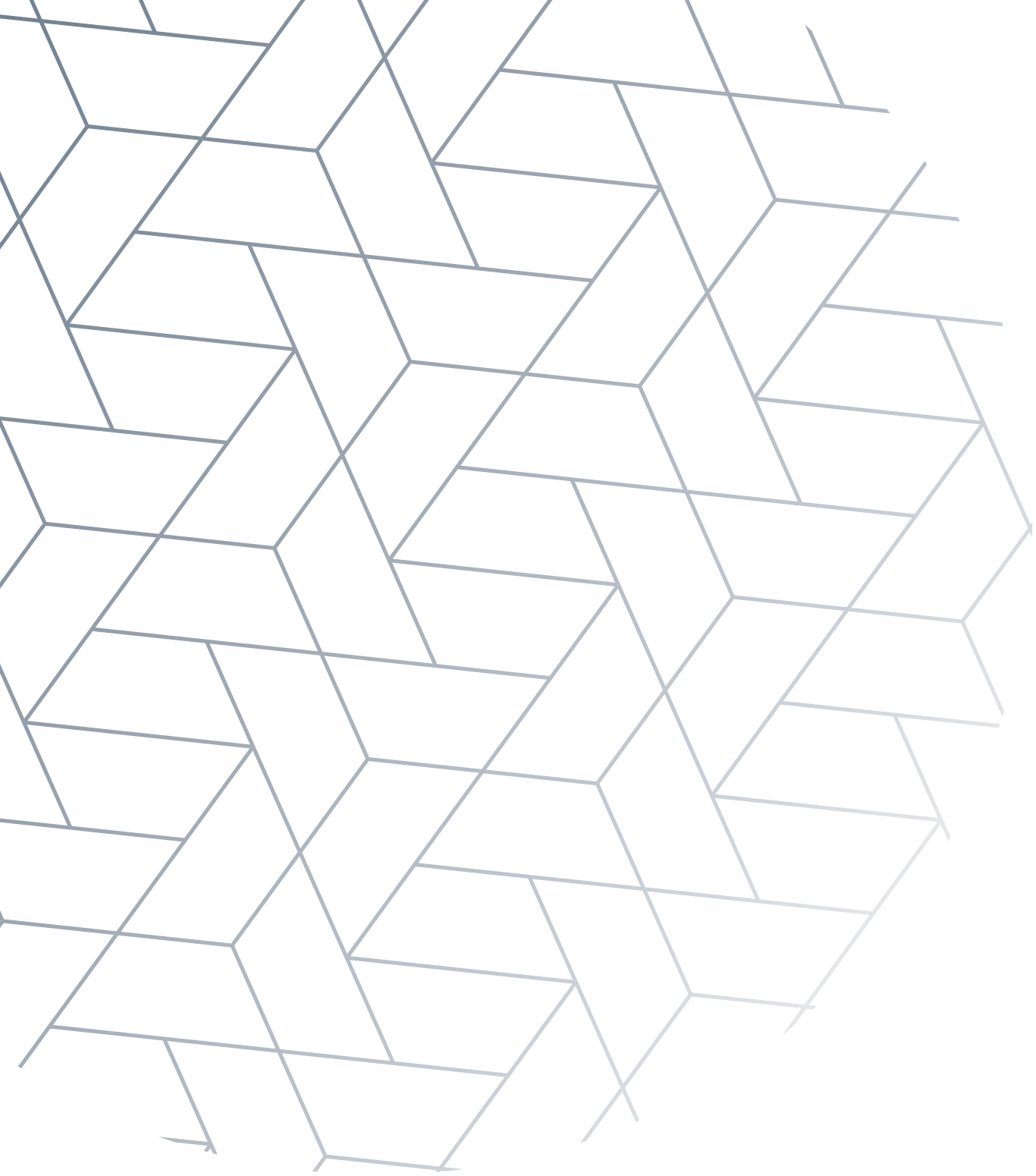
10) CD labelled "Photo Video 05.09.2019" (1x)

11) CD labelled "Photo Video 07.09.2019" (1x)

12) CD labelled "Photo Video 09.10.2019" (1x)

13) CD labelled "Photo Video 12.11.2019" (1x)

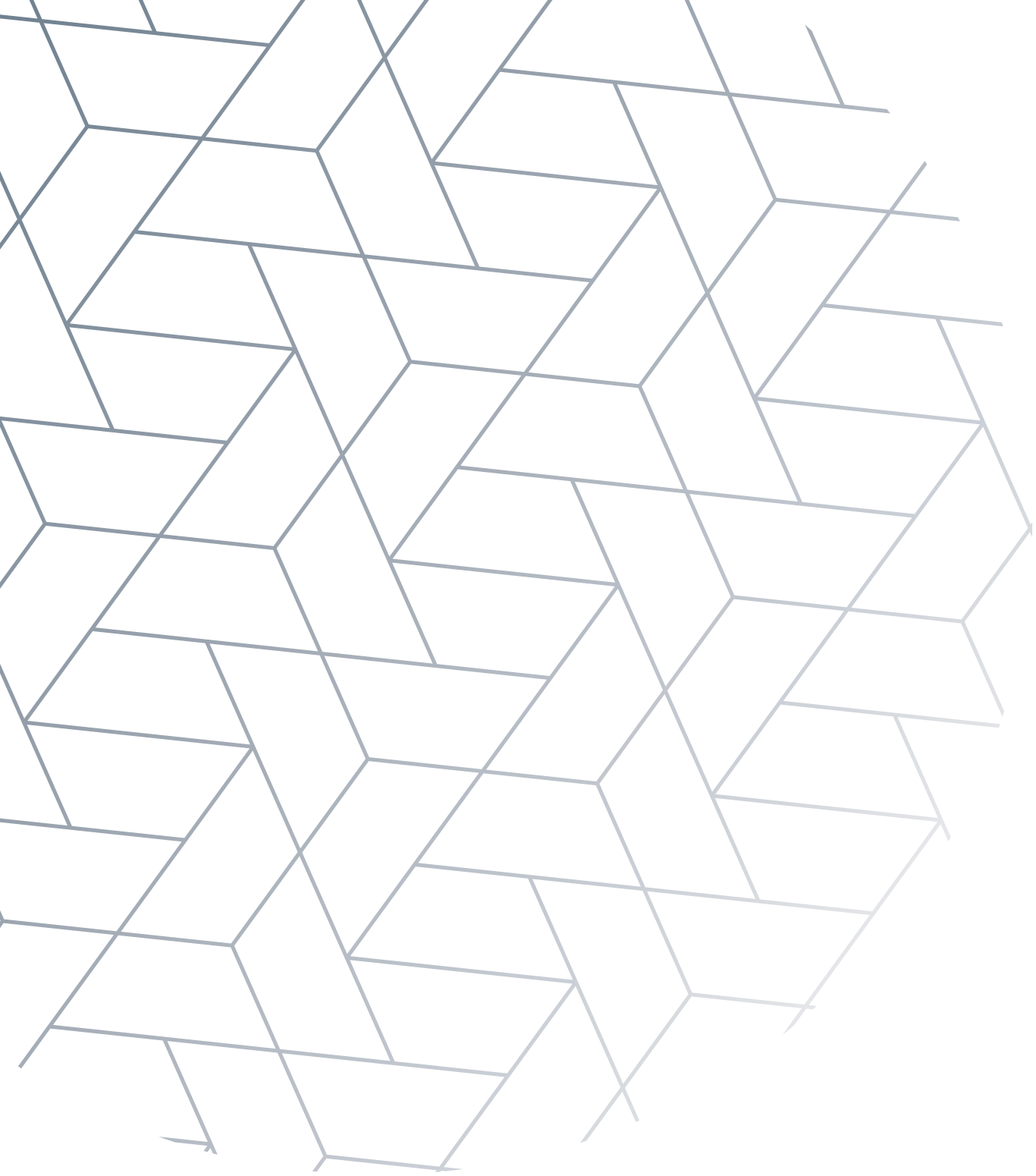
14) Copy of the Report of the Police of _____ number T-_____/19 of 12 December 2019.



3.

Judicial decision-making on special investigative measures*

* Authors: Aleksandar Despenić, Basic Court in Bijeljina, Davorin Jukić, Court of BiH; Minka Kreho, Court of BiH; Siniša Lazarević, Basic Court in Bijeljina and Željka Marenić, Court of BiH.



Special investigative measures were introduced in the national criminal legislation to address the need for prevention of the most serious criminal offences, primarily organized crime and terrorism, and also for the purpose of harmonization of the national legislation with the international documents recommending introduction of special investigative measures. Considering that special investigative measures temporarily interfere with the basic human rights and freedoms in the process of gathering data and evidence needed for the criminal proceedings, special investigative measures must be implemented in a statutory format by the authorized public authorities only when evidence needed for successful conduct of criminal proceedings could not be gathered and secured by other statutory measures prescribed for that purpose. Crucial to determination of special investigative measures to be used, among other things, is consideration of the purpose of the measures and the need for their application. The purpose of special investigative measures and the need for their application depends on the objective of detection, proving and prosecuting perpetrators of criminal offences and preventing acts involving criminal behavior. The need for special investigative measures depends on the results of the activities undertaken during the investigation. Namely, special investigative measures are used only when evidence could not be gathered otherwise or when gathering of evidence would be accompanied by disproportional difficulties. Application of special investigative measures thus requires proportionality between the restrictions imposed on the citizen's freedoms and rights on one side and the gravity of the criminal offences on the other. The court is the only authority that can authorize these measures and inspect the legality of their implementation. In the process of authorizing special investigative measures and determining the deadline for their implementation as well as the use of evidence thus gathered and assessment of conditions for implementation of measures, the courts are not only bound by the specific procedural provisions but also by the basic standards arising from the Constitutions and conventions, namely the right to a fair trial and the right to privacy and family life, home and correspondence.

Duration of special investigative measures is limited and there must exist reasons justifying their extension, which is determined by the court based on the prosecutor's reasoned motion.

III. 1. Order of the preliminary proceedings judge

Special investigative measures may be applied only based on the order (written or verbal) of the preliminary proceedings judge. The court order by rule is issued in writing and it must contain the prescribed elements. Verbal court order is issued only in exceptional circumstances. Namely, if the written order cannot be received on time and there is a risk of delay, special investigative measures may commence based on the verbal order of the preliminary proceedings judge. However, a written order of the preliminary proceedings judge must be obtained within 24 hours as of the issuance of the verbal order (Article 118, paragraph 2 of the CPC BiH).[64] The legislator has thus only postponed the time needed to produce the written order authorizing the special investigative measure, without undermining the implementation of the special investigative measure to achieve the legitimate objective, which can commence right after the verbal order of the preliminary proceedings judge is issued. The judge will ascertain whether all substantive and statutory requirements have been met to order the special investigative measure and provide an explanation thereto in the written order that will be issued within 24 hours. Having in mind the basic rights and freedoms of all citizens, this legal exception implies that the preliminary proceedings judge, prior to issuing their verbal order, must receive the prosecutor's reasoned motion to order special investigative measures in writing.

Prosecutor's motion must be properly reasoned, that is, it must contain all the data foreseen in Article 118, paragraph 1 of the CPC BiH (see discussion in Chapter II).

When deciding on the well-foundedness of the prosecutor's motion, the court will first determine whether special investigative measures may be ordered for the criminal offence alleged in the reasoned motion in light of the restrictions stipulated in the relevant provisions of the procedural codes (see discussion in Chapter I. 4).

Considering that the procedural code[65] prescribes that the order of the preliminary proceedings judge must contain the same data as those featured in the prosecutor's motion, the court has to verify the existence of the grounds for suspicion that the person alone or with others took part or is taking part in the commission of the criminal offence for which special investigative measures may be ordered, and depending on the circumstances of the case, whether there are grounds for suspicion that the person is conveying information to or receiving information from the perpetrator of the criminal offence for which special investigative measures may be ordered, and whether the perpetrator is using the person's means of telecommunication (see discussion in Chapter II. 2. 2).

The order of the preliminary proceedings judge must include the data against the person against whom the measure is to be applied (see discussion in Chapter II. 2. 1).

Further on, the court must subject the prosecutor's motion to **a necessity test**. In other words, the court must ascertain whether evidence could be obtained by other means. This requirement demonstrates the intention of the legislator to limit the application of SIMs, emphasizing that these are exceptional measures aimed at gathering evidence and not measures applied by rule and that there are restrictions to their application.

64 Identical exceptions are foreseen in Article 118, paragraph 2 of the CPC BDBiH, Article 132, paragraph 2 of the CPC FBiH, Article 236, paragraph 2 of the CPC RS.

65 Article 118, paragraph 1 of the CPC BiH, Article 118, paragraph of the CPC BDBiH, Article 132, paragraph 1 of the CPC FBiH and Article 236, paragraph 1 of the CPC RS.

Considering that the prosecutors in their motion refer to one or more specific SIMs, outlining the method of their implementation (preliminary proceedings judge cannot decide which SIMs should be ordered), if the prosecutor has moved the court to order or authorize implementation of two or more SIMs, the preliminary proceedings judge will have to verify compliance with legal requirements for each measure sought and specify the manner of their implementation, in line with the reasoned motion (for example, surveillance and technical recording of a telephone number, or surveillance and technical recording of a facility). The court order must specify the time when the measure will commence, that is, the moment from which the deadline for implementation will be counted. Given that these measures restrict person's basic rights and freedoms, commencement of measures and their duration must be counted from the moment of issuance of the written court order, and in case of a verbal order, from the issuance of the verbal order. In conclusion it should be reiterated that the prosecutor must provide the preliminary proceedings judge with all the elements required for the issuance of the order authorizing special investigative measures whereupon the judge will inspect these elements and decide whether to order the measures. Should the judge decide to order special investigative measures, they shall specify the manner and the scope of their implementation as well as their duration. Irregularities in the ordering of measures and in their implementation may cause evidence to be declared unlawful and inadmissible in the criminal proceedings, and also unusable in terms of judicial decisions. When it comes to unlawful *ex iudicio* evidence, the court must state the reasons based on which it found that the violation of a specific provision of the criminal procedure code caused the evidence obtained through such violation inadmissible (Article 10 of the CPC BiH).[66]

If the preliminary proceedings judge disagrees with the prosecutor's motion, the order authorizing SIMs will not be issued. Namely, the preliminary proceedings judge is not obliged to grant the prosecutor's motion. The preliminary proceedings judge has the right to authorize specific measure (or measures), to specify the manner of its (their) implementation and their duration.

If the court refuses the motion, it shall issue a decision which may be appealed within 3 days, in line with Article 318 of the CPC BiH.[67] Otherwise, if all requirements have been met, the court shall issue the order authorizing special investigative measures.

66 Article 10 of the CPC BDBiH, Article 11 of the CPC FBiH, Article 10 of the CPC RS.

67 Article 318, paragraph 5 of the CPC BDBiH, Article 334 of the CPC FBiH and Article 334 of the CPC RS.

III. 2. Duration of special investigative measures

Special investigative measure may be ordered for the period of one month in the initial stage. They may be extended in intervals of up to one month and their overall duration depends on the type of the measure and the criminal offence alleged against the person, as foreseen in the criminal procedure code (see II. 2. 6).

In line with the criminal procedure codes, the standard that must be considered when deciding on the motion to extend special investigative measures ***is whether the measures have produced results and whether there are reasons to continue implementing the measures in order to gather evidence***.

Accordingly, every motion to extend special investigative measures must be based on the evidence gathered through these measures under the previous order. The court will review the results of the previously implemented measures when considering the motion to extend the measures. Even though the law does not expressly prescribe an obligation on the part of the prosecutor to submit to the court a report on implemented measures with the motion to extend the measures, this is the only way for the court to verify the justification of the motion in line with the mentioned standards (*have measures produced results and are there reasons to continue implementing them to gather evidence*). For special investigative measures to be extended, the prosecutor must submit a properly reasoned motion. The order of the court extending special investigative measures must have the same content as the prosecutor's motion at the minimum in order to be "in compliance with the law", and must be drafted in the format of the court order, as explained earlier.

If the court finds, upon reviewing the report or otherwise (for example, the prosecutor proposes termination of the measures for technical or other reasons, such as lack of evidence about the criminal offence), that the reasons for implementation of special investigative measures no longer exist, the court shall **terminate** their implementation forthwith in a written order, as foreseen in Article 118, paragraph 5 of the CPC BiH.[68]

More details on notifying the court about the special investigative measures implemented are available in Chapter II. 2. 7. It should be noted here that the preliminary proceedings judge inspects compliance with their order based on the prosecutor's written report detailing implemented SIMs, which the prosecutor is obliged to submit (Article 119, paragraph 1 of the CPC BiH).[69]

Upon this inspection, the court will notify **forthwith** the person surveilled about the measures implemented against them. This person may request a review of legality of the order and the manner of implementation of the measure.[70]

If he prosecutor decides to abandon the criminal prosecution or if information and data obtained through ordered measures are not needed for the criminal proceedings, the preliminary proceedings judge will issue the order to destroy all material gathered through special investigative measures under judicial oversight, of which

68 Article 118, paragraph 5 of the CPC BDBiH, Article 132, paragraph 5 of the CPC FBiH and Article 236, paragraph 5 of the CPC RS.

69 Article 119, paragraph 1 of the CPC BDBiH, Article 133, paragraph 1 of the CPC FBiH, Article 237, paragraph 1 of the CPC RS.

70 In the jurisprudence of the BiH Court, this deadline is three days as of the day of receipt of notification. The motion is considered by the out of court panel, whose jurisdiction in this stage of the proceedings is fairly limited to verification of legality of the order and the method of its enforcement.

event a record will be made (Article 119, paragraph 2 of CPC BiH).[71] The person who was the subject of covert surveillance will be notified thereafter of this fact and that the material has been destroyed.

III. 3. Judicial practice

Special investigative measures raise a number of issues regarding judicial practice. Research carried out within this project has shown that many of those issues, among other things, have to do with the type of the decision of the preliminary proceedings judge refusing prosecutor's motion to order special investigative measures and definition of the right to appeal allowing the prosecutor to challenge the decision of the preliminary proceedings judge refusing their motion. The fact that these issues are not regulated by the procedural codes in BiH has resulted in different approaches in judicial practice. According to the majority opinion, if the prosecutor's motion to order special investigative measures is deemed unfounded for any reasons, the preliminary proceedings judge should rule on that motion in a form of a decision. If this is the case, may this decision be appealed? Opinions differ. According to some, this decision is appealable and the party whose motion was refused should be entitled to a decision review, in line with the principle of two instances. Others, however, argue that the decision refusing prosecutor's motion to order SIMs may not be appealed, because this decision is rendered in the investigation stage. (also in accordance with Article 334, paragraph 2 of the CPC RS). Contributing to these different approaches are differing provisions of the criminal procedure codes governing SIMs (Article 318, paragraph 1 of the CPC BiH, Article 318, paragraph 1 of the CPC BDBiH, Article 334, paragraphs 1 and 2 of the CPC FBiH, and Article 334, paragraph 2 of the CPC RS). In some cases, this issue (course of action by the preliminary proceedings judge refusing the prosecutor's motion to order SIMs) was resolved by sending a reasoned notification to the prosecutor informing them that their motion was refused.

[71] Article 119, paragraph 2 of the CPC BDBiH (obtained information and data referred to in this paragraph are considered official secret), Article 133, paragraph 2 of the CPC FBiH, Article 237, paragraph 2 of the CPC RS).

III. 4. Case law of the Court of Bosnia and Herzegovina

This chapter provides examples of the Court of BiH case law in the criminal matters following the decision of the Constitutional Court of BiH No. 5/16 of 1 June 2017, in line with the guidelines mentioned above.

III. 4. 1. Returning motion to extend special investigative measures

On 22 January 2019, the Court received your motion to issue an order extending special investigative measure of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) of the Criminal Procedure Code of BiH (CPC BiH), against the suspects AA et al, for the grounds for suspicion that the criminal offence of *organized crime* under Article 250, paragraph 2 of the Criminal Code of Bosnia and Herzegovina (CC BiH), in conjunction with the criminal offences of *illicit trafficking in narcotic drugs* under Article 195, paragraph 1, and *money laundering* under Article 209, paragraph 3, as read with paragraph 1 of the Criminal Code of BiH (CC BiH), has been committed.

Having reviewed the motion, the Court found certain deficiencies in terms of the application of the provisions of the CPC BiH as follows;

According to the provision of Article 116, paragraph 1 of the CPC BiH, *if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense.*

According to the provision of Article 118, paragraph 3 of the CPC BiH, special investigative measures, referred to in Article 116, paragraph 2, items a) through d) and g) therein, may last up to one month, and *if the measures have produced results and there are reasons to continue with their application in order to gather evidence, they may be extended for another month* ***upon a properly reasoned motion of the prosecutor.***

The motion of the Prosecutor's Office did not specify the reasons necessitating extension of special investigative measures against the individual XX. These reasons **ought to have been based primarily on the *results* of implementation of special investigative measures whose extension is sought**. However, the Prosecutor's Office has based its reasoning primarily on the operative intelligence, without specifying the content and the scope of the results of special investigative measures ordered by the Court on 27 December 2018. The reasoning of the motion, therefore, does not indicate the need for extension of the mentioned measures. It follows from the official note of the SIPA No. 16-04/2-28/19 of 11 January 2019 that *operative activities* in the territory of Bijeljina resulted in the gathering of intelligence on the suspect XX's real estate dealings, including *unverified intelligence*, and that according to thus *gathered intelligence* suspect XX was often seen in the company of AA with whom he goes out for lunch.

The Court emphasizes that the special investigative measure of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) of the CPC BiH, has been implemented against the suspect AA for 3 (three) months already, while the measure of covert following and technical recording of persons, means of transport and objects related to them, referred to in Article 116, paragraph 2, item d) of the CPC BiH, has been implemented for over a month against the same suspect. On 27 December 2018, the Court also issued the order authorizing special investigative measure of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) of the CPC BiH, against the suspect XX.

The motion of the Prosecutor's Office did not specify any of the results of application of the mentioned special investigative measures indicating communications of the suspects AA and XX. Those should have been the expected results of surveillance of telecommunications of the suspect AA or XX and the measures of covert following of the suspect AA.

Further on, the Prosecutor's Office has omitted to include the legal qualification of the offence alleged against the suspect XX on page 3 of the motion, while on page 2/3 it failed to include the description of the act alleged against the same suspect. Therefore, the Court could not discern which offence was alleged against the suspect XX (*illicit trafficking in narcotic drugs* under Article 195, paragraph 1 of the CC BiH or *money laundering* under Article 209, paragraph 3, in conjunction with paragraph 1 of the CC BiH) and how verifying information on this suspect's real estate dealings contributed to the investigation in this case. The Prosecutor's Office is hereby invited to **explain** in a form of a supplemented motion **the grounds for suspicion pertaining to the connection between the suspect XX and the organized crime group whose alleged organizer is suspect AA, and provide detailed description of evidence corroborating these allegations which is derived from the results of the special investigative measures implemented**.

The Court reminds the Prosecutor's Office that the motion to extend special investigative measures must indicate stronger grounds for suspicion that the criminal offence has been committed than the ones determined under the initial orders authorizing the measures. Each new motion to extend special investigative measures should refer to the results of the measures ordered earlier which confirm the grounds for suspicion about the commission of the criminal offence and the urgent need to extend the measures in the interests of the society. The Constitutional Court of BiH issued a decision number U-5/16 of 1 June 2017 to that effect leading to the adoption of the Law on amendments to the Criminal Procedure Code, Official Gazette No. 65/18 of 21 September 2018. According to these amendments, the legality of orders shall be subjected to a rigorous and demanding test of compliance with the new provisions of the CPC BiH during any subsequent main trial.

According to the provision of Article 118, paragraph 1 of the CPC BiH, *the order shall contain the same data as those featured in prosecutor's motion*, which means that the prosecutor's motion must contain all the statutory elements, upon which depends the legality of the court's order. Therefore, the Prosecutor's Office should supplement the motion in line with the quoted provisions **within 3 (three) days** as of the receipt of this document, and rectify the mentioned deficiencies to enable the Court to consider the motion. Otherwise, the Court will refuse the motion in line with Article 148, paragraph 2 of the CPC BiH.

Having reviewed the motion of the Prosecutor's Office number T20 0 KTO 00 15564 18 of 22 January 2019, the Court issued the order number S1 2 K 028361 18 Krn 9 on 25 January 2019 authorizing special investigative measures against other persons as listed in the motion.

PRELIMINARY PROCEEDINGS JUDGE

III. 4. 2. Refusing motion to order special investigative measures

The Court of Bosnia and Herzegovina, judge...., acting in the capacity of a preliminary proceedings judge, in the criminal case against the suspect ..... et al, for the grounds of suspicion that the criminal offence of *organizing a group or an association for the purpose of perpetration of the criminal offences of smuggling of migrants* under Article 189, paragraph 2 of the Criminal Code of Bosnia and Herzegovina (CC BiH), in conjunction with the criminal offence of *smuggling of persons* under Article 189 of the CC BiH, upon the motion of the Prosecutor's Office of BiH number..... to order special investigative measures, pursuant to Article 148, paragraph 3 of the CPC BiH, on 24 June 2019, issues the following:

DECISION

Refusing the motion of the Prosecutor's Office of Bosnia and Herzegovina number ..... to order special investigative measures referred to in Article 116, paragraph 2, items a) and d) of the CPC BiH, against the suspects.....

Explanation

On....., the Court received your motion to issue the order approving and extending special investigative measures of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) and covert following and technical recording of persons, means of transport and objects related to them, referred to in Article 116, paragraph 2, item d) of the Criminal Procedure Code of BiH (CPC BiH), against the suspects ....., for the grounds for suspicion that the criminal offence of organizing a group or an association for the purpose of perpetration of the criminal offences of smuggling of migrants under Article 189, paragraph 2 of the CC BiH has been committed, in conjunction with the criminal offence of smuggling of persons under Article 189 of the CC BiH.

According to the provision of Article 116, paragraph 1 of the CPC BiH, *if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense.*

According to the provision of Article 118, paragraph 3 of the CPC BiH, special investigative measures under Article 116, paragraph 2, item a) through d) and g) therein, may last up to one month, *and if measures have produced results and there are reasons to continue with their implementation in order to gather evidence, they may be extended for another month upon a properly reasoned motion of the prosecutor*.

Mindful of the quoted provisions, the Court has ascertained, upon the review of the contents of the submitted motion, that the motion lacks explanation of the facts and reasons indicating that the person ..... is participating in the commission of the criminal offences alleged against them in the motion, and the important reasons justifying extension of the special investigative measures against the suspects ..... The Court also notes that the content of communication each of the suspects had over the course of the past month, that has operational value and as such is important for the case, allowing the Court to establish the existence of important reasons, has not been delivered. The Court has invited the prosecutor in the letter of 28 May 2019 to supplement the motion in line with the mentioned provision, in the shortest time possible, but not later than 3 (three) days, otherwise the Court would refuse the motion under Article 148, paragraph 3 of the CPC BiH.

Considering that the Prosecutor's Office of BiH did not supplement the motion within the specified deadline as instructed by the Court, including on the day of issuance of this decision, and the fact that the prosecutor was warned of the consequences of non-compliance, the Court has decided to refuse the motion of the Prosecutor's Office of BiH against the suspects .....

PRELIMINARY PROCEEDINGS JUDGE

NOTE ON LEGAL REMEDY: Appeal against this decision may be filed with the panel of this Court referred to in Article 24, paragraph 7 of the CPC BiH within 3 (three) days as of the receipt of the decision.

III. 4. 3. Refusing motion to order special investigative measures

THE COURT OF BOSNIA AND HERZEGOVINA, judge AA, acting in the capacity of a preliminary proceedings judge, in the criminal proceedings against the suspects XX et al, *for the grounds of suspicion that the criminal offence of organized crime under Article 250, paragraph 2 of the Criminal Code of Bosnia and Herzegovina (CC BiH) has been committed, in conjunction with the criminal offence of illicit trafficking in arms and military equipment and products of dual use, under Article 193, paragraph 1 of the CC BiH, the criminal offence of illegal manufacturing and trade of weapons or explosive substances under Article 361 of the Criminal Code of the Republika Srpska (CC RS), and the criminal offence of illicit trafficking in narcotic drugs, under Article 195 of the CC BiH*, upon the motion of the Prosecutor's Office of Bosnia and Herzegovina number..... dated ....., received on ...., and supplemented on ....., for the issuance of order authorizing special investigative measures, pursuant to Article 116, paragraph 2, items a) and d), and Article 118, paragraphs 1 and 3 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), on .... 2018 issues the following:

D E C I S I O N

The motion of the Prosecutor's Office of Bosnia and Herzegovina dated ..... 2017, received on ..... 2017, and supplemented on ..... 2018, to issue the order **authorizing and extending** special investigative measures referred to in Article 116, paragraph 1, items a) and d) of the CPC BiH, against the suspect XX, **is refused as unfounded**.

E x p l a n a t i o n

On ...2017, the Court received the motion to extend and order special investigative measures of surveillance and technical recording of telecommunications, referred to in Article 116, paragraph 2, item a) of the CPC BiH, and covert following and technical recording of persons, means of transport and objects related to them, referred to in Article 116, paragraph 2, item d) of the CPC BiH, against the suspects YY et al, for the grounds of suspicion that the criminal offence of *organized crime* under Article 250, paragraph 2 of the CPC BiH has been committed, in conjunction with the criminal offence of *illicit trafficking in arms and military equipment and products of dual use* under Article 192, paragraph 1 of the CC BiH, the criminal offence of *illegal manufacturing and trade of weapons or explosive substances* under Article 361 of the CC RS, and the criminal offence of *illicit trafficking in narcotic drugs,* under Article 195 of the CC BiH.

On ..... 2018, the Court issued a decision refusing the motion which was appealed by the Prosecutor's Office. Following the appellate decision rendered by the out-of-hearing panel, the case was returned for a new decision-making. Accordingly, on ..... 2018, the Court sent a letter to the Prosecutor's Office returning the motion to be supplemented. The Prosecutor's Office submitted to the Court the supplemented motion on ..... 2018.

According to the provision of Article 116, paragraph 1 of the CPC BiH, *if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense*. According to Article 118, paragraph 1 of the CPC BiH, *prosecutor's properly reasoned motion and the Court order must contain, among other things, the data on the person against whom the measure is to be applied*. The same provision foresees that special investigative measures referred to in Article 116, paragraph 2, items a) through d) and g) of this Code may last up to one month and may be extended for additional month for *particularly important reasons* upon a properly reasoned motion of the prosecutor.

Having reviewed the motion, the Court found certain deficiencies with respect to application of the provisions of the CPC BiH and invited the Prosecutor's Office to supplement the motion with respect to the existence of particularly important reasons necessitating application of special investigative measures in this case against the suspects A, S and XX, in line with Article 118, paragraph 1 of the CPC BiH. The Court reminded the Prosecutor's Office of the decision of the Constitutional Court of BiH No. U-5/16 of 1 June 2017, which emphasizes, among other things, the importance of fulfilment of all requirements for the application of special investigative measures, and that they can be extended after the expiry of one month as of the day they were ordered only if there are particularly important reasons necessitating that. It is expected that these reasons will be more closely defined in the amendments to the CPC BiH. The Court is obliged, pending the harmonization of the relevant provisions of the CPC BiH with the decision of the Constitutional Court of BiH, to exercise due caution in analyzing the foundedness of the motion to extend special investigative measures, and determining whether the results of the SIMs ordered earlier demonstrate compliance with this standard and justify extension of SIMs.

Having reviewed the contents of the supplemented motion of …. 2018, the Court finds that the Prosecutor's Office has failed to supplement the motion in the part concerning particularly important reasons that justify the extension of SIMs against the suspect XX. Such reasons should arise primarily from the results of the SIMs whose extension in sought because only the continuity of the discovered facts and circumstances can justify the extension of these SIMs.

In the explanation of the submitted motions, the Prosecutor's Office mostly referred to the intelligence gathered in the earlier stages of the investigation, without presenting the content and the scope of the results of the SIMs authorized under the Court order dated ….. 2017 against the suspect XX. It was reasonable to expect that the surveillance and technical recording of the suspects listed in the order would lead to discovery of information about the contacts between the suspects and their communication with other persons in relation to the commission of the alleged offense, which could constitute important reasons for the extension of SIMs, in addition to gathered evidence. *The Prosecutor's Office did not refer in their motion to any relevant communication or action documented during the covert following, which would constitute a particularly important reason to extend the SIMs against the suspect XX. Therefore, the reasons for the prosecutor's motion to extend SIMs against this person were unknown to the Court.*

In order for the Court to decide on the necessity of further application of the special investigative measures and ensure legality of their extension, the Court has to review the results of the initial SIMs and base its decision on those results, which were not presented to the Court in this case.

The Court finds the motion against the suspects A, S and Y to be proper and complete and issues the order extending and authorizing special investigative measures referred to in Article 116, paragraph 2, items a) and d) against these persons.

III. 4. 4. Order authorizing special investigative measures

The Court of Bosnia and Herzegovina, judge BB, acting in the capacity of a preliminary proceedings judge, in the criminal proceedings against the suspects ..... et al., for the grounds of suspicion that the criminal offence of organized crime under Article 250 of the Criminal Code of Bosnia and Herzegovina (CC BiH) has been committed, in conjunction with the criminal offence of smuggling under Article 214, paragraph 1 of the CC BiH, the criminal offence of abuse of office or official authority under Article 220, paragraph 1 of the CC BiH, the criminal offence of accepting gifts and other forms of benefits under Article 217, paragraph 1 of the CC BiH, and the criminal offence of customs fraud under Article 216 of the CC BiH, as read with the criminal offence of giving gifts and other forms of benefits under Article 218, paragraph 1 of the CC BiH, deciding upon the motion of the Prosecutor's Office of BiH ..... to order special investigative measures referred to in Article 116, paragraph 1 and 2, item a) of the Criminal Procedure Code of BiH (CPC BiH), Article 117, item d) of the CPC BiH, and Article 118 of the CPC BiH, on .....2018 issues the following

O R D E R

Against the suspects:

1) **.....**;

2) **.....**;

due to the grounds for suspicion that the criminal offence of organized crime, under Article 250 of the CC BiH has been committed, in conjunction with the criminal offences of smuggling under Article 214, paragraph 1 of the CC BiH, abuse of office or official authority under Article 220, paragraph 1 of the CC BiH, accepting gifts and other forms of benefits under Article 217, paragraph 1 of the CC BiH, and customs fraud under Article 216 of the CC BiH, as read with the criminal offence of giving gifts and other forms of benefits, under Article 218, paragraph 1 of the CC BiH,

I

The following special investigative measures **ARE AUTHORIZED**:

SURVEILLANCE AND TECHNICAL RECORDING OF TELECOMMUNICATIONS referred to in Article 116, paragraph 2, item a) of the CPC BiH,

- to wit: interception and recording of conversations using the equipment for interception and recording, recording of all conversations by means of audio equipment which does not imply interception and recording, daily listing of incoming and outgoing calls and messages, and IMEI numbers of mobile phones, including surveillance of base stations through which mobile phones are communicating, for the purpose of detecting the suspects in the preparation and perpetration of the mentioned criminal offences, detecting and identifying other members of the group and gathering material evidence against all of them.

II

Special investigative measures referred to in Article 116, paragraph 2, item a) of the CPC BiH and ordered under item **I** herein shall be approved for the period of 1 (one) month, **from .....2018 until .....2018**.

III

This order is issued based on the granted motion of the Prosecutor's Office of BiH ..... to order special investigative measures and attachments thereto, in line with Article 116, paragraph 2, item a), Article 117, item d), and Article 118, paragraph 1 and 3 of the Criminal Procedure Code of Bosnia and Herzegovina (Motion).

Based on the Motion of the Prosecutor's Office to order special investigative measures and attachments thereto, the Court established the existence of grounds for suspicion that the suspects **.....**, acting in the capacity of ....., failed to perform their official duties and thus committed the criminal offence of abuse of office or official authority under Article 220 of CC BiH, that they accepted gifts to undertake actions they are prohibited from undertaking (.....), which constitutes elements of the criminal offence under Article 217 of the CC BIH, in conjunction with the criminal offence of organized crime under Article 250 of CC BiH. It follows from the evidence enclosed with the Motion, that there are grounds for suspicion that the mentioned persons organized ...., while the suspects ..... Modus operandi .... was witnessed by the person from whom the suspect .... requested 500 EUR in order to ....., but who refused to give this award.

In view of the above-mentioned, the Court has found that the requirements to implement special investigative measures referred to in Article 116, paragraph 2, item a) of the CPC BiH, ordered under item I herein, have been met considering that the evidence of the suspects' involvement in the mentioned activities could not be otherwise gathered. The Court has taken into account the fact that all persons participating in the commission of the criminal offences (.....) have been cooperating and communicating efficiently, which is evident in their preparation of all necessary documents prior to committing the criminal offences, to ensure that everything is in order in case of any inquiries. Also, ..., making it impossible to approach the suspects in any other way, also bearing in mind that some of them ..... were investigated by the SIPA earlier, and given that they know many of the officials of this agency, they are expected to be extremely cautious in carrying out their criminal plans. The Court has decided, therefore, that the Motion is well-founded and that the evidence in this case could not be gathered by any other means and that the gathering of evidence would be accompanied by disproportional difficulties, and issued the order as stated herein.

The Court has examined the foundedness of the Motion in light of the decision of the Constitutional Court of BiH No. U-5/16 of 1 June 2017, taking into consideration the arguments of the Constitutional Court therein and decided that the Motion was founded. Under the mentioned decision, the Constitutional Court of BiH declared the provision of Article 117, item d) of the CPC BiH unconstitutional, as it unjustifiably allowed the use of special investigative measures on a plethora of criminal offences. The provision therefore needs to be modified by specifying criminal offences or elements thereto that fall into the narrow category of offences in respect to which there is a legitimate social interest justifying interference with the right to privacy of such extent. Since the legislator has not enforced the mentioned decision to date, the Court must ascertain in each individual case if the motion for special investigative measures meets the criteria defined in the decision.

The Prosecutor's Office has proposed special investigative measures in the present case against ....., an employee of ....., and against three ....., who have acted in concert over a fairly long period of time in order to avoid applying relevant provisions of ..... and thus acquire illegal property gain, whereby they knowingly undermined the functioning of a public service. The evidence indicates that there are grounds for suspicion that ..... have received bribe from ..... in return for certain favors, which represents an internal attack on the integrity of the service and warrants urgent discovery of all aspects of commission of this criminal offence that undisputedly undermines the fundamental values of the society. In this context, it bears remembering that BiH has been plagued by endemic corruption which impedes its progress towards EU integrations, as confirmed by the recent reports of the international groups dealing with this issue. The Court was mindful of the concurrence of

several criminal offences in the present case defined in Chapters XVIII and XIX of the Criminal Code of BiH, and that the criminal offence under Article 217 of the CC BiH (accepting gifts and other forms of benefits) is punishable by a term of imprisonment between one and ten years, which indicates seriousness of this act against the object of protection, and leads to a justified expectation that the legislator will increase the common punishment threshold as basis for determining validity of special investigative measures, and include the criminal offence under Article 217 of the CC BiH under this modified provision.

The totality of the described facts has convinced the Court that interference with the individual's privacy through the measures ordered in the operative part herein is proportional to the legitimate goal of their application.

III. 4. 5. Order to extend special investigative measures

The Court of Bosnia and Herzegovina, judge ....., acting in the capacity of a preliminary proceedings judge, for the grounds of suspicion that the criminal offence of organized crime under Article 250, paragraph 2 and 3 of the Criminal Code of BiH (CC BiH) has been committed, in conjunction with the criminal offences of illicit trafficking in narcotic drugs under Article 195, paragraph 1 and money laundering under Article 209, paragraph 3, as read with paragraph 1 of the CC BiH, deciding upon the Motion to order special investigative measure of the Prosecutor's Office of BiH No.... dated... January 2019, based on Article 117, item b) and Article 118, paragraph 1 and 3, as read with Article 116, paragraph 2, item a) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), on ... January 2019, issues the following:

O R D E R

against the suspects:

1.XXX;

2.YYY;

3.ZZZ;

4.QQQ,

due to the existence of the grounds for suspicion that the criminal offence of organized crime under Article 250, paragraph 2 and 3, in conjunction with the criminal offences of illicit trafficking in narcotic drugs under Article 195, paragraph 1 and money laundering under Article 209, paragraph 3 of the CC BiH has been committed.

I

Special investigative measure of **SURVEILLANCE AND TECHNICAL RECORDING OF TELECOMMUNICATIONS** under Article 116, paragraph 2, item a) of the CPC BiH is hereby **EXTENDED** with respect to**:**

- **XXX**, user of the telephone number **...**;
- **YYY**, user of the telephone number**....**;
- **ZZZ**, user of the telephone number**...**;
- **QQQ**, user of the telephone number**...**,

and all other telephone devices with IMEI numbers to be determined through surveillance of the user numbers and placed under surveillance and technical recording, and other user numbers and telephone devices identified through the implementation of the special investigative measure of surveillance of user numbers and telephone devices as those belonging to the mentioned persons in contact with other suspects and in contact with other persons, in order to detect the suspects in the preparation and perpetration of the criminal offences charged against them.

II

Special investigative measure under item **I** herein is authorized for the period of one month, **from .... January 2019 until .... February 2019**.

III

The order is issued based on the reasoned motion of the Prosecutor's Office number ... of ... January 2019 and the attachments thereto[72] (Motion).

The Motion indicates the existence of grounds for suspicion that the suspect *XXX*, in the period from ... including the present day, in the territory of BiH, A, B, C and D, organized and managed a group for organized crime referred to in Article 1, paragraph 22 of the CC BiH, which he formed for the purpose of illegal international trade in narcotic drugs by organizing purchase and transport of the narcotic drugs cocaine from D into BiH and heroin from C into BiH, personally and through other members of the group, including distribution and sale of these narcotic drugs in the territory of BiH, A, B and C, legalizing proceeds of sale by depositing the money on the accounts of the business entities in BiH, whereby this group for organized crime was joined by *YYY*, *ZZZ*, SS, MM, person nicknamed P from C, RR, EE, unknown person from the territory of W and T, who each played designated roles in the described purchase, transport and sale of narcotic drugs, *QQQ*, HH, OO and ŠŠ who each played designated roles in covering up the proceeds of sale of the narcotic drugs. The group operated in the following manner. The organizer of the group XXX would travel to D several times in the course of one month in his personal vehicle or by plane, while one of the girls, members of the group, would travel to D in another vehicle or by plane, with the third person of trust RR carrying large quantities of cash and handing it over to PP in B, and sometimes to the territory of ..., whereafter PP using his companies in BiH and B transferred the money to the organizer of the group in D and C through one of the intermediary companies. Upon the purchase of the narcotic drug cocaine in D, the drug would be transported from D into BiH by of the female members of the group, ZZZ or FF, in small passenger vehicles bought for that purpose in D or in luxurious passenger vehicles rented only for that purpose. Heroin from D would be transported by ŠŠ, whereafter upon arrival in BiH, it would be distributed within two to three days to the buyers through other members of the group, TT II and another person, whereafter the vehicles used for transport of the narcotic drug from D, with D license plates, would no longer be used to smuggle narcotic drugs and would be sold at the scrap yard. The cash earned selling the narcotic drugs XXX would entrust to be deposited on the accounts of the companies owned by his close associates for the purpose of its legalization, specifically to the accounts of the companies owned by QQQ, to wit A Ltd. and other.

According to the Motion and the attachments thereto, special investigative measures implemented in the previous period resulted with the discoveries confirming all intelligence and data gathered thus far about the modus operandi of the organized crime group. Special investigative measures have revealed that the suspects XXX and YYY are still using the garage in the street ....., presumably to store ..... According to the information gathered earlier in the investigation, the same garage was used to store the narcotic drug cocaine smuggled from ....., and heroin smuggled from D. XXX has requested from YYY to contact RR from ..., to find out the price of ... for the purpose of its further sale (intercepted communications number 733, 734, 735, 740 of 29 December 2018), which can be brought into connection with earlier intelligence indicating that XXX used the services of RR to purchase .... from JJ from ....., who in accordance with their agreement had placed in the packaging of 1 kg of ..... half kg of the narcotic drug cocaine, which was then smuggled together with .... to BiH. Conversations intercepted in January 2019 between YYY and KK revealed that KK inquired if XXX was going to come to see him, which shows that the earlier plan for purchase of the narcotic drug from December 2018 was not carried out and that KK from ..... was still asking to meet with XXX. Authorized official persons have placed GPS devices on the vehicles used by the suspects ..... and ZZZ, based on the order of the BiH Court, which should provide information about the locations visited by these persons, all in order to locate "storages" used by this group. It follows from the intercepted communications that the suspect ZZZ has very good relations with XXX who is financing her and in return she provides services of transportation to the locations suspected to be the

[72] Motion to apply special investigative measure of surveillance and technical recording of telecommunications submitted by the Ministry of Security of BiH – State Protection and Investigation Agency No. ... of ... 2 January 2019 with attachments, to wit: Official Note No. ... of... January 2019; Official Note No. ... of ... January 2019; Official Note No. ... of ... January 2019; Official Note No. ... of ... January 2019.

storages for concealment of narcotic drugs. Important in this regard is the communication between these two persons which occurred on ..... According to the most recent report on implemented measures, the suspect XXX had frequent communication with the individual PP, who according to operation intelligence has been depositing big amounts of cash to the account of the companies owned by QQQ, and it is suspected that this money originates from the commission of the criminal offence of illicit trafficking in narcotic drugs. Communication number 3350 was particularly revealing for the Court. It took place on .... December 2018. The communication revealed that PP was supposed to hand over a big sum of money to the suspect QQQ who told him: "... we shall talk when we see each other, I'll explain why I need it...". Taking into account all the mentioned information and intelligence gathered through special investigative measures, it can be concluded that there exist grounds for suspicion that the conversations between QQQ and PP refer to the legalization of money that the group, headed by XXX, acquired through commission of the criminal offence of illicit trafficking in narcotic drugs.

Considering that the grounds for suspicion that the suspects committed the criminal offence charged against them were established in the Motion, as confirmed by the results of the SIMs implemented earlier, the Court has found the Motion to be justified, under the terms of Article 118, paragraph 3 of the CPC BiH, for the purpose of gathering additional evidence about the activities of the group. Since this case involves serious and complex criminal offences, and a highly structured and conspirative organization with significant financial power trading in large quantities of narcotic drugs on the international level, between D and BiH (for cocaine) and between H, T and BiH (for heroin), the Court deems these circumstances to be objective difficulties impeding regular gathering of evidence on the criminal offences, necessitating implementation of special investigative measures to gather evidence, as outlined in the Motion. The Court has issued this order accordingly.

IV

Implementation of special investigative measures referred to in this order shall be entrusted to the members of the State Investigation and Protection Agency of BiH, Operational Support Division. Implementation of SIMs may be entrusted to another authorized police agency and another authorized agency may provide technical support to implementation of special investigative measures, in compliance with the orders and instructions of the Prosecutor's Office of BiH.

V

Police agencies, departments and members of specific police agencies designated by the Prosecutor's Office of Bosnia and Herzegovina may provide operational and/or technical support to the SIPA in the implementation of the special investigative measures ordered herein if there is a need for that, in compliance with the orders and instructions of the Prosecutor's Office of Bosnia and Herzegovina.

VI

The prosecutor of the Prosecutor's Office of Bosnia and Herzegovina shall deliver forthwith to the preliminary proceedings judge of the Court of BiH a report on implemented measures, upon the completion of the measures and within the deadline and scope specified in this order, for the purpose of inspection of enforcement of this order.

VII

The prosecutor of the Prosecutor's Office of Bosnia and Herzegovina ... is authorized to coordinate the enforcement of this order.

VIII

This order shall be kept in a sealed envelope.

PRELIMINARY PROCEEDINGS JUDGE

III. 4. 6. Notifying the person against whom special investigative measures were implemented

Pursuant to Article 119, paragraph 3 of the CPC BiH, you are hereby informed that you were a subject of special investigative measures of **surveillance and technical recording of telecommunications**, referred to in Article 116, paragraph 2, item a) of the CPC BIH, between 25 January and 23 April 2019, and **covert following and technical recording of persons, means of transport and objects related to them**, referred to in Article 116, paragraph 2, item d) of the CPC BiH, between 25 January and 23 April 2019. These measures were ordered against you due to the disproportional difficulties associated with the gathering of evidence and because evidence could not be gathered by other means.

The orders to implement special investigative measures were ordered against you by the Court of BiH upon the motion filed by the Prosecutor's Office of BiH, on the **grounds for suspicion** that the criminal offence of organizing a group of people or association for the purpose of committing a criminal offence of smuggling of migrants under Article 189a, paragraph 1 and 2 of the Criminal Code of Bosnia and Herzegovina and other.

You are advised that in accordance with Article 119, paragraph 3 of the CPC BiH, you may request from the Court to review the legality of the order and the method of its enforcement within 3 (three) days as of the receipt of this notification.

PRELIMINARY PROCEEDINGS JUDGE

Number and name assigned to the casefile	**S1 Krn**
Subject of the official note	Information about the implementation of SIMs
Officer's name	
Date of the official note	... 2019

The Court of Bosnia and Herzegovina, in line with the provision of Article 119, paragraph 3 of the CPC BiH, has made provisions to notify the suspects in this case about the implementation of special investigative measures against them.

Having reviewed the casefile, it was established that these persons did not maintain a registered permanent or temporary residence and that they were foreign nationals.

Considering that this writ contains strictly confidential information, whose disclosure to unauthorized persons might jeopardize the rights of the person who was a subject of SIMs, as foreseen under Article 8 of the ECHR, the Court did not publish the writ on the noticeboard.

The persons, therefore, cannot be informed about the implementation of the special investigative measures at this time. The Court shall inform the persons about the referenced measures as soon as it obtains information about their address.

The judge seized with the case has been duly informed.

III. 4. 7. Notifying the person against whom special investigative measures were implemented (review of legality of the order and method of its enforcement)

Number: .... KV
Sarajevo, 12 April 2017

The Court of Bosnia and Herzegovina, in the panel composed of judges ....., as the president of the panel and .... and ....., as members of the panel, in the criminal case against the suspects XY and YY, for the grounds for suspicion that the criminal offence of abuse of office or official authority under Article 220 of the CC BiH and the criminal offence of illegal interceding under Article 219 of the CC BIH have been committed, deciding upon the request of the suspect XY to review legality of the order authorizing special investigative measures, pursuant to Article 119, paragraph 3 of the Criminal Procedure Code of BiH, issues the following

D E C I S I O N

I

It has been ascertained, in line with the Criminal Procedure Code of BiH, that the preliminary proceedings judge of this Court issued the order number S1 2 K XXXXXX 16 Krn of 20 May 2016, authorizing special investigative measures of surveillance and technical recording of telecommunications, under Article 116, paragraph 2, item a) of and covert following and technical recording of persons, means of transport and objects related to them, under Article 116, paragraph 2, item d) of the Criminal Procedure Code of BiH and that these measures were implemented in line with the order specifying the scope and the duration of measures.

II

It has been ascertained that the suspect was not informed about the special investigative measures implemented against him under Article 116 of the CPC BiH, *immediately* upon their implementation.

E x p l a n a t i o n

The preliminary proceedings judge of this Court, deciding on the motion of the Prosecutor's Office number: TXX XX KTA YYYYYYY 16 of 20 May 2016, due to the grounds for suspicion that the criminal offence of abuse of office or official authority, under Article 220 of the CC BiH and the criminal offence of illegal interceding under Article 219 of the CC BiH were committed, issued the order number S1 2 K XXXXXX 16 Krn on 20 May 2016 authorizing special investigative measures against the suspects XY and YY, pursuant to Article 116, paragraph 2, item a) and d) of the CPC BiH, which may be implemented until 20 June 2016.

Preliminary proceedings judge notified the suspects in writing on 31 March 2017, in line with Article 119, paragraph 3 of the CPC BiH, that they were subjects of special investigative measures and advised them of their right to request review of legality of the order S1 2 K XXXXXX 16 Krn 0f 20 May 2016 and of the method by which the order was enforced.

On 7 April 2017, the suspect XY submitted a request to review legality of the special investigative measures stating that in early December 2016 he was informed verbally by the acting prosecutor that special investigative measures were implemented against him. Considering that he was not notified to that effect by the Court, the suspect filed a request to be duly notified. The suspect therefore argues that his right to be notified about the special investigative measures forthwith was violated, because he was officially notified by the Court about the measures only ten months later, counting from the date when the measures were terminated. The suspect contests the legality of the order arguing that he was examined as a witness in the same criminal case in February 2017, which makes his status of a suspect questionable.

Having reviewed the casefile, the panel decided as stated in the operative part herein for the following reasons:

In the process of review of legality of the mentioned order, pursuant to the provision of Article 118 of the CPC BiH, and its contents, the panel has established that the order of the Court number S1 2 K XXXXXX 16 Krn of 20 May 2016 was issued upon a reasoned motion of the prosecutor. The motion contained the data on the person against whom the measure was to be applied, the grounds for suspicion, the reasons for the special investigative measures and other important circumstances necessitating their application, the special investigative measure sought and the method of its implementation, including the scope and the duration of the SIMs.

Further on, the order contains an explanation of the grounds for suspicion that the suspect committed the criminal offence charged against him and the reasons which led the Court to conclude that in this case evidence could not be gathered by other means or that the gathering of evidence would be accompanied by disproportional difficulties. The panel finds the order to be sufficiently specific with respect to the factual basis and evidence that corroborates the existence of grounds for suspicion and makes the issuance of the order justified. The standard established in the decision of the European Court of Human Rights in the case *Dragojević vs. Croatia*[73] has been thus fulfilled.

Considering that special investigative measures interfere with one of the fundamental human rights foreseen in Article 8 of the ECHR (right to privacy and respect for family life), which may be restricted only to protect legitimate interests of the society, the panel has examined whether these measures were justified from the aspect of their necessity. The panel finds that the order was justified because the same objective could not be achieved by other measures, for which the Court provided clear and sufficient reasoning.

However, notwithstanding the legality of the Court order number S1 2 K XXXXXX 16 Krn of 20 May 2016, the Court finds that Article 119, paragraph 3 of the CPC BiH was violated because the suspect was not notified about the special investigative measures implemented against him without delay upon the completion of the measures referred to in Article 116 of the CPC BiH and that the reasonable deadline for notifying the suspect was exceeded.

According to the mentioned order, "*preliminary proceedings judge shall, forthwith, upon completion of the measures referred to in Article 116 herein, notify the person against whom the measure was applied*."

Although the Code does not provide a precise definition of the time when the suspect must be notified of the special investigative measures implemented, the panel was mindful of the fact that the suspect must be notified as soon as possible upon the completion of the SIMs because these measures interfere with one of the basic human rights and freedoms.

The suspect in the present case was notified in writing by the preliminary proceedings judge on 31 March 2017 while the special investigative measures were implemented between 20 May 2016 and 20 June 2016. The suspect was notified nine months after the measures ceased to be applied.

Taking into account that the special investigative measures referred to in Article 116, paragraph 2, item a), may last up to six months in line with Article 118, paragraph 3 of the CPC BiH, the panel finds that the suspect should have been notified forthwith, upon the expiry of this deadline, in order to comply with the quoted provision of the law, which was not done in this case.

73 Decision number 68955/11, Decision of 15 January 2015

However, failure to comply with Article 119, paragraph 3 of the CPC BiH does not automatically mean that the gathered evidence is absolutely illegal because these are procedural provisions that govern procedures which follow after evidence has been gathered and that the suspect in the criminal proceedings still has all procedural mechanisms on his disposal to request review of legality of the SIMs implemented.

Based on the above-mentioned, the Court decided as stated in the operative part herein.

PRESIDENT OF THE PANEL

JUDGE

NOTE ON LEGAL REMEDY: No appeal shall be allowed against this decision.

III. 4. 8. Order to destroy data

The Court of Bosnia and Herzegovina, judge ..., acting in the capacity of a preliminary proceedings judge, in the criminal proceedings against the suspect AA, for the grounds for suspicion that the criminal offence of organizing a group or an association for the purpose of committing a criminal offence of smuggling of migrants under Article 189a, paragraph 2 of the Criminal Code of Bosnia and Herzegovina, in conjunction with the criminal offence of smuggling of persons under Article 189 of the CC BiH, issues the following order in line with Article 119, paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), on 28 August 2019.

ORDER

to destroy data gathered through application of special investigative measures

I THE EVIDENCE ROOM of the Court of BiH is ORDERED TO DESTROY the data obtained through application of special investigative measures in the case of the Prosecutor's Office of BiH number T20 0 KTO ..... 18, submitted on 1 (one) DVD labeled "Bosnia and Herzegovina, Ministry of Security, State Protection and Investigation Agency, ..., and marked with the text "Dispatched on ..... 2019, number: I.....CD".

II There shall be a record of the destruction of the referenced material and accompanying photographs.

III This order shall be enforced forthwith and a report thereto shall be delivered promptly to the preliminary proceedings judge.

PRELIMINARY PROCEEDINGS JUDGE

Annex:

- 1 DVD in a sealed envelope

III. 4. 9. Refusing appeal as unfounded

The Court of Bosnia and Herzegovina, the panel composed of judges ....., as the president of the panel, and judges .... and ....., as members of the panel, for the grounds for suspicion that the criminal offence of abuse of office or official authority under Article 220, paragraph 3, as read with paragraph 1 of the Criminal Code of Bosnia and Herzegovina (CC BiH) has been committed, in conjunction with Article 54 of the CC BiH, deciding upon the appeal of the Prosecutor's Office of Bosnia and Herzegovina, number: T20 0 KTK XXXXXXX 17 of 13 February 2017, lodged against the decision of the Court of BiH No. S1 2 K XXXXXXX 17 Krn3 of 10 February 2017, issues the following decision pursuant to Article 321, paragraph 2 and 3 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) on .....2017.

D E C I S I O N

The appeal of the Prosecutor's Office of Bosnia and Herzegovina number TT20 0 KTK XXXXXXX 17 of .....2017, from the decision of the Court of BiH number S1 2 K XXXXXXX 17 Krn3 of .....2017 **is refused as unfounded**.

E x p l a n a t i o n

The motion of the Prosecutor's Office of BiH No. T20 0 KTK XXXXXXX 17 of 13 February 2017 was refused under the decision of the Court No. S1 2 K XXXXXXX 17 Krn3 of 10 February 2017 in the part referring to the issuance of the order authorizing special investigative measures referred to in Article 116, paragraph 2, item d) of the CPC BiH against the suspect XY, finding the motion to be lacking convincing reasons and a summary of important circumstances necessitating special investigative measures referred to in Article 116, paragraph 2, item d), which are mandatory contents of the motion under the terms of Article 118, paragraph 1 therein.

The Prosecutor's Office of BiH appealed the decision on the ground of erroneously and incompletely established state of facts pursuant to Article 299 of the CPC BiH. According to the appeal, the Court had set an unreasonably high standard for inspection of compliance with the requirements governing special investigative measures under Article 116, paragraph 1 and Article 118, paragraph 1 of the CPC BIH, which exceeded the threshold foreseen under the same Code. The fact that the Court issued three search warrants and the order to seize the suspect's computer cannot be used as an argument for the conclusion that these measures would produce evidence on the commission of the criminal offence and the perpetrators, thus eliminating the mentioned requirement of Article 116, paragraph 1 of the CPC BiH. The Prosecutor's Office further argued that the established fact that the suspect demonstrated interest in the investigation and that she expressed willingness to actively contribute to gathering of information to advance the investigation should be observed in the context of the established grounds for suspicion that the suspect committed the mentioned criminal offence, and that upon learning that the investigation is directed against her, the Court should have drawn a logical conclusion that she would do everything to conceal evidence, in particular the evidence pertaining to money. Lastly, the Prosecutor's Office contended that the Court in the contested decision assessing if evidence could be gathered by other means and if it would be accompanied by disproportional difficulties, failed to take into account the reasons outlined in the motion, to wit the time between the commission of the offence and discovery of money disappearance and the fact that money was misappropriated in cash, which significantly impeded the following of money, constituting extreme and disproportional difficulties for the investigation. In the conclusion of the appeal, the Prosecutor's Office proposed that the out of hearing panel honors the appeal, modifies the contested decision or revokes it and returns the case for a new decision-making.

The appeal is unfounded.

The panel notes the fact that special investigative measures represent radical interference with human rights and freedoms recognized in the recent history to protect the most important social values. In essence, these measures represent derogation from the rights guaranteed under the European Convention of Human Rights and the Constitution to enable the gathering of evidence necessary for the criminal proceedings which could not be otherwise gathered by regular investigatory measures.

Considering that this is an exception from the regular procedures and investigative techniques, the legislator has prescribed strict requirements and mechanisms to control the application of special investigative measures. According to those requirements "*if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense referred to in Article 117 of this Code".*

The wording „*if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties*", according to all rules of interpretation, implies circumstances that prevent the prosecutor from gathering evidence on legally relevant facts, or disproportional difficulties which would accompany the gathering of evidence, and thus slow down and protract the investigation.

It is clear, based on the quoted provision, that special investigative measures may not be applied if it is possible to gather evidence by other means, that is, by undertaking investigatory measures, which was done in the present case through search warrants and order to seize the computer from the suspect.

The Court hereby emphasizes other specificities of special investigative measures, namely: a) the fact that these measures can be ordered only for specific criminal offences (Article 117 of the CPC BiH), b) that the Prosecutor's Office must corroborate its argument about not being able to gather evidence through other investigatory measures or disproportional difficulties accompanying that process (Article 116, paragraph 1 of the CPC BiH), c) the fact that the motion of the Prosecutor's Office to order these measures must be properly reasoned, clear and precise (Article 118, paragraph 1 of the CPC BiH) .

The preliminary proceedings judge in the present case reviewed the motion of the Prosecutor's Office and inspected its compliance with the requirements to order the measure sought and correctly established that the motion did not contain convincing reasons and other important circumstances necessitating application of special investigative measure under Article 116, paragraph 2, item d) of the CPC BiH. The reasons must refer primarily to the evidence which could not be gathered without encountering disproportional difficulties, or evidence which could not be gathered in any other way. The Prosecutor's Office did not provide the preliminary proceedings judge with other necessary data to order the measure sought besides the statement that the suspect "*showed an interest in the investigation*" and that a fairly long period of time has passed since the commission of the offence. One of the reasons to order special investigative measures, according to the prosecution, is the fact that this matter involves the use of cash which is hard to trace, and requires detecting and identifying persons meeting with the suspect. Further on, because of the interest of the suspect in the investigation, it would be possible to trace the money flow and discover how the money went missing, which in this panel's opinion is unfounded as this type of special investigative measure may be ordered to detect and identify persons committing criminal offences, or preparing to commit an offence, and not after a fairly long period of time had passed from the commission of the criminal offence.

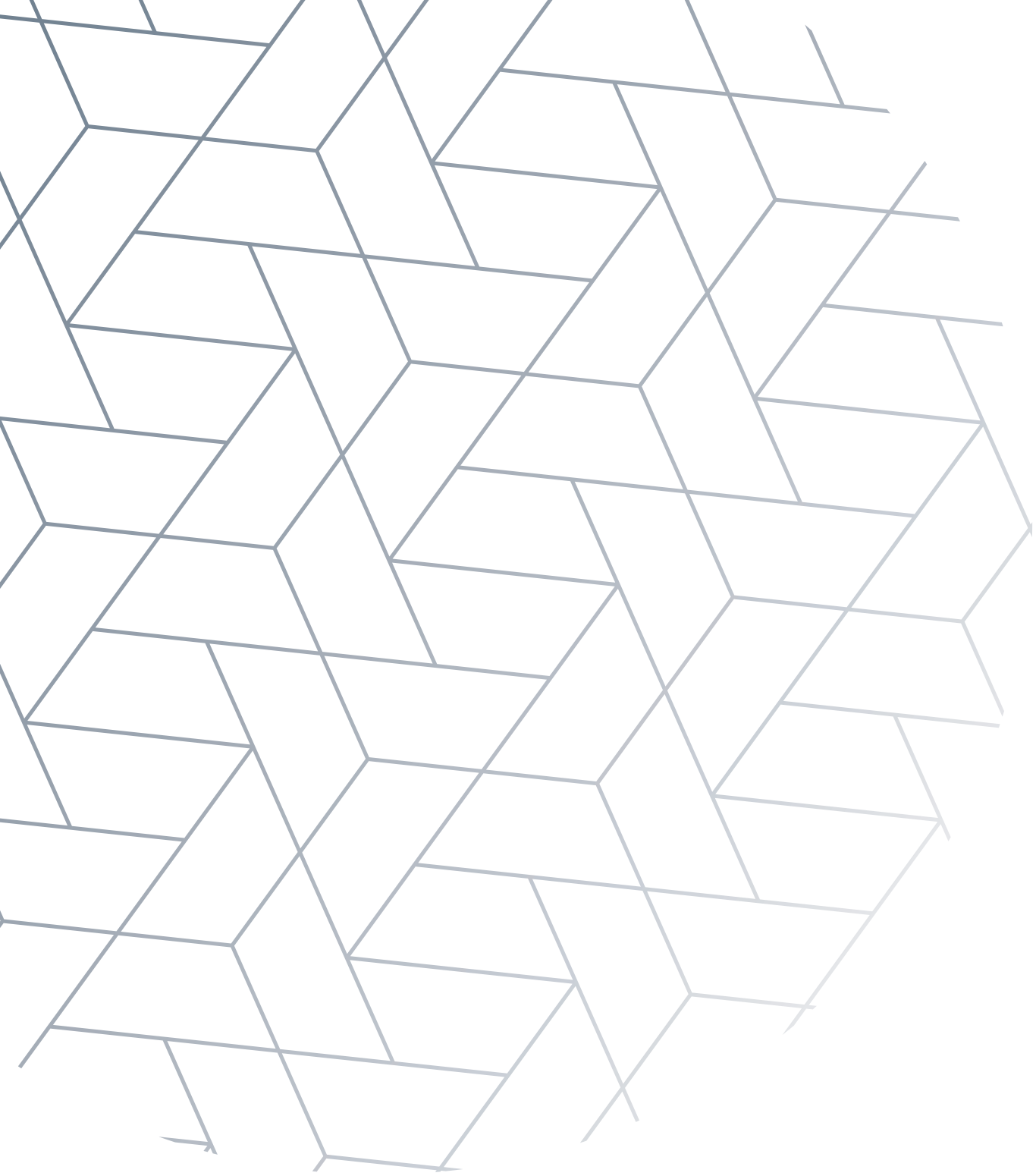
Therefore, the panel finds that the preliminary proceedings judge drew a correct conclusion that regular investigative measures could produce evidence on the criminal offence and the perpetrators, which means that the second requirement of Article 116, paragraph 1 of the CPC BiH has not been fulfilled, as well as the requirement related to the application of the sought measure under Article 116, paragraph 2, item d) of the same Code.

The panel concludes that the preliminary proceedings judge rendered a correct and lawful decision refusing the motion of the Prosecutor's Office as unfounded, and refuses the appeal against this decision as unfounded.

PRESIDENT OF THE PANEL

JUDGE

NOTE ON LEGAL REMEDY: No appeal shall be allowed against this decision.



4.

Presentation of evidence obtained by special investigative measures*

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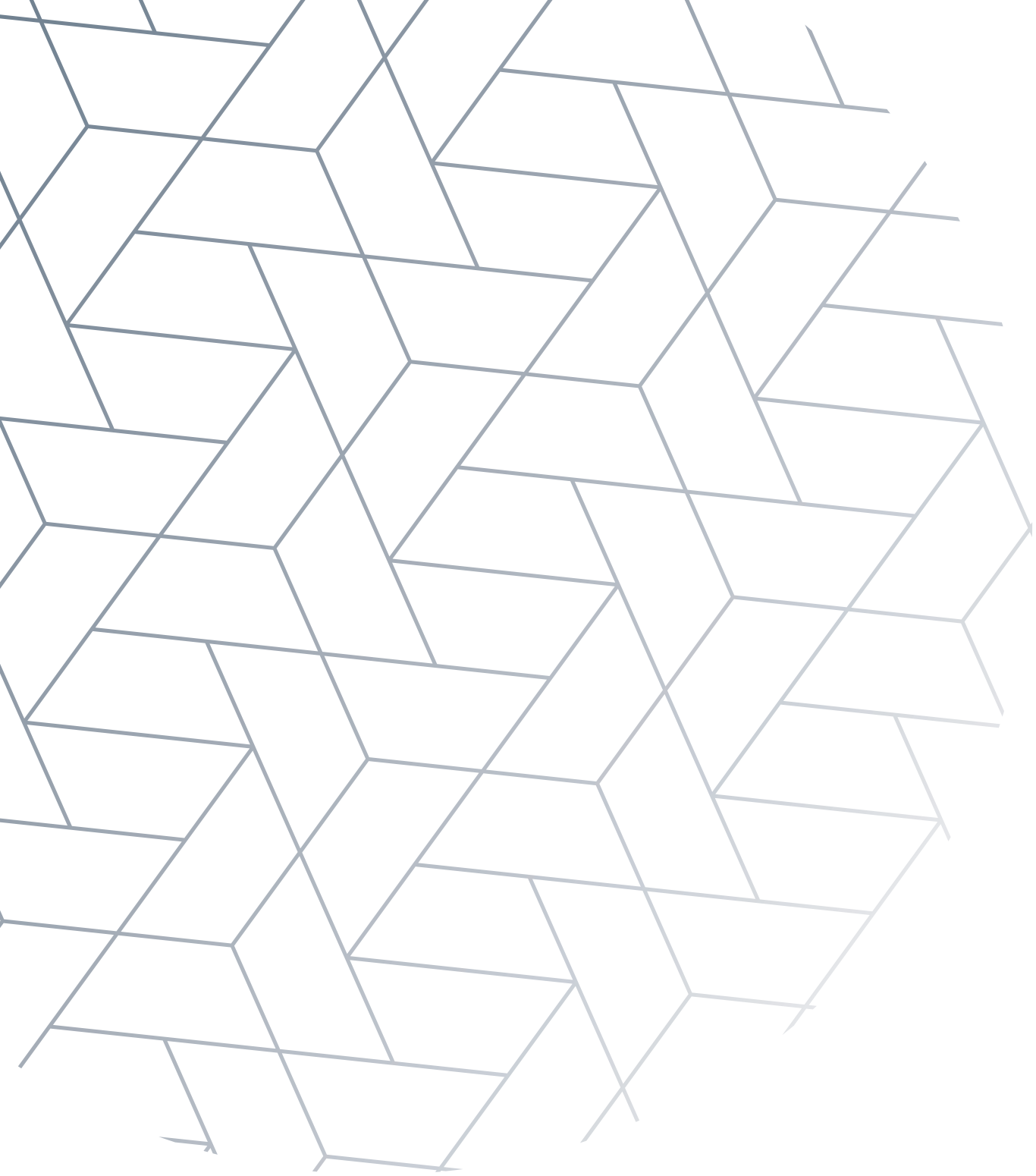

Evidence in the criminal proceedings is presented at the main trial, which can be considered the central, or key part of the proceedings. All evidence is presented in this manner, both that of the prosecution, and that of the defense. It bears mentioning that the importance of evidence does not depend on the party proposing or presenting it. What is important is that evidence was obtained in compliance with the procedure prescribed by the law, or in other words, that evidence is legal. Once its legality is ensured, it is ultimately irrelevant if the evidence was collected by regular activities ("regular" activities of evidence gathering), or by special investigative measures. In evaluating the legality of individual pieces of evidence, the essential starting point is the provisions of the Criminal Procedure Code, in particular Article 10 of the CPC of BiH.[74]

In the context of the criminal procedure, evidence is the source of knowledge on the facts that are established in the given criminal proceedings. Established facts are always legally relevant ones, or in other words, facts determining the application of substantive or procedural law to the given criminal matter.

In the context of evidence obtained by special investigative measures, it should be emphasized that their presentation requires caution. This is evidence that has been obtained by a necessary and legal intrusion upon the privacy of the person who was subject to special investigative measures, or by infringing on their fundamental rights and freedoms.

[74] Article 10 of the CPC of BD BiH, Article 11 of the CPC of FBiH, Article 10 of the CPC of RS.

IV. 1. The principle of imminent presentation of evidence

As a rule, evidence is presented imminently at the main trial, with a few exceptions allowed. Imminent presentation of evidence is an important principle, which requires the adjudicating court in the evidentiary proceedings to be in direct contact with the original evidence. This means that the court will form its impressions of each piece of evidence and the whole body of evidence in the case by direct observation. Thereupon, the court will base its decision in the given criminal matter on the evidence presented. In this manner, the court also directly hears the factual submissions of the parties and their theories about the criminal incident which is the subject of trial. Evidence obtained by special investigative measures is also presented in this manner. The phases of evidentiary proceedings are precisely defined in Article 261 of the CPC of BiH.[75] Paragraph 1 of this Article provides that parties and the defense attorney are entitled to call witnesses and to present evidence. Paragraph 2 provides that unless the judge or the Panel, in the interest of the justice, decides otherwise, the evidence at the main trial shall be presented in the following order: a) evidence of the prosecution; b) evidence of the defense; c) rebutting evidence of the prosecution; d) evidence in rejoinder to the Prosecutor's rebutting evidence; e) evidence whose presentation was ordered by the judge or the Panel, and f) all evidence relevant for the pronouncement of the criminal sanction. The structure of this provision clearly shows that the parties are the ones who confront each other and present evidence, while the court has essentially a limited role in this aspect (though foreseen by the law). Pursuant to Article 227 paragraph 1 item e) of the CPC of BiH[76], in the indictment submitted for confirmation, the prosecutor proposes evidence to be tendered at the main trial, listing witnesses and experts or pseudonyms of protected witnesses, as well as the documents to be read and items that will be used as evidence. The prosecutor reflects on the evidence on which the indictment is based in the opening statements. At this stage of the main trial, the prosecutor and defense counsel present their case theory. They may also specify the evidence that they will tender to corroborate their particular claims.

The applicable procedural code prescribed the presentation of evidence identically for all types of evidence. It is for the court to decide which evidentiary motions it will grant, or which evidence proffered by the prosecution and the defense will be presented in the course of the evidentiary proceedings. The method of presentation of evidence varies, depending on the variety of the evidentiary materials. Pursuant to Article 274 paragraph 1 of the CPC of BiH[77], records concerning the crime scene investigation, the search of dwellings and persons, the forfeiture of things, books, records and other evidence, shall be introduced at the main trial in order to establish their content, and at the discretion of the judge or presiding judge, their content may be entered in the record in summarized version. If necessary, a police official who made the given record, or official note, can be heard to remove doubts that may be raised during the presentation of that documentary evidence. Paragraph 4 further specifies that evidence referred to in paragraph 1 of this Article shall be read unless the parties and the defense attorney agree otherwise. This provision is applicable to evidence obtained by special investigative measures when it is presented as evidence at the main trial. Evidence obtained by this "special" procedure does not continue to be treated as special in the subsequent stages of the criminal proceedings. Rather, it is subject to the general rules of the criminal procedure code pertaining to the presentation of evidence at the main trial. The circumstances that warranted the

75 Article 261 of the CPC of BD BiH, Article 276 of the CPC of FBiH, Article 276 of the CPC of RS.

76 Article 227 paragraph 1 item e) of the CPC of BD BiH, Article 242 paragraph 1 item e) of the CC of FBiH and Article 242 paragraph 1 item d) of the CPC of RS.

77 Article 274 paragraph 1 of the CPC of BD BiH, Article 289 paragraph 1 of the CPC of FBiH, Article 289 paragraph 1 of the CPC of RS.

special procedure to gather evidence suggesting or identifying the most serious forms of crime, do not affect the presentation of evidence in the contradictory proceedings.

In relation to the above it should be noted that the criminal procedure codes contain a provision defining the manner of use of evidence gathered by special investigative measures. Article 122 of the CPC of BiH[78] provides that technical recordings, documents and objects obtained under the conditions and in the manner prescribed by this Code may be used as evidence in the criminal proceedings. This means that the undercover investigator and informant referred to in Article 116 paragraph 2 item e) of the CPC of FBiH[79] may be heard as witnesses, or protected witnesses (depending on the motions of the prosecution and the defense), about the course of implementation of the measures, or other relevant circumstances. The foregoing provision refers (generally) only to the manner of presentation of evidence regarding the use of undercover investigators and informants. In relation to other special investigative measures, there are no specific provisions regulating the presentation of evidence gathered by such measures by the prosecutor at the main trial. A logical conclusion would then be that technical recordings, documents and objects (see Article 122 of the CPC of BiH above), gathered by special investigative measures, are fully covered by the general rules on the presentation of evidence at the main trial and are presented in the same manner as other evidence of the prosecution and the defense in the evidentiary proceedings.

Certain practice in the application of the Criminal Procedure Code has been established in BiH to date in relation to the presentation of evidence gathered by special investigative measures. Since pursuant to Article 118 paragraph 1 of the CPC of BiH[80] these measures are ordered by the preliminary proceedings judge upon the reasoned motion of the prosecutor seized of the case, the evidence gathered by the special investigative measures is prosecution evidence and presented at the main trial by the prosecutor representing the indictment in the given case. During the presentation of evidence, the prosecutor tenders technical recordings, documents and objects that were obtained in a legal manner during the investigation by means of one or several special investigative measures foreseen in Article 116 paragraph 2 of the CPC of BiH[81]. At the main trial, the prosecutor can refer to the specific charges to which particular evidence is relevant and what that evidence proves. The analysis of the contents of evidence presented in this manner should be submitted in the closing arguments.

Special investigative measures, their key characteristics and evidence gathered by their implementation and the presentation of such evidence at the main trial are analyzed in detail below.

IV. 1. 1. Surveillance and technical recording of telecommunications

Article 116 paragraph 2 item a) of the CPC of BiH prescribes the special investigative measure of surveillance and technical recording of telecommunications (see the relevant sections in previous chapters).

The implementation of this special investigative measure infringes on the right of the citizen to inviolability of "telecommunications", whereby such infringement affects not only the target of the measures, but also other individuals who communicate with the target during the implementation of the measure. After the completion of this measure, all recorded conversations are technically transferred from the computer system to a CD/DVD and

78 Article 122 of the CPC of BD BiH, Article 136 of the CPC of FBiH, Article 240 of the CPC of RS.

79 Article 116 paragraph 2 item e) of the CPC of BD BiH, Article 130 paragraph 2 item e) of the CC of FBiH and Article 234 paragraph 2 item d) of the CPC of RS.

80 Article 118 paragraph 1 of the CPC of BD BiH, Article 132 paragraph 1 of the CPC of FBiH, Article 236 paragraph 1 of the CPC of RS.

81 Article 116 paragraph 2 of the CPC of BD BiH, Article 130 paragraph 2 of the CPC of FBiH, Article 234 paragraph 2 of the CPC of RS.

submitted to the prosecutor's office. That is the evidence the prosecutor will use at the main trial and tender into the case file. Accordingly, only what has been recorded in the course of the surveillance is relevant. Summaries of recorded conversations compiled after the implementation of the specific measure are not considered evidence, but they can be helpful in navigating through the technical recording which is the actual evidence. It should also be noted that the law enforcement agencies entrusted with the enforcement of this special investigative measure are obliged to enter the number of the relevant court order on the technical recording prior to the start of the recording, as well as indicate the time and place of the beginning and of the end of the measure. This is necessary to preserve the authenticity of the technical recording as evidence, and to enable (primarily the defense) the verification of the authenticity, if needed.

Since this is a very complex and demanding investigative measure, it is necessary to invest due effort in the presentation of this evidence at the main trial, in order for the measure to be fully effective. According to the practice of the courts, evidence collected by this special investigative measure is presented in the following manner. The prosecutor provides an introductory explanation for each communication or series of communications between the same individuals, about the section of the indictment to which they are relevant or other evidence of the liability of the defendants which these communications supplement. The prosecutor then reads the identification number (ID number) of the conversation, date, time and participants. The recordings of conversations are then played at the main trial. Only the reproduced recordings of conversations between legally surveilled persons can be used as evidence on which the Court will base its decision. This means that after each reproduced recording defense counsel should be allowed to raise objections in relation to the introductory explanations of the prosecutor about the context of the intercepted conversations. The objections can aim at contesting this evidence, just as any other evidence presented at the main trial.

The participation of official persons from law enforcement agencies at the main trial was contested by the defense which questioned the legality of such participation. Even though the method of examination of the official persons in these contexts could be questioned as a matter of principle, their participation at the main trial is not deemed illegal. This is corroborated by the opinion of the Supreme Court of FBiH in its decision No. 09 0 K 027665 19 Kž 22 of 10 September 2019. In this case, defense counsel of the defendant F.N. claimed in their appeal the essential violation of the provisions of the criminal procedure pursuant to Article 312 paragraph 1 item i) of the CPC of FBiH. The defense submitted that the prosecution witness Đ.B. who was an inspector of the Federation Administration of the Police exceeded his authority, during the examination about the implementation of the special investigative measures at the main trial, because the Court allowed him to retell and give his account of the heard telephone conversations and SMS messages. Finding these appellate arguments unfounded, the Supreme Court of FBiH explained in its verdict, inter alia, that "one should bear in mind that this witness, as a professional, participated most directly in the selection of relevant telephone conversations (from the pool of several thousand registered ones) that took place at the relevant time between the suspects as members of the organized group, on the one hand, as well as conversations between certain suspects and buyers and consumers of the narcotic drug, on the other. Thereupon, members of the Federation Administration of the Police intercepted buyers and consumers and searched them. The search resulted in the discovery of the narcotic drug bought and taken over after the telephone communication. In his testimony, witness Đ.B. spoke about the searches in which he had participated personally, and about the related seizures of drugs and telephones, with specifics about the activities of the police officials in relation to individual buyers who testified at the main trial (as well as during the investigation) about these events (A.H., E.R., R.Ć., A.P., R.B., A.O., H.D., K.B., and others). He also provided the chronology of previous coded conversations between the suspects and with the buyers and consumers, which had justifiably been qualified as relevant and led to the operative activities of the police officials which resulted in the searches and discovery of

narcotic drugs, previously taken over, on the defendants and buyers. Therefore, the Court finds that the witness B.Đ. did not exceed his authority and limits of his testimony during the testimony at the main trial (the appeal failed to specify the authority and limits in question, and defense counsel did not refer to a particular provision to substantiate such claim), because the contents of his testimony and the method of presentation had invariably been determined by the circumstances of this criminal incident and the specific role of this witness, as the team leader during the implementation of the special investigative measures, and other measures and the resulting activities." These are the reasons of the Supreme Court of FBiH for the finding that the contested activity was not illegal, and consequently, that the evidence derived from it was not illegal either. The Court therefore found that there was no essential violation of the provisions of the criminal procedure pursuant to Article 312 paragraph 1 item i) of the CPC of BiH in this case.

IV. 1. 2. Access to the computer systems and computerized data processing

This special investigative measure limits the safety and confidentiality of personal information, which is one of the fundamental human rights (see the relevant sections in previous chapters). In the absence of adequate case law to date, it can be concluded that this measure should be accompanied by the ordering and implementation of other special investigative measures or activities aimed at gathering evidence, in other for it to produce desired results. For that reason, evidence that can be collected by this special investigative measure varies. The nature of evidence collected will determine the method of presentation at the main trial.

IV. 1. 3. Surveillance and technical recording of premises

Evidence that can be obtained by this special investigative measure also varies. It can take the form of audio and video recordings and similar evidence (see relevant sections in the previous chapters). At the main trial, the prosecutor presents this evidence by listening to or watching the relevant recording. An authorized official can testify about the implementation of the measures. The case file should contain an official note about the devices used for the recording.

IV. 1. 4. Covert following and technical recording of individuals, vehicles and items related to them

There are different methods of implementation of this measure in practice (see relevant sections in the previous chapters). For that reason, many and different evidence can be collected by this measure, such as various photographs of the suspect, vehicles and items related to the instant criminal case, audio and video recordings of following, etc. The same rules explained above apply to the presentation of evidence collected by this measure.

IV. 1. 5. Use of undercover investigators and informants

Undercover investigators are specially trained authorized officials who act under a changed identity during the investigation and infiltrate illegal circles in order to collect evidence that will be presented at the main trial (see relevant sections in the previous chapters). Undercover investigators can be heard as witnesses, or protected witnesses, in relation to the implementation of the measures or other relevant circumstances.[82] In the context of

[82] For more details, see: Special investigative measures - Relevant provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights. Seminar for prosecutors. Sarajevo, 2019 The Aire Centre, p. 44.67.

evidence secured by the activities of the undercover investigator, it should be emphasized that the undercover investigator can secure evidence (documents, various items related to the criminal offence), and also observe and identify various facts, or gather certain intelligence which can be of relevance in proving a criminal offence. The intelligence of this kind can have legal relevance, only if the undercover investigator is heard as a witness.

Certain specific features should be pointed out in terms of the procedure of implementation of respective special investigative measures (in particular, the use of undercover investigators and informants, and simulated and controlled purchase of items and simulated bribery), and in terms of the method of presentation of evidence gathered by these measures at the main trial. Criminal procedure codes provide explicitly that in the course of the implementation of special investigative measures, the police agencies or other persons must not undertake activities that constitute incitement to perpetrate a criminal offence, and if such activities had been undertaken, despite this ban, the incited person cannot be criminally prosecuted for the criminal offence perpetrated as a result of the incitement. Procedural norms also set forth that the undercover investigator may participate in legal transactions using the changed identity, and, if necessary for establishing and maintaining that identity, appropriate documents may be produced, modified or used. Finally, undercover investigators can be heard as a witness or protected witness in relation to the implementation of the measure or other relevant circumstances. This is the framework that the prosecutor should have in mind, when they decide to go through with the presentation of this evidence. Obviously, this is a specific evidentiary instrument. The hearing of an undercover investigator at the main trial, especially in the capacity as a protected witness, raises a number of questions that can be very important for the assessment of fairness of the given criminal proceedings. The duty to enable the defendant to have full disclosure of the evidence against them collected during the investigation is particularly important in this context. The principle of imminent presentation of evidence requires that the court be presented evidence directly.

The hearing of the undercover investigator is a procedural option, rather than an obligation. The undercover investigator can testify about the implementation of the measure or other relevant circumstances. In terms of the credibility of these testimonies, the principle of free evaluation of evidence by the court applies. Parts of the statement of the undercover investigator explaining certain “technical” aspects of information and evidence gathering are not disclosed during the testimony, because they are very often classified as official secret. These most secret aspects of the work of the undercover investigator are disclosed only in those instances where the veracity and authenticity of the testimony of the undercover investigator is questioned.

In that regard, there are no procedural doubts about the method of presentation at the main trial of physical evidence gathered during the investigation by undercover investigators. There is, however, the issue of their hearing as witnesses. Undercover investigators are questioned in line with the general rules on the examination of witnesses. However, the number of undercover investigators in the law enforcement agencies in BiH is limited, considering that they are specially trained to perform very complex and hazardous activities. This requires that their identity and safety be protected during the main trial, in case they are heard as witnesses, when such protection is necessary. This includes testifying from a separate room (so that the defendant and other persons do not see the undercover investigator taking the stand), and full protection in order to remove any risk of disclosure of their true identity. Undercover investigators are heard as witnesses, witnesses awarded certain protective measures (e.g. their personal details are not used at the main trial, they are addressed by the pseudonym used during the investigation, pursuant to the order for the special investigative measure issued by the relevant court), or protected witnesses. This is achieved by awarding anonymity to the undercover investigator and issuing a ban on the disclosing of all information and personal data of witnesses to the defendants, defense counsel and the public. In other words, the order of full anonymity makes all the information related to the identity of the

witness confidential. As such, this information is treated as an official secret, pursuant to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses. Its unauthorized disclosure is a criminal offence.[83]

Additional protection of the identity of these witnesses can be provided through the use of voice distortion devices. This requires the adjudicating judge, or president of the panel conducting the main trial to render a decision specifying the manner and form of protection of these witnesses, applying the relevant provisions of the law on protection of witnesses under threat and vulnerable witnesses. Protection of these witnesses allows for their participation in other investigations, because the disclosing of their identity in the course of the main trial would completely prevent, or significantly limit their participation in other investigations.

This would achieve the desired effect, insofar as all facts that could not be determined otherwise, would be determined at the main trial, while preserving the safety of the undercover investigator. The legality of evidence gathered and presented is maintained, while the right of the defendant to appropriate defense is observed, because they have the opportunity to ask all questions they deem to be in the interest of their defense.

According to the ECtHR case law, the competitive interests to the rights of the defense must also be protected in the criminal procedure, such as the interests of national security, necessary protection of a vulnerable witness or undercover police investigators, protection of the fundamental rights of another, or an important public interest. Procedural rights of the parties ensuring the equality of arms can be limited for this purpose (this would apply only to the defense). This could affect for example the right to review the case file, the right to know the witnesses for the prosecution, although the limitations are very restricted and only applied when absolutely necessary and compensated in the criminal procedure.

IV. 1. 6. Simulated purchase of certain objects and simulated bribery

These are actually two separate special investigative measures. Simulated purchase is one and simulated bribery the other (see previous chapters). These measures primarily result in the gathering of physical evidence, although the persons who enforced the measures can be heard as witnesses. The presentation of this evidence at the main trial depends on their actual nature. It mainly involves the hearing of informants as witnesses or the hearing of authorized officials if they were involved in the covert following and searched the suspect, in order to seize items, and the reproduction of audio/video recordings, etc.

IV. 1. 7. Supervised transport and delivery of objects of criminal offense

This special investigative measure enables the following of all persons involved in a criminal incident which is often of international nature (see the relevant sections above). Evidence collected varies considerably (both subjective and objective evidence) and the same explanations stated above apply to the presentation of this evidence.

[83] Law on Protection of Witnesses under Threat and Vulnerable Witnesses of BiH (Official Gazette of BiH, 3/03; 21/03; 61/04, and 55/05); Law on Protection of Witnesses under Threat and Vulnerable Witnesses of BD BiH (Official Gazette of BD BiH, 11/03; 8/07); Law on Protection of Witnesses under Threat and Vulnerable Witnesses of FBiH (Official Gazette of FBiH, 36/03), Law on Protection of Witnesses in the Criminal Procedure of RS (Official Gazette of RS, 48/03).

IV. 2. Case law

An excerpt from the Verdict of the Court of BiH No. X-KŽ-07/436 of 16 December 2010 is shown below. The section talks about the evaluation of the legality of the reports of undercover investigators with respect to the fact that they were not heard at the main trial.

Excerpt from the verdict

a) Reports of undercover investigators 1 and 2

With reference to the appellate arguments under Article 297 paragraph 1 item i) of the CPC of BiH, the appellants have submitted that the reports of undercover investigators 1 and 2 are also illegal evidence on which the contested verdict is based, given that these investigators were never heard at the main trial.

Contrary to the appellate arguments, the Panel finds that this evidence is not illegal, despite the fact that the undercover investigators were not heard at the main trial. This was already explained in the part of the Verdict pertaining to the substantial violations of the criminal procedure under Article 297 paragraph 1 item d) of the CPC of BiH. It follows from the case file that the First Instance Panel undertook all necessary actions to secure the presence of, and allow the defense to cross examine the undercover investigators. When this failed, the Panel summoned the witness B.P., who was the superior to the undercover investigators at the time when the necessary special investigative measures were implemented in Croatia. As their superior, he supervised their activities and was in charge of the control of the accuracy of data in the reports that were used as evidence. The defense was given the opportunity to cross examine this witness and thus was able to contest the legality of this evidence with valid arguments. Since the defense failed to do so, the Panel finds that the evidence related to the undercover investigators is not rendered illegal by the sole fact that they were not heard at the main trial in the circumstances which made their hearing impossible. Therefore, the Court refused these appellate arguments as unfounded.

The defendant S.A. further objects that the reports of undercover investigators 1 and 2 were not read at the main trial. It is indisputable that the evidence was not read at the main trial. However, it follows from the case file that the parties did not ask that the reports be read. Even more so, at the hearing of 25 January 2010, when this evidence was tendered into the case file, the defense objected to the prosecutor's motion to read it and refused the opportunity of reading of this evidence offered by the President of the Panel. It is particularly important to note that Article 274 paragraph 1 of the CPC of BiH provides that the records and other evidence is presented at the main trial, in order to establish its content, and paragraph 4 of that article provides that evidence referred to in paragraph 1 is read out, unless parties and defense counsel agree otherwise. This provision of the law foresees the possibility to present this evidence without reading. In addition, the case file shows that this evidence was delivered to the defense together with the confirmed indictment, which is an additional reason to find this appellate argument unfounded.

5.

International legal cooperation and assistance in criminal matters*

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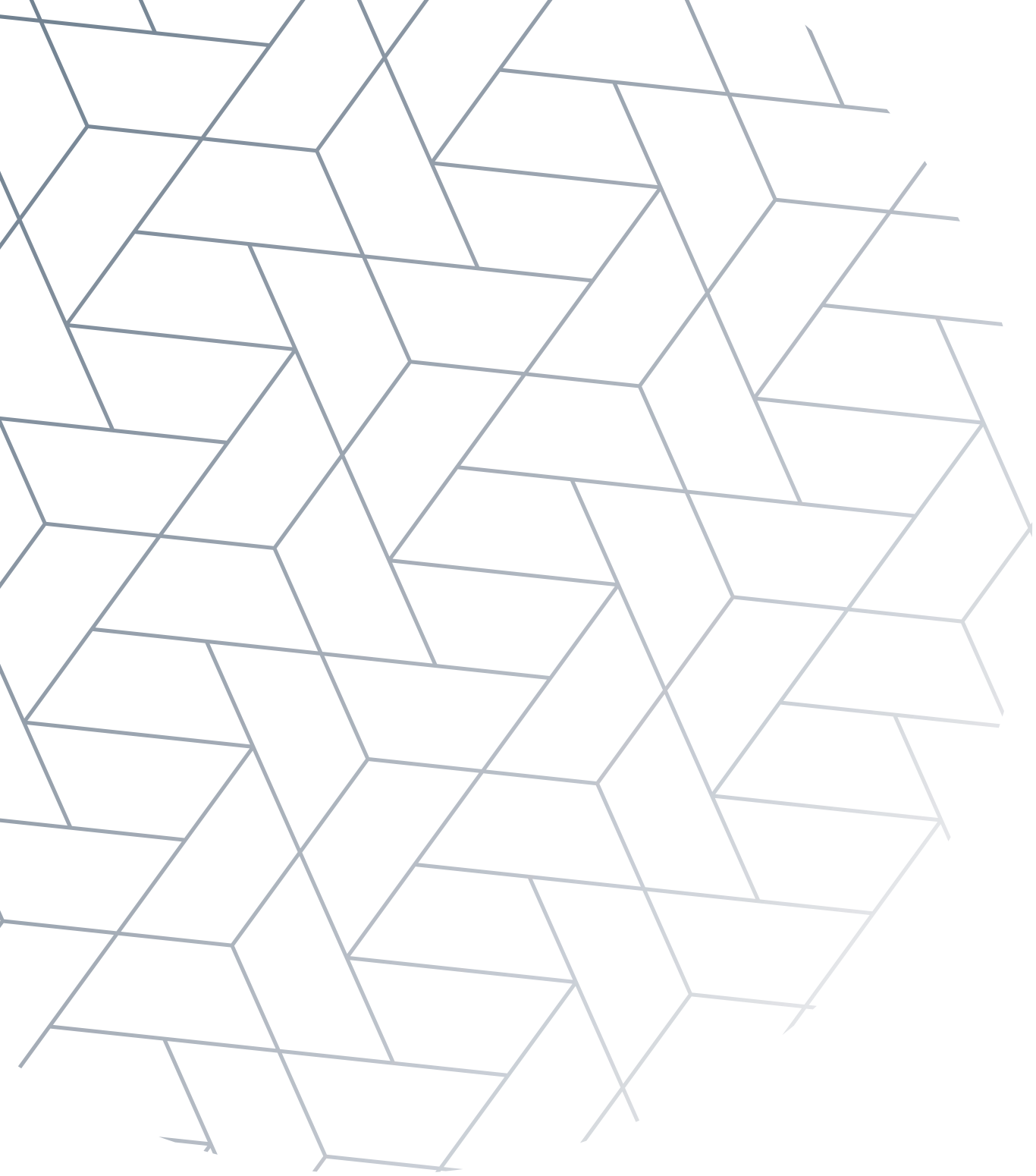

V.1. Introduction

Experience and information gathered to date show that organized crime is growingly transnational, with various models of cooperation between organized criminal groups from different countries being established and resulting in the creation of autonomous transnational organized criminal communities. Generally speaking, criminal activities of these organizations take the form of serious criminal offences aimed at securing direct or indirect financial and other gain, or gaining or retaining influence over economic and other state structures of importance. Both purposes incur undeniable and unmeasurable damage on individuals, society and the country, which is why transnational and international organized crime have become one of the most dangerous and most unconventional threats in many countries around the world. Its organizational, technological, geographical and temporal complexities, make translational organized crime a hard to manage threat to national security of countries[84], which resort to international cooperation to investigate and combat this form of crime.

The notion of international legal assistance in criminal matters, or mutual assistance in criminal matters, denotes a set of actions and measures undertaken by the criminal procedure bodies of one state, upon the request of another state, in order to facilitate the prosecution, trial or enforcement of sentence in a criminal case. It is a part of cooperation between countries in criminal cases with an international element.[85] Judicial cooperation is based on the trust in the justice system of another country and on the principle of mutual recognition. In the context of international legal assistance, the concepts of formal and informal cooperation should be explained. Informal cooperation is favored as an instrument of timely exchange of information in specific criminal cases. It takes place between police agencies in compliance with the Police Cooperation Convention for Southeast Europe (PCC SEE). This type of cooperation is also foreseen in international mechanisms which qualify it as information exchange between agencies. This includes the UN Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Protocol against the Smuggling of Migrants, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, etc. Formal international cooperation and legal assistance in criminal matters is based on bilateral and multilateral agreements, relevant national legislation and the principle of reciprocity.

International legal assistance and cooperation in BiH is regulated by the Law on International Legal Assistance in Criminal Matters[86] (LILACM or the Law), bilateral agreements that BiH entered into, or took over by succession and multilateral conventions.

Unless an international agreement provides otherwise, or in absence of an international agreement, LILACM regulates the procedure of international legal assistance in criminal matters. This Law provides for direct application of international bilateral and multilateral agreements in BiH, while BiH legislation, including this Law, is subsidiary to them.

84 According to: Babić, M., Filipović, Lj., Marković, I., Rajić, Z., *Komentari krivičnih/kaznenih zakona u BiH (Commentary to Criminal Codes in BiH)*, Sarajevo, 2005, 802.

85 Krapac, D., *Međunarodna kaznenopravna pomoć: Uvod u teoriju međunarodne kaznenopravne pomoći, Komentar Zakona o međunarodnoj pravnoj pomoći u kaznenim stvarima i Zbirka međunarodnih ugovora Republike Hrvatske u međunarodnoj pravnoj pomoći u kaznenim stvarima* (International legal assistance in criminal matters: Introduction to the theory of international legal assistance in criminal matters, Commentary to the Law on International Legal Assistance in Criminal Matters and Compendium of International Treaties of the Republic of Croatia relative to international legal assistance in criminal matters), Zagreb, 2006, 3.

86 Law on International Legal Assistance in Criminal Matters, Official Gazette of BiH, 53/2009 and 58/2013.

Accordingly, the main legal basis for international legal assistance in criminal matters is international multilateral and bilateral agreements between BiH and other countries, as well as multilateral and bilateral agreements which BiH took over from the former Yugoslavia in line with the notification of succession of international treaties. In case of conflict between any applicable international agreement in the area of international judicial cooperation in criminal matters and the laws in BiH, the international agreement is applied directly.

With reference to multilateral conventions on international legal cooperation, BiH has signed many universal conventions (e.g. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, succession to BiH on 1 September 1993 and UN Convention against Transnational Organized Crime, ratified by BiH), and regional treaties (European Convention on Mutual Assistance in Criminal Matters and Second Additional Protocol, European Convention on the Transfer of Proceedings in Criminal Matters, European Convention on Extradition and its three Additional Protocols).

The principle of reciprocity is applied to countries with which no bilateral agreements were concluded, or countries which are not signatories to the international conventions in the area of criminal law.

BiH entered into agreements with some of the countries of the region.[87] Pursuant to Article 4 (paragraph 3 and 4) of the Law, in urgent cases, when such communication is foreseen in an international treaty, MLA requests can also be disseminated through the International Criminal Police Organization - INTERPOL and the European Union Agency for Criminal Justice Cooperation - EUROJUST.

In addition to these, a number of agreements were concluded directly between the judicial institutions in the region, supplementing the bilateral and multilateral agreements signed and defining the operative aspects of cooperation between prosecutor's offices in the investigations of the most complex criminal offences, such as organized crime, illicit trafficking in narcotic drugs, human trafficking, weapons trafficking, corruption, money laundering, international terrorism and war crimes.[88]

87 The following agreements were signed:

1. Agreement between BiH and Montenegro on legal assistance in civil and criminal matters of 9 July 2010 (Official Gazette of BiH - International Treaties, No. 7/11), entered into force on 7 November 2011;
2. Agreement between the Government of BiH, the Government of the Federation of BiH and the Government of the Republic of Croatia on legal assistance in civil and criminal matters of 26 February 1996 (Official Gazette of R BiH - International Treaties, No. (1/96), provisional implementation since the date of signing, entered into force on 20 December 1996;
3. Agreement between BiH and the Government of the Republic of Croatia on the amendments to the Agreement between the Government of BiH, the Government of FBiH and the Government of the Republic of Croatia on legal assistance in civil and criminal matters of 17 June 2002 (Official Gazette of BiH - International Treaties, No. 11/05), application since the date of signing, entered into force on 8 February 2006;
4. Agreement between BiH, Serbia and Montenegro on legal assistance in civil and criminal matters of 24 February 2005 (Official Gazette of BiH - International Treaties, No. 11/05), entered into force on 9 February 2006;
5. Agreement between BiH and the Republic of Serbia on the amendments to the Agreement between BiH, Serbia and Montenegro on legal assistance in civil and criminal matters of 26 February 2010 (Official Gazette of BiH - International Treaties, No. 8/10), entered into force on 10 February 2011;

88 These are:

1. Agreement on cooperation in the fight against international terrorism, illicit trafficking in narcotic drugs and psychotropic substances and organized crime between the Council of Ministers of BiH and the Government of the Republic of Turkey, Ankara: 21 June 2000, number 4/04.
2. Agreement between the Government of the Republic of BiH and the Government of the Republic of Hungary on cooperation in the fight against terrorism, trade in narcotic drugs and organized crime, Budapest: 21 April 1996, number 8/05.
3. Agreement between the Council of Ministers of BiH and the Government of the Republic of Greece on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and organized crime, Athens: 9 February 2006, number 14/06.
4. Agreement on cooperation between the Council of Ministers of BiH and the Government of the Republic of Italy in the fight against organized crime, Sarajevo: 28 January 2002, number 10/07.

V. 2. Parallel investigations and joint investigation teams

Standard investigative methods, or localized investigations alone are not sufficient for an effective and efficient response to organized and other forms of serious crime, in particular transnational[89], cross-border and international crime. There are very serious criminal offences, both in terms of their consequences and the sentences they carry. They are also very difficult to detect, investigate and prove, due to their characteristics. Numerous criminal formations and various forms of organized crime have been identified in BiH within a relatively short time span. Groups active in BiH, neighboring and other countries have an obvious intention and are seeking to network. Different forms of organized crime were registered in BiH through the following criminal activities: illicit production and trafficking in narcotic drugs, illicit trafficking in weapons and military equipment, trafficking in human beings, smuggling of people and illegal migrations, economic crime and tax evasion, counterfeiting of money and other securities, abuse of office, cybercrime, auto theft and resale, blackmail, extortion, abduction, armed robbery, etc.

Modern scientifically and technologically based methods, and extension of the investigation reach beyond the national borders are necessary tools in investigations into these forms of transnational crime.

Parallel investigation *(concomitant investigation, coordinated investigation)* is one form of cooperation between countries, focusing on the same criminal group or the same form of crime. The countries conduct several investigations (each country in its respective jurisdiction) which are **separate** in terms of their managing structures

5. Agreement between the Council of Ministers of BiH and the Government of the Republic of Slovakia on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and organized crime, Sarajevo, 5 June 2006, number: 3/07.
6. Agreement between the Council of Ministers of BiH and the Government of the Arab Republic of Egypt on cooperation in the suppression of crime, Cairo, 14 December 2006, number: 8/07.
7. Agreement between BiH and the Swiss Confederation on police cooperation in the fight against crime, Bern, 24 April 2007, number: 12/07.
8. Agreement between the Council of Ministers of BiH and the Government of Romania on cooperation in the fight against terrorism and organized crime, Bucharest, 4 June 2007, number: 2/08.
9. Agreement between the Council of Ministers of BiH and the Government of Montenegro on cooperation in the fight against terrorism, organized crime, illegal trafficking in narcotic drugs, psychotropic substances and precursors, illegal migrations and other criminal offences, Budva, 7 September 2007, number: 02/08.
10. Agreement between the Council of Ministers of BiH and the Government of the Republic of Macedonia on cooperation in the fight against terrorism, organized crime, illegal trafficking in narcotic drugs, psychotropic substances and precursors, illegal migrations and other criminal offences, Ohrid, 21 March 2008, number: 8/08.
11. Agreement between the Council of Ministers of BiH and the Council of Ministers of the Republic of Albania on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and organized crime, Sarajevo, 24 March 2009, number: 07/09.
12. Agreement between the Council of Ministers of BiH and the Government of the Republic of Croatia on police cooperation in the fight against transborder crime, Sarajevo, 17 September 2010, number: 09/11.
13. Agreement between the Council of Ministers of BiH and the Government of the Hashemite Kingdom of Jordan on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and organized crime, Amman, 30 January 2011, number: 8/11.
14. Agreement between BiH and the Kingdom of Spain on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and organized crime, Madrid, 3 March 2011, number: 8/11.
15. Agreement between the Council of Ministers of BiH and the Government of the Republic of Moldavia on cooperation in the fight against organized crime, illegal trafficking in narcotic drugs and psychotropic substances, terrorism and other types of serious crime, Brdo kod Kranja, 17 May 2012, number: 6/13.
16. Agreement between BiH and the Czech Republic on cooperation in the fight against crime, in particular terrorism, illegal trafficking in narcotic drugs and psychotropic substances and organized crime, Sarajevo, 12 September 2013, number: 6/14.

89 Pursuant to Article 3 paragraph 2 of the UN Convention against Transnational Organized Crime, an offence is transnational in nature if: it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

and scope of tasks. They seek to dismantle an organized criminal group or a form of crime affecting all countries involved in such investigation.[90]

Evidence collected in the course of a parallel investigation is used in **separate** criminal proceedings in the countries which conducted the investigations (each country uses the evidence gathered in the course of the investigation in its jurisdiction). Evidence is exchanged through formal mutual legal assistance mechanisms (MLA request), according to the same rules that apply to countries which have not conducted a parallel investigation.

In the course of the parallel investigation, representatives of the competent authorities of the relevant countries maintain close cooperation, ongoing informal communication and constant real time exchange of important information about the activities of the suspects. Thus all participants gain a much broader picture of the investigated organized criminal group, than would be the case if each country conducted its own investigation without coordination with the other relevant countries using the mechanism of parallel investigation. This cooperation also results in much faster processing of MLA requests (owing to personal contacts and previously established trust, as well as shared knowledge of all stakeholders about the details of the entire case), and pronouncement of more stringent sanctions in the verdicts, due to the fact that the competent authorities of each participating state can present to the court the whole structure of the organized crime group and highlight the broader (regional or international) negative impact of its activities.

Time element is also an advantage in this form of inter-state cooperation. Experience has shown that simultaneous criminal proceedings in different countries had an obliterating effect on organized groups operating regionally or internationally. Different time frames of separate investigations in respective jurisdictions would result in only occasional prosecution of individual members of an organized criminal group, while other members would be able to proceed with criminal activities and ensure the survival of the group.

Notwithstanding all the benefits explained above, cooperation in the framework of parallel investigation is sometimes not enough to ensure success. Members of organized criminal groups work together very efficiently, without any rules or procedures to restrict their activities. They are motivated exclusively by common interest and their cooperation is quite successful.

That is why the countries which cannot achieve the results necessary to ensure a successful criminal proceeding have the possibility to set up a ***joint investigation team (JIT or team)***.

JIT is a team established for a specific period of time by an agreement between two or more countries or other competent authorities, in order to investigate a specific criminal offence. This definition contains several elements: international component; formal agreement; joint investigation; time period and specific criminal offence.[91]

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90 According to: Guide to EU Member States' legislation on Joint Investigation Teams, Council of the European Union, No. 13598/09, Brussels, 23 September 2009. (Available at: http://www.google.ba/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiltsmt5tvrAhVPpYsKHRAFAmMQFjACegQIARAB&url=http%3A%2F%2Fmsb.gov.ba%2Fdokumenti%2FPrirucnik%2520za%2520provodjenje%2520Konvencije%2520.doc&usg=AOvVaw1A5YIJk5sxo6IHT3QEYkBG, accessed on: 9 September 2020);

91 According to: Sagmeister Ranzinger, A., Jeseničnik J., "IPA 2010 – Borba protiv organizovanog kriminala i korupcije: Jačanje tužilačke mreže", *Priručnik o zajedničkim istražnim timovima*, (*"Fighting organized crime and corruption: Strengthening the prosecutorial network", Joint Investigation Teams Handbook),* Sarajevo, 2014, pp. 7 and 9.

Setting up of JITs has legal basis in the international documents adopted by BiH. They have priority over the law. It is important to note an aggravating fact that BiH is not a member of the EU, and EU regulations do not apply directly.

Two important international legal documents providing legal grounds for the setting up of a JIT are:

- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Articles 20, 21, and 22), but bearing in mind that Austria, Germany, Italy, Cyprus, Turkey and some other European countries have not adopted the Second Protocol, while some non-European countries, such as Chile and Israel, have.[92]
- PCC SEE (Article 27);

There are other international instruments that could provide legal grounds for the same purpose, if broader interpretation is applied:

- UN Convention against Transnational Organized Crime (Article 19), which was signed by 179 countries;[93]
- UN Convention against Corruption (Article 49), signed by 168 member countries;[94]
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Article 49);
- Convention on Cybercrime (Article 25);

If these issues are not regulated by the conventions listed above, national legislation of the countries participating in the JIT is considered.[95]

LILACM provides for inter-state cooperation within a joint investigation team, in addition to general and specific types of international legal assistance.[96] Following the amendments to the Law in 2013, the instrument of JIT was further regulated. The Law provides that a JIT can be formed if: the investigation of criminal offences conducted in one country requires a complex and extensive investigation connected to other countries; several parties investigate criminal offences of such nature that requires coordinated and concerted action of the countries involved; investigative measures should alternate between BiH and another country, or several countries.[97]

The following general requirements apply to the work of a joint investigation team in the territory of BiH: team leader will be the prosecutor of the relevant prosecutor's office in BiH; the team will implement activities in accordance with the criminal laws in BiH, and the national and international members of the joint investigation

92 Sagmeister Ranzinger, A., Jeseničnik J., "IPA 2010 – Borba protiv organizovanog kriminala i korupcije: Jačanje tužilačke mreže", *Priručnik o zajedničkim istražnim timovima*, Sarajevo, 2014, p. 17.

93 Sagmeister Ranzinger, A., Jeseničnik J., "IPA 2010 – Borba protiv organizovanog kriminala i korupcije: Jačanje tužilačke mreže", *Priručnik o zajedničkim istražnim timovima*, Sarajevo, 2014, p. 20.

94 Sagmeister Ranzinger, A., Jeseničnik J., "IPA 2010 – Borba protiv organizovanog kriminala i korupcije: Jačanje tužilačke mreže", *Priručnik o zajedničkim istražnim timovima*, Sarajevo, 2014, p. 21.

95 Sagmeister Ranzinger, A., Jeseničnik J., "IPA 2010 – Borba protiv organizovanog kriminala i korupcije: Jačanje tužilačke mreže", *Priručnik o zajedničkim istražnim timovima*, Sarajevo, 2014, p. 22.

96 Article 24 of the LILACM from 2009, provides for the setting up of a joint investigation team, if warranted by the circumstances of the given case, for the purpose of conducting a criminal investigation in the territory of one or several contracting states setting up a JIT.

97 Amended Article 24 paragraph 5 of the LILACM from 2013.

team will perform their tasks at the direction of the team leader and the relevant prosecutor's office in BiH will undertake all necessary organizational activities for the needs of the team.[98]

The analyses of joint investigations conducted by JITs have identified three main phases of a JIT: establishment of the JIT, operational phase, and the conclusion of the JIT. In the first phase, the relevant institutions of the states involved have to identify a common interest in and the purpose of setting up a cooperation framework such as JIT. This requires that the links between the investigations in the relevant states have been established and reaffirmed. Experience so far has shown that the need for a JIT is most often recognized in bilateral contacts. After the need for a JIT has been identified, states most often include EUROJUST to discuss the details of the JIT Agreement at coordination meetings. In some cases, the need to establish a JIT was identified during EUROJUST coordination meetings. Different states had conducted parallel investigations before[99], and the discussion at coordination meetings highlighted the need to open the investigation in other states as well.[100] The Agreement on the establishment of a JIT defines: the composition of the team, tasks of the team, authority of team members and the period during which the team will operate (which can be extended).[101]

JIT is a form of continuous mutual legal assistance in a particular case. It provides two main opportunities: extended exchange of information among the JIT members, and extended operational cooperation, facilitating faster and more effective investigations across borders.[102] These possibilities are also the main benefits of JITs compared to other forms of inter-state cooperation in this field.

Within a JIT, national competent judicial authorities can under certain circumstances use the information obtained by national or international members of the JIT in the course of their work in the team, which would otherwise not be available to them. This information can be used: for the purpose for which the team was set up, to detect, investigate or prosecute other criminal offences, with the approval of the country to whose members the information was given for use, to prevent direct or serious danger to public safety, and for other purposes, if the JIT members agreed so.[103]

The JIT agreement can provide for direct use of evidence gathered in the course of the team work by every state in the team (as well as evidence collected by the states independently prior to the establishment of JIT and evidence obtained from states which are not team members, upon MLA request by one of the JIT member states)[104], which is much easier and faster than the MLA request.

98 General conditions for the work of the joint investigation team in BiH territory are set forth in Article 24 paragraph 6 of the Law.

99 In 88% of cases analyzed, the states which entered into a JIT agreement had conducted parallel investigation before that. According to: *First JIT Evaluation Report from February 2016 (evaluations received between: April 2014 and October 2015)*, pp. 12 and 20, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/First%20JIT%20Evaluation%20Report%20(February%202016)/2016-02-08-JIT-Evaluation_EN.pdf (accessed on: 8 September 2020).

100 *Third JIT Evaluation Report from March 2020 (evaluations received between: November 2017 and November 2019)*, pp. 7 and 8, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Third%20JIT%20Evaluation%20Report%20(March%202020)/2020-03_3rd-JITs-Evaluation-Report_EN.pdf (accessed on: 8 September 2020).

101 Article 24 paragraph 2 of the Law.

102 For more details, see: Klother, M., *Joint Investigation Teams – problems, shortcomings and reservations,* Bachelor Thesis, Westfälische Wilhelms-Universität Münster, Universiteit Twente Enschede, 2014, 10.

103 Article 24 paragraph 11 of the Law.

104 See: Council Resolution on a Model Agreement for setting up a Joint Investigation Team (JIT) (2017/C 18/01, 2, 3 and 5).

Work within the team entails direct, joint implementation of some investigative measures, including special investigative measures,[105] which additionally facilitates international cooperation and makes it more flexible, considering that outside JIT, legal assistance for this purpose has to be formally requested of another state.

The Law also provides that foreign members of the joint investigation team are as a rule allowed to attend the investigation in the territory of BiH, while the team leader has the authority to decide otherwise on specific grounds and in compliance with BiH legislation. The team leader may also delegate authority for some investigative measures to foreign team members, also pursuant to BiH legislation and subject to the authorization of the competent judicial authorities of the country which seconded these team members.[106]

Due to all the benefits explained above, the JIT is a useful cooperation tool to avoid long procedures of requesting and granting mutual legal assistance through the MLA request. JIT enables the gathering of legal evidence necessary for the continuation and successful completion of the criminal proceedings within a short period of time (which is often crucial in transnational investigations).

105 Pursuant to Article 24 paragraph 9 of LILACM, national members of the JIT implement special investigative measures for the purposes of the team in their jurisdiction and pursuant to their laws.

106 Article 24, paragraph 7 and 8 of the Law.

V.3. International planning and implementation of special investigative measures

The expansion of organized crime and its technological resources globally, including BiH, has made special investigative measures a necessary tool to ensure, at least to some extent, the balance of power in the fight against organized crime. Special investigative measures are of particular importance in the efforts to detect and curb both national and transnational organized crime. In the absence of such measures, valid evidence is difficult, if not impossible, to obtain. These investigative measures usually include the following: surveillance and technical recording of telecommunications; access to the computer systems and computerized data processing; surveillance and technical recording of premises; covert following and technical recording of individuals and objects; use of undercover investigators and informants; simulated purchase of certain objects and simulated bribery; and supervised transport and delivery of objects of criminal offense. The importance of special investigative measures is reinforced through different international instruments (e.g. relevant conventions). Therefore, special investigative measures are an important and distinct instrument of international legal assistance and cooperation in criminal matters.

As pointed out above, the use of special investigative measures is widely accepted and recognized in international and regional conventions. These measures are often sought in MLA requests.

Special investigative measures are usually used to: gather information on the criminal activity in general; gather evidence required for the criminal prosecution of the individual concerned; collect intelligence on the planning or commission of a criminal offence; identify the persons involved in the given criminal activity; prove the connection between the members of the criminal organization; identify persons from the criminal circles who are willing to cooperate, either as informants or as potential witnesses; verify the information gathered by other investigative measures; locate smuggled and other incriminated goods or items; identify the best time to implement certain measures, e.g. search or arrests of certain persons, etc. Accordingly, both in the case of a national independent investigation, or parallel investigations, and investigations within a joint investigation team, the planning of these measures will depend on the goals, gathered information, and collected evidence.

In terms of evidence collected by special investigative measures, there are two possible situations - when special investigative measures are implemented at the initiative and upon the request of the requesting state and when they are implemented at the initiative of a foreign country in its own investigation, while the results of that investigation can be useful for the criminal investigations and prosecution in the requesting state. The first situation usually occurs in independent investigations, while the second occurs when two or more states investigate criminal activities of one or more criminal groups in their jurisdictions.

Since BiH is not a member of the EU, or a full member of EUROJUST, evidence gathered through special investigative measures abroad is usually obtained through mutual legal assistance using MLA requests in both situations. Exceptionally, evidence can be obtained directly, if BiH and the state whose evidence we need have set up a JIT.

Pursuant to LILACM, MLA request for special investigative measures in another country should contain all elements prescribed by this Law. The MLA request of a national judicial body, as well as the enclosed documents have to be translated into the official language of the requested state. If the international treaty or the provisions of this Law do not provide otherwise, the MLA request must contain the following: a) name of the body writing the request, case number, the exact name of the requested state, and if possible the name of the requested body; b) legal foundation for mutual legal assistance; c) precise description of the relief sought through mutual legal assistance and the reason for the MLA request; d) legal qualification of the criminal offence and a short description of facts; e) precise personal particulars and nationality of the person subject to the MLA request and their capacity in the proceedings; f) title of the documents and name and address of the recipient, if court and other documents are submitted and g) other information of relevance to the request. MLA request as well as the documents submitted by courts and other relevant bodies have to be signed and bear the stamp of the court or the issuing authority. If the information contained in the MLA request and the enclosed documents is insufficient, additional explanation and documents can be sought.[107] The MLA request must comply with the following main requirements: a) if granted, it must not be in violation of the legal order of BiH or have the potential to undermine the sovereignty or safety of BiH; b) the request must not pertain to the offence considered a political crime or an offence linked to a political crime; c) the request must not pertain to military crimes; d) the person subject to the request must not be acquitted of guilt on grounds of substantive law, or be subject to terminated proceedings, or be acquitted from sentence, or have served the sentence and must not be in a situation that the sanction cannot be enforced pursuant to the law of the state in which the verdict was rendered; e) the person subject to the request must not be subject to a criminal proceeding in BiH for the same criminal offence, unless the enforcement of the request might result in an acquittal of this person; f) prosecution or the enforcement of sanction must not be excluded due to the statute of limitations according to the national law. Otherwise, the MLA request will be refused.[108] In the MLA request, the international instrument should be cited precisely, if the requesting and the requested states are signatories to a multilateral or bilateral agreement.

Since special investigative measures are particularly intrusive upon human rights and fundamental freedoms, the MLA requests should contain additional explanation about their necessity, or the proportionality of the infringement on the human rights and fundamental freedoms to the social interest of to investigate the criminal offence, along with the explanation that evidence could not be otherwise gathered or that its gathering would be disproportionately difficult.

It is particularly important that the representatives of the requesting state be given the opportunity to be present during the implementation of the measure sought in the MLA request. Their attendance can be approved upon their explicit request and the agreement of the Ministry of Justice of BiH, subject to the opinion of the body acting upon the request.[109]

107 Article 3 of the LILACM.

108 Article 9 paragraph 1 of the LILACM.

109 Article 21 of the LILACM.

The 2013 amendments to the Law additionally regulated three specific options which correspond to special investigative measures set forth in the CPC of BiH:[110] 1) Following outside the borders of one state party, which is complementary with the investigative measure of covert following and technical recording of persons, vehicles and objects related to them; 2) controlled delivery, which is complementary with the special investigative measure of supervised transport and delivery of objects of criminal offense and 3) covert investigation, which is essentially identical to the special investigative measure of the use of undercover investigators and informants.

The MLA request for any of these measures can be sent by the requesting state, or a foreign judicial authority, via the Ministry of Justice of BiH to the relevant prosecutor's office in BiH.[111] It can also be sent directly to the relevant prosecutor's office in BiH,[112] if so foreseen in the international treaty. More specific arrangements apply in cases of covert investigation, allowing for an agreement on the assistance by one party to the other in a criminal case in which members of the internal affairs authority work under secret or false identity.[113]

In all three situations, the relevant prosecutor's office in BiH is obliged to examine whether special requirements, which are different for each of these situations, have been met. If not, the prosecutor's office will refuse the request and inform the requester accordingly,[114] and if the request meets all the necessary requirements, the motion to order the special investigative measure sought is drafted and submitted to the relevant court in BiH.[115] If the requirements have been met for the motion to be granted, the court issues the order for the implementation of the special investigative measure sought.[116] The foreign judicial authority is informed of the court's decision.[117]

Enforcement, direction and control of special investigative measures is regulated differently in the three situations above. In instances of controlled delivery, the law enforcement agencies in BiH have the authority, pursuant to national criminal legislation.[118] Covert investigations, or the use of foreign undercover investigators and the use of foreign informants are also implemented pursuant to the criminal legislation of BiH. It is specifically provided, however, that the competent authorities of the states participating in the investigation will agree on the duration of the covert investigation, details, requirements and legal status of officials in the course of the investigations, abiding by the BiH legislation and procedures, and that they will cooperate in the preparation and supervision of the covert investigation and ensure protection of officials working under a secret or false identity, and that their agreement will be recorded in writing.[119]

110 Article 116 of the CPC of BiH provides for the following special investigative measures:
a) Surveillance and technical recording of telecommunications;
b) Access to the computer systems and computerized data processing;
c) Surveillance and technical recording of premises;
d) Covert following and technical recording of individuals, vehicles and items related to them;
e) Use of undercover investigators and informants;
f) Simulated purchase of certain objects and simulated bribery;
g) Supervised transport and delivery of objects of criminal offense.

111 Article 24a paragraph 1 of the Law.

112 Article 24b paragraph 1 and Article 24c paragraph 1 of the Law.

113 Article 24c paragraph 1 of the Law.

114 Article 24a, paragraph 4, 24b paragraph 4, and 24c paragraph 4 of the Law.

115 Article 24a, paragraph 5, 24b paragraph 5, and 24c paragraph 5 of the Law.

116 Article 24a, paragraph 6, 24b paragraph 6, and 24c paragraph 6 of the Law.

117 Notification is sent through the Ministry of Justice of BiH, pursuant to Article 24a paragraph 7 of the Law, while Articles 24b paragraph 6, and 24c paragraph 6 of the Law do not explicitly refer to the Ministry of Justice of BiH.

118 Article 24b paragraph 7 of the Law.

119 Article 24, paragraph 7 through 9 of the Law.

PCC SEE also recognizes that several countries can agree on mutual assistance in covert investigations, or the investigations of criminal offences conducted by officials under a secret or false identity.[120] Member state in need of this type of assistance will send a request to the member state from which the assistance is needed, and that state, or its competent authorities which receive the request, decide on the request on a case to case basis, in compliance with the their national law and procedures. Agreements in relation to the duration of the covert investigation, detailed requirements and legal status of officials during the covert investigations are reached by the parties in compliance with their national laws and procedures,[121] and covert investigations in the territories of the respective member states are conducted in the same manner. Member states participating in the covert investigation take part in ensuring the preparation and supervision of covert operations and in safety arrangements for the officials working under a secret or false identity.[122]

Following outside the state borders of a state party is regulated in greater detail. There is a possibility for the officials of the internal affairs authorities of the requesting country who enforce the measure of following within a criminal investigation to be authorized to continue the following of the suspect in BiH territory, even if the request for authorization could not be sent for reasons of great urgency. The following conditions apply: a) that the relevant prosecutor's office in BiH be notified immediately that the border has been crossed during the following and b) a request for assistance outlining the grounds for crossing the border without prior authorization be submitted without delay.[123]

The following is suspended immediately, if the relevant prosecutor's office in BiH requests so, or if the court does not issue the order within five hours following the crossing of the state border,[124] and if the court issues the order, the following proceeds in compliance with the general conditions provided for in the Law.[125]

It should be noted that Chapter III (Articles 17 through 22) of the PCC SEE regulates the interception of telecommunications as a special procedure in mutual legal assistance in criminal matters between the member countries. This measure is comparative to the special investigative measure of surveillance and technical recording of telecommunications in the CPC of BiH (Article 116 paragraph 2 item A) of the CPC of BiH). LILACM does not regulate in greater detail the surveillance and technical recording of telecommunications. In Article 13 of the Law the phone surveillance and tapping is included as one of the general forms of mutual legal assistance. PCC SEE also provides for cross-border surveillance (Article 14), controlled delivery (Article 15) and undercover investigations (Articles 16 and 17), which correspond to the provisions of the Law (Articles 24a through 24c) and the provisions of the CPC of BiH on special investigative measures (Articles 116 through 122).

If several states conduct a parallel investigation, the procedure for special investigative measures enforcement is the same as in the cases of requests for mutual legal assistance, particularly because every state conducts its own, independent investigation, as previously explained. The arrangements applicable to JIT

120 Article 14 paragraph 1 of the PCC SEE.

121 Article 14 paragraph 2 of the PCC SEE.

122 Article 14 paragraph 3 of the PCC SEE. Paragraph 4 of the same article provides that a member country may declare itself not bound by this Article. This declaration can be withdrawn at any time.

123 Article 24a paragraph 8 of the Law. The cited paragraph requires that persons in question are assumed to have committed criminal offences referred to in paragraph 1 item D) of this Article. In light of the provisions in Article 24 of the Law, and the fact that paragraph 1 is not divided into items, it is reasonable to conclude that reference is actually made to paragraph 2 item D) of the same article.

124 Article 24a paragraph 9 of the Law.

125 Article 24a paragraph 10 of the Law.

cooperation are considerably different. The concept of a joint investigation team was created to meet the need for a more efficient response to new, modern challenges faced by the law enforcement authorities. The experience so far has shown that the circumstances surrounding the commission (or ongoing commission) of the criminal offences investigated by JITs require the use of special investigative measures.

It is necessary to differentiate between the use of these measures within a JIT, where special investigative measures are sought directly be the JIT members in the country where the team operates, and the use of investigative measures as an MLA tool, where the prescribed communication procedure between the requesting and requested states has to be complied with, in order to ensure the legality of such measures. Crucial for the JIT member states is that the results of special investigative measures from any of the members can be used directly as evidence by all other members, provided that this has been regulated in the JIT agreement.

EUROJUST (European Union Agency for Criminal Justice Cooperation) is particularly important for the setting up and operations of JITs and for the implementation of special investigative measures within the teams. EUROJUST's main role is to provide support to EU member countries in combating crime affecting several EU member countries, and the judicial cooperation focuses on the cases of transnational crime and the types of criminal offences which the EU Council categorized as priority.[126] EUROJUST's mission is to improve the efficiency of national investigation and enforcement bodies in combating serious forms of transnational and organized crime and to ensure their cooperation and coordination. In doing so, EUROJUST's vision is to be an important partner and judicial expertise hub for efficient measures in the fight against crime. EUROJUST deals with challenges and practical issues arising from the differences between the legal systems of all EU member countries. It assists in resolving the conflict of jurisdiction between several member states and provides support in the application of international judicial instruments (such as the European Arrest Warrant). It can also provide financial and technical support for the establishment and operations of JITs.

For more efficient implementation of its goals, EUROJUST also hosts the secretariats of the European Justice Network, Joint Investigation Teams Network and the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network').

EUROJUST can also cooperate, directly or indirectly, with non-EU countries, including BiH. This is called cooperation with "third countries". Indirect cooperation takes place at the level of contact points. EUROJUST approaches individual countries, if having contact points in those countries is deemed to be a mutual interest. Approached countries decide if they want to have a contact point for EUROJUST, the number of contact points and persons who will perform that task. Third countries may also approach EUROJUST with an expression of interest to establish cooperation through contact points.

On 1 August 2018, the Council of Ministers of BiH adopted a Decision on the establishment of the expert group for preparations in the preliminary negotiation phase of the agreement on cooperation between EUROJUST and BiH. The expert group is in charge of: maintaining regular contacts with EUROJUST, holding meetings regularly, and at least once a month, to exchange information regarding the compliance with requirements for the opening

[126] The types of criminal offences set as priority in the fight against serious and organized crime are listed in the conclusions of the EU Council: Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2014 and 2017 (available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137401.pdf, accessed on: 11 September 2020) and Council conclusions on setting the EU's priorities for the fight against serious and organised crime between 2018 and 2021 (available at: http://data.consilium.europa.eu/doc/document/ST-9450-2017-INIT/en/pdf, accessed on: 11 September 2020).

of negotiations on the agreement on cooperation between EUROJUST and BiH, providing information sought to EUROJUST, in relation to the compliance with requirements in preliminary negotiations phase, including relevant legislation, obtaining information from EUROJUST with respect to the state of affairs relative to the commencement of negotiations, and the issues that may arise in relation to the compliance with requirements in the preliminary phase of negotiations, progress reporting to the relevant institutions of BiH and the Council of Ministers of BiH, proposing further course of action, meetings with EUROJUST, if needed, and preparing for possible study visit to EUROJUST for the purpose of assessment of the legislation on personal information.

The Decision of the EU Council on the establishment of EUROJUST provides that the states will report to EUROJUST about their intentions to set up a JIT in a particular case. This enables the mechanism for facilitated information exchange on specific cases with EUROJUST.[127] In addition to the formal channels to engage EUROJUST in the work of JITs, informal contacts between EUROJUST representatives and representatives of different states are equally important for exchange of information on investigations where their assistance and cooperation with other countries in the form of JIT is required. Cross-referencing information from different countries, EUROJUST is very well positioned to identify the cases suitable for cooperation through JITs.[128] On the her hand, EUROJUST will not propose the establishment of a JIT, in case it finds this form of cooperation inadequate or different legal systems "irreconcilable". It will propose other modes of international cooperation, such as parallel investigations or MLA requests.

EUROJUST should also provide legal counsel and information in the preliminary phase in relation to differences between the legal systems of states who seek to set up a JIT. Thus, EUROJUST supports negotiations with the aim of entering into an agreement on the establishment of a JIT. During the operative phase, EUROJUST should ensure that national procedural regulations pertaining to the rules of evidence gathering are complied with. Another key role of EUROJUST pertains to the financial support to JITs.[129] Since 2016, EUROJUST has been able to reimburse the costs incurred by non-EU States parties, provided that at least one member of the JIT is also a member of the EU, and that the JIT filed a request for financial support.[130]

The involvement of EUROJUST does not necessarily cease upon the completion of the joint investigation. The case often remains open in EUROJUST, especially because EUROJUST provides support during the evaluation of the JIT, and the sending of additional MLA requests (bearing in mind that the completion of JIT does not always coincide with the completion of the investigations in all member states of the team, and EUROJUST support may also be required during the trial).

127 Article 13 paragraph 5 of the Decision of the Council of the European Union 2002/187/JHA, amended by the Council Decision 2009/426/JHA of 16 December 2008.

128 See: *Second JIT Evaluation Report from February 2018 (evaluations received between: April 2014 and October 2017)*, p. 30, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Second%20JIT%20Evaluation%20Report%20(February%202018)/2018-02_2nd-Report-JIT-Evaluation_EN.pdf (accessed on: 11 September 2020)..

129 See: Klother, M., *Joint Investigation Teams – problems, shortcomings and reservations,* Bachelor Thesis, Westfälische Wilhelms-Universität Münster, Universiteit Twente Enschede, 2014, 24. See also: *First JIT Evaluation Report from February 2016 (evaluations received between: April 2014 and October 2015)*, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/First%20JIT%20Evaluation%20Report%20(February%202016)/2016-02-08-JIT-Evaluation_EN.pdf (accessed on: 11 September 2020), *Second JIT Evaluation Report from February 2018 (evaluations received between: April 2014 and October 2017)*, available at:: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Second%20JIT%20Evaluation%20Report%20(February%202018)/2018-02_2nd-Report-JIT-Evaluation_EN.pdf (accessed on: 11 September 2020) and *Third JIT Evaluation Report from March 2020 (evaluations received between: November 2017 and November 2019)*, pp. 7 and 8, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Third%20JIT%20Evaluation%20Report%20(March%202020)/2020-03_3rd-JITs-Evaluation-Report_EN.pdf (accessed on: 11 September 2020).

130 *Third JIT Evaluation Report from March 2020 (evaluations received between: November 2017 and November 2019)*, p. 23, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Third%20JIT%20Evaluation%20Report%20(March%202020)/2020-03_3rd-JITs-Evaluation-Report_EN.pdf (accessed on: 11 September 2020).

V. 4. Evaluation of legality of the implementation of special investigative measures ordered/enforced abroad

Actions required to obtain evidence through mutual legal assistance are undertaken upon the MLA request in compliance with the legislation and procedures of the requested state, unless the LILACM or an international treaty provide otherwise[131], and the stakeholders cooperate during the preparation and oversight of the measures sought. The legality of evidence obtained upon the request is usually reviewed pursuant to the laws of the requested country and the regulations pertaining to the delivery of this evidence via diplomatic channels. The review of legality of this evidence, and the analysis whether its gathering entailed violations of human rights and freedoms enshrined in the BiH Constitution and international treaties ratified by BiH, requires examination of circumstances in which the evidence was gathered and the relevant regulations applicable to the gathering of this evidentiary material. The focus is on examining whether the evidence obtained by special investigative measures was gathered lawfully by the competent authorities of the requested state.

Evidence obtained through special investigative measures implemented within the mutual legal assistance arrangement is presented by the party that proposed the evidence in question. Usually, that is the prosecutor representing the indictment before the national court. The prosecutor reproduces audio or audio-video content of the evidence in question (or enlists the help of technical staff who do not present any factual or legal conclusions). The prosecutor presents documentary evidence obtained through special investigative measures abroad in the same manner. There are no obstacles for the person who participated in the implementation of special investigative measures in the country which enforced them in certain capacity (as an investigator, undercover investigator or informant) to appear, if necessary, before the court and testify as a witness about what he or she knows directly or indirectly. Provisions of the Law on Protection of Witnesses under Threat or Vulnerable Witnesses may apply to the hearing of investigators, undercover investigators and informants, if necessary.

Regardless of the shared interest of the requesting state and the requested state, the differences in their respective legislations or legal systems as a whole can render the evidence gathered by international cooperation unusable. By the filing of a MLA request, the requesting state accepts potential differences between its own law and that of the requested state, and the risk of those differences rendering the gathered evidentiary materials unusable in the national proceedings. However, it is important to know to what extent the results of evidence gathering abroad can be used in national criminal proceedings, since the rules of evidence vary in different legal systems, where different standards apply in terms of accurately established and reliable state of facts.[132]

There are also arrangements seeking to mitigate the differences between rules and regulations of the requesting state and the requested state. They range from allowed attendance of the officers of the requesting

[131] According to: Article 6 paragraph 1 of the LILACM, while Article 23 paragraph 1 of LILACM provides that national judicial authority can implement activities as indicated in the MLA request, if the requester asks so, provided that such activities do not violate the basic principles of BiH legal order and if the international treaty foresees this possibility.

[132] Similar position can be found in: Krapac, D., *Međunarodna kaznenopravna pomoć: Uvod u teoriju međunarodne kaznenopravne pomoći, Komentar Zakona o međunarodnoj pravnoj pomoći u kaznenim stvarima i Zbirka međunarodnih ugovora Republike Hrvatske u međunarodnoj pravnoj pomoći u kaznenim stvarima*, Zagreb, 2006, pp. 106-107. And in: Klother, M., *Joint Investigation Teams – problems, shortcomings and reservations,* Bachelor Thesis, Westfälische Wilhelms-Universität Münster, Universiteit Twente Enschede, 2014, 27. Differences between legal systems in terms of legality of evidence are one of the main reasons for slow progress in the area of international cooperation in criminal matters.

country during the activities implemented by the requested state, in order to remove obstacles to the use of material gathered in this manner in the requesting country, to the obligation of the requested state to apply the rules of the requesting state, provided that they are not contrary to the principles of the legal order of the requested state.[133] There are efforts to minimize the negative effects of differing legal rules and systems, reflected in the attempt to create the "supra-state concept" of legality of evidence in criminal matters, both within the EU through the initiative to replace the principle of mutual assistance with the principle of mutual recognition, and before the international criminal tribunals through provisions on (in)admissible evidence.[134]

The same rules applicable to evidence gathered through international legal assistance apply to the legality of evidence gathered through special investigative measures implemented within parallel investigation. All evidence gathered by states participating in a parallel investigation is exchanged by means of a request.

Cooperation between JIT member states is an important distinction. As explained above, the JIT agreement can regulate direct exchange of evidence gathered by the team, which considerably contributes to the efficiency of the investigation as compared to the MLA request. Investigation by JITs also allows for direct implementation of special investigative measures in the member state where such investigative measures are necessary. This "skips" the whole procedure of requesting and receiving mutual legal assistance in criminal matters.

According to very encouraging EUROJUST's statistics to date, in all cases where the legality of evidence gathered through JITs was contested, the relevant courts found that evidence to be legal.[135]

To conclude, legal norms of different states pertaining to investigations are often insufficient for the law enforcement authorities to successfully respond to all challenges of modern (in particular transnational) crime by themselves. In some cases, traditional forms of international legal assistance are also not sufficient to meet the needs of the law enforcement authorities. New models of cooperation are available for a more adequate response to the challenges of ever more innovative ways of commission of criminal offences and the growing cooperation between members of organized criminal groups which is not bound by regulations or rules, especially in transnational contexts.

Members of organized criminal groups are not burdened by the limitations of the rules of mutual legal assistance which law enforcement bodies of different states are bound by in their efforts to stop the criminal offences which negatively affect several legal systems at the same time. With that in mind, it seems that the least the law enforcement authorities can do to ensure successful investigation within the framework of MLA requests, parallel investigations and joint investigation teams is to assume as flexible and open approach to investigation as possible, using the most appropriate models in every case. This will allow them to tackle successfully the challenges brought about by new ways of commission of criminal offences.

133 For more details, see: Krapac, D., *Međunarodna kaznenopravna pomoć: Uvod u teoriju međunarodne kaznenopravne pomoći, Komentar Zakona o međunarodnoj pravnoj pomoći u kaznenim stvarima i Zbirka međunarodnih ugovora Republike Hrvatske u međunarodnoj pravnoj pomoći u kaznenim stvarima*, Zagreb, 2006, pp. 102 and 103.

134 For more see: Krapac, D., *Međunarodna kaznenopravna pomoć: Uvod u teoriju međunarodne kaznenopravne pomoći, Komentar Zakona o međunarodnoj pravnoj pomoći u kaznenim stvarima i Zbirka međunarodnih ugovora Republike Hrvatske u međunarodnoj pravnoj pomoći u kaznenim stvarima*, Zagreb, 2006, pp. 111-113.

135 See: *First JIT Evaluation Report from February 2016 (evaluations received between: April 2014 and October 2015)*, p. 24, available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/First%20JIT%20Evaluation%20Report%20(February%202016)/2016-02-08-JIT-Evaluation_EN.pdf (accessed on: 11 September 2020), and *Second JIT Evaluation Report from February 2018 (evaluations received between: April 2014 and October 2017)*, pp. 26 and 52 available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITsevaluation/Second%20JIT%20Evaluation%20Report%20(February%202018)/2018-02_2nd-Report-JIT-Evaluation_EN.pdf (accessed on: 11 September 2020).

V.5. Examples

V. 5. 1. MLA request (Request for international legal assistance)

Ministry of Justice of Bosnia and Herzegovina

Department of international and inter-entity legal assistance and cooperation

Trg BiH 1

71000 Sarajevo

Bosnia and Herzegovina

SUBJECT: Request for international legal assistance in the serving of the summons for the interview of a suspect

Dear Sir/Madam,

Please find attached the Request for international legal assistance in relation to the criminal proceedings in the case of the Prosecutor's Office of Bosnia and Herzegovina, number _____ against several persons, due to the grounds for suspicion that criminal offences falling under the jurisdiction of the Court of Bosnia and Herzegovina have been committed.

Pursuant to Article ____ of the Agreement between Bosnia and Herzegovina and _____ on legal assistance in criminal matters, the Prosecutor's Office of Bosnia and Herzegovina submits this Request for forwarding through your Ministry and the competent national authority to the competent judicial authority in ____, for the purpose of the serving of the summons for the interview on _____, one of the suspects in the case referenced above.

Please treat the information enclosed as confidential. We also kindly ask for your urgent action upon the request, because it is essential that the suspect be served the summons timely, in view of the date of the interview.

For additional information, please contact the relevant prosecutor of the Prosecutor's Office of Bosnia and Herzegovina.

Respectfully yours,

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina

Enclosures:

- *Request for international legal assistance for the serving of the summons for the interview of a suspect, number ____ dated _____ and translation into ____;*
- *Summons for the interview of a suspect in the investigation, number_____, dated ____ and translation into _____;*

COMPETENT JUDICIAL AUTHORITY _____

(State of which mutual legal assistance is requested)

SUBJECT: Request for international legal assistance in the serving of the summons for the interview of a suspect

Dear Sir/Madam,

Prosecutor's Office of Bosnia and Herzegovina requires legal assistance in the ongoing investigation against _____ and others, due to the grounds for suspicion that a criminal offence in violation of Article _____ of the Criminal Code of Bosnia and Herzegovina was committed.

This Request is submitted pursuant to Article _____ of the Agreement between Bosnia and Herzegovina and _____ on legal assistance in criminal matters.

I *CONFIDENTIALITY*

We kindly ask that you treat the information enclosed as confidential to ensure the secrecy of the investigation.

II *INVESTIGATION*

Prosecutor's Office of Bosnia and Herzegovina approaches you for the following reasons: on _____, the Order to conduct investigation against several persons was issued in the case referenced above, including _____, born on ___ in _____, maintaining residence at _____, national of _____ (according to the Passport of _____ number _____, issued on: _____, valid through: _____) *(remaining particulars unknown)*, in relation to whom there are grounds for suspicion that he committed the aforementioned criminal offence together with other suspects, in the following manner: *(Factual description of the offence)*

III *LEGAL ASSISTANCE*

Prosecutor's Office of Bosnia and Herzegovina requests that _____ be served the summons for the examination of the suspect, seeing as he is a _____ national and is in the territory of _____. The proof of due service should be returned to the Prosecutor's Office of Bosnia and Herzegovina, using the reference number above.

Prosecutor's Office of Bosnia and Herzegovina notes that service of the summons was previously unsuccessfully attempted at the address _____. Therefore, pursuant to Article _____ of the Agreement between Bosnia and Herzegovina and _____ on legal assistance in criminal matters, we request that measures necessary to identify the address be implemented by the requested authority, if the summons cannot be duly served at the address indicated in the Request.

Thank you for your kind assistance.

For additional information, please contact the relevant prosecutor of the Prosecutor's Office of Bosnia and Herzegovina.

Respectfully yours,

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina

V. 5. 2. Joint Investigation Team Agreement

MODEL AGREEMENT ON THE ESTABLISHMENT OF A JOINT INVESTIGATION TEAM[136]

In accordance with:

[Please indicate here the applicable legal bases, which may be taken from – but not limited to — the instruments listed below:

— *Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000*;

— *Council Framework Decision of 13 June 2002 on joint investigation teams*;

— *Article 1 of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto of 29 December 2003*;

— *Article 5 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America*;

— *Article 20 of the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959*;

— *Article 9(1)(c) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)*;

— *Article 19 of the United Nations Convention against Transnational Organized Crime (2000)*;

— *Article 49 of the United Nations Convention against Corruption (2003)*;

— *Article 27 of the Police Cooperation Convention for South East Europe (2006)*.]

1. Parties to the Agreement

The following parties have concluded an agreement on the setting up of a joint investigation team, hereafter referred to as 'JIT':

1. *[Insert name of the first competent agency/administration of a State as a Party to the agreement]*

   And

2. *[Insert name of second competent agency/administration of a State as a party to the agreement]*

The parties to this agreement may decide, by common consent, to invite other States' agencies or administrations to become parties to this agreement.

2. Purpose of the JIT

This agreement shall cover the setting up of a JIT for the following purpose:

[*Please provide a description of the specific purpose of the JIT.*

This description should include the circumstances of the crime(s) being investigated in the States involved (date, place and nature) and, if applicable, reference to the ongoing domestic procedures. References to case-related personal data are to be kept to a minimum.

This section should also briefly describe the objectives of the JIT (including e.g. collection of evidence, coordinated arrest of suspects, asset freezing …). In this context, Parties should consider including the initiation and completion of a financial investigation as one of the JIT objectives.]

[136] Model Agreement is annexed to the Resolution of the EU Council on a Model Agreement for setting up a Joint Investigation Team (JIT) (2017/C 18/01), available at: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32017G0119(01)&from=EN (accessed on: 26 September 2020);

3. Period covered by this agreement

The parties agree that the JIT will operate for *[please indicate specific duration],* starting from the entry into force of this agreement.

This agreement shall enter into force when the last party to the JIT has signed it. This period may be extended by mutual consent.

4. States in which the JIT will operate

The JIT will operate in the States of the parties to this agreement.

The team shall carry out its operations in accordance with the law of the States in which it operates at any particular time.

5. JIT Leader(s)

The leaders of the team shall be representatives of the competent authorities participating in criminal investigations from the States in which the team operates at any particular time, under whose leadership the members of the JIT shall carry out their tasks.

The parties have designated the following persons to act as leaders of the JIT:

Name	Position/Rank	Authority/Agency	State

Should any of the abovementioned persons be unable to carry out their duties, a replacement will be designated without delay. Written notification of such replacement shall be provided to all concerned parties and annexed to this agreement.

6. Members of the JIT

In addition to the persons referred to in point 5, a list of JIT members shall be provided by the parties in a dedicated annex to this agreement.

Should any of the JIT members be unable to carry out their duties, a replacement will be designated without delay by written notification sent by the competent leader of the JIT.

7. Participants in the JIT

Parties to the JIT agree to involve *[Insert here e.g., Eurojust, Europol, OLAF…]* as participants in the JIT. Specific arrangements related to the participation of *[Insert name]* are to be dealt with in the relevant appendix to this agreement.

8. Gathering of information and evidence

The JIT leaders may agree on specific procedures to be followed regarding the gathering of information and evidence by the JIT in the States in which it operates.

The parties entrust the JIT leaders with the task of giving advice on the obtaining of evidence.

9. Access to information and evidence

The JIT leaders shall specify the processes and procedures to be followed regarding the sharing between them of information and evidence obtained pursuant to the JIT in each Member State.

[*In addition, parties may agree on a clause containing more specific rules on access, handling and use of information and evidence. Such clause may in particular be deemed appropriate when the JIT is based neither on the EU Convention nor on the Framework Decision (which already include specific provisions in this respect – see Article 13(10) of the Convention)*.]

10. Exchange of information and evidence obtained prior to the JIT

Information or evidence already available at the time of the entry into force of this agreement, and which pertains to the investigation described in this agreement, may be shared between the parties in the framework of this agreement.

11. Information and evidence obtained from States not participating in the JIT

Should a need arise for a mutual legal assistance request to be sent to a State that does not participate in the JIT, the requesting State shall consider seeking the agreement of the requested State to share with the other JIT party/parties the information or evidence obtained as a result of the execution of the request.

12. Specific arrangements related to seconded members

[*When deemed appropriate, parties may, under this clause, agree on the specific conditions under which seconded members may:*

— *carry out investigations – including in particular coercive measures — in the State of operation (if deemed appropriate, domestic legislations may be quoted here or, alternatively, annexed to this agreement)*

— *request measures to be carried out in the State of secondment*

— *share information collected by the team*

— *carry/use weapons*]

13. Amendments to the agreement

This agreement may be amended by mutual consent of the parties. Unless otherwise stated in this agreement, amendments can be made in any written form agreed upon by the parties.

14. Consultation and coordination

The parties will ensure they consult with each other whenever needed for the coordination of the activities of the team, including, but not limited to:

— the review of the progress achieved and the performance of the team

— the timing and method of intervention by the investigators

— the best manner in which to undertake eventual legal proceedings, consideration of appropriate trial venue, and confiscation.

15. Communication with the media

If envisaged, timing and content of communication with the media shall be agreed upon by the parties and followed by the participants.

16. Evaluation

The parties may consider evaluating the performance of the JIT, the best practice used and lessons learned. A dedicated meeting may be arranged to carry out the evaluation.

[*In this context, parties may refer to the specific JITs evaluation form developed by the EU Network of JITs experts. EU funding may be sought to support the evaluation meeting.*]

17. Specific arrangements

[*Please insert, if applicable. The following sub-chapters are intended to highlight possible areas that may be specifically described.*]

17.1. *Rules of disclosure* [*Parties may wish to clarify here applicable national rules on communication to the defence and/or annex a copy or a summary of them.*]

17.2. *Management of assets/asset recovery arrangements*

17.3. *Liability* [*Parties may wish to regulate this aspect, particularly when the JIT is based neither on the EU Convention nor on the Framework Decision (which already include specific provisions in this respect – see Articles 15 and 16 of the Convention).*]

18. Organisational arrangements

[*Please insert, if applicable. The following sub-chapters are intended to highlight possible areas that may be specifically described.*]

18.1. *Facilities (office accommodation, vehicles, other technical equipment)*

18.2. *Costs/expenditures/insurance*

18.3. *Financial support to JITs* [*Under this clause, Parties may agree on specific arrangements concerning roles and responsibilities within the team concerning the submission of applications for EU funding.*]

18.4. *Language of communication*

Done at [place of signature], [date]

[Signatures of all parties]

Appendix I

TO THE MODEL AGREEMENT ON THE ESTABLISHMENT OF A JOINT INVESTIGATION TEAM

Participants in a JIT

Arrangement with Europol/Eurojust/the Commission (OLAF), bodies competent by virtue of provisions adopted within the framework of the Treaties, and other international bodies.

1. Participants in the JIT

The following persons will participate in the JIT:

Name	Position/Rank	Organisation

[Insert name of Member State] has decided that its national member of Eurojust will participate in the joint investigation team on behalf of Eurojust/as a competent national authority.

Should any of the above-mentioned persons be unable to carry out their duties, a replacement will be designated. Written notification of such replacement shall be provided to all concerned parties and annexed to this agreement.

2. Specific arrangements

The participation of the above-mentioned persons will be subject to the following conditions and only for the following purposes:

2.1. *First participant in the agreement*

2.1.1. Purpose of participation

2.1.2. Rights conferred (if any)

2.1.3. Provisions concerning costs

2.1.4. Purpose and scope of participation

2.2. *Second participant in the agreement (if applicable)*

2.2.1. ...

3. Conditions of participation for Europol staff

3.1. Europol staff participating in the joint investigation team shall assist all the members of the team and provide the full range of Europol's support services to the joint investigation as provided for and in accordance with the Europol Regulation. They shall not apply any coercive measure. However, participating Europol staff can, if instructed and under the guidance of the leader(s) of the team, be present during operational activities of the joint investigation team, in order to render on-the-spot advice and assistance to the members of the team who execute coercive measures, provided that no legal constraints exist at national level where the team operates.

3.2. Article 11(a) of the Protocol on the Privileges and Immunities of the European Union shall not apply to Europol staff during their participation in the JIT. During the operations of the JIT, Europol staff shall, with respect to offences committed against or by them, be subject to the national law of the Member State of operation applicable to persons with comparable functions.

3.3. Europol staff may liaise directly with members of the JIT and provide all members of the JIT with all necessary information in accordance with the Europol Regulation.

Appendix II

TO THE MODEL AGREEMENT ON THE ESTABLISHMENT OF A JOINT INVESTIGATION TEAM

Agreement to extend a joint investigation team

The parties have agreed to extend the joint investigation team (hereinafter 'JIT') set up by agreement of *[insert date],* done at *[insert place of signature],* a copy of which is attached hereto.

The parties consider that the JIT should be extended beyond the period for which it was set up *[insert date on which period ends],* since its purpose as established in Article *[insert article on purpose of JIT here]* has not yet been achieved.

The circumstances requiring the JIT to be extended have been carefully examined by all parties. The extension of the JIT is considered essential to the achievement of the purpose for which the JIT was set up.

The JIT will therefore remain in operation for an additional period of *[please indicate specific duration]* from the entry into force of this agreement. The above period may be extended further by the parties by mutual consent.

Date/signature

Appendix III

TO THE MODEL AGREEMENT ON THE ESTABLISHMENT OF A JOINT INVESTIGATION TEAM

The parties have agreed to amend the written agreement setting up a joint investigation team (hereinafter 'JIT') of *[insert date],* done at *[insert place],* a copy of which is attached hereto.

The signatories have agreed that the following articles shall be amended as follows:

1. (Amendment ...)
2. (Amendment ...)

The circumstances requiring the JIT agreement to be amended have been carefully examined by all parties. The amendment(s) to the JIT agreement is/are deemed essential to achieve the purpose for which the JIT was set up.

Date/signature