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SPECIAL EVIDENTIARY ACTIONS IN THE CONTEXT OF JUDICIAL CONTROL OF THEIR APPLICATION IN PRACTICE IN THE REPUBLIC OF CROATIA

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ABSTRACT

The focuse of this paper is the institute of special evidentiary actions, its application in practice, and the question to what extent the content component of the investigating judge's order must be justify in order to respond to the challenge of the standard of legal predictability. Proving the existence of certain forms of crime, with elements of conspiracy and latency, would be significantly hampered without the use of special evidentiary actions. The complexity of this challenge is raised to a higher level as it involves certain encroachment into individual human rights that are proclaimed as the highest constitutional values and are the subject of numerous international conventions and documents. Special evidentiary actions are taken latently, or secretly, because otherwise the realization of their very nature and purpose would be thwarted. In the light of this, the main guarantee of the protection of the defendants rights, as well as other persons, from excessive interventions into their fundamental rights lies precisely in the role of the court. The turning point in Croatian court practice was the decision of the European court for human rights in the case Dragojević v. Croatia, successively followed by the decisions in the cases of Bašić v. Croatia and Matanović v. Croatia, in the field of retrospective statement of reasons for investigating judge's orders, through the application of special evidentiary actions in practice. Such practice of domestic courts, by the decision of European court for human rights, was established as a behavior contrary to Art. 8. of the Convention, which led to a reassessment of the assurance level of appropriate guarantees against various possible abuses by public authorities.

Keywords: *special evidentiary actions, investigative judge's order, statement of reasons for order, court practice, Supreme Court decision, Constitutional Court decision, human rights violations, protection of personal and family life, European Court of Human Rights*

1. INTRODUCTION

The organic nature of the Criminal Procedure Act (CPA)[1] has resulted in its perception of "applied constitutional law", as it has a great impact on human rights and has an extraordinary reflection on private, social and political life.[2] Special evidentiary actions in the literature are often terminologically differently called as measures of secret surveillance, special investigative measures, special investigative methods, obscure methods, secret operations, etc., while in essence they represent a certain intensity of interventions into fundamental human rights and freedoms by which the constitutional rights of citizens are temporarily restricted. The application of special evidentiary actions in practice necessary involves the intervention into right to privacy and personal life, the individual rights proclaimed as the highest constitutional values (Art. 35 and 36 of the Constitution of the Republic of Croatia)[3] and which are the subject to numerous international conventions and documents, among which, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms

[1] Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17.
[2] Compare Z. Đurđević: Odluka Ustavnog suda RH o suglasnosti Zakona o kaznenom postupku s Ustavom Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), Vol. 19, No. 2/2012, p. 411.
[3] Official Gazette 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

(ECHR),[4] the International Covenant on Civil and Political Rights[5] and the Universal Declaration of Human Rights of 1948.[6] Special evidentiary actions present a special way of obtaining the objects and evidence necessary to establish the facts in the criminal proceedings, which, in accordance with the principle of proportionality, only take action "if the investigation cannot be carried out in any other way or would be accompanied by great difficulties "(Art. 332, para.1 of the CPA).

2. MATERIAL AND FORMAL ASPECTS OF APPLICATION OF SPECIAL EVIDENTIARY ACTIONS

Conditions for the application of special evidentiary actions may be identified as material and formal one. The material conditions of the application of special evidentiary actions are related to the types of criminal offense and the probative difficulties that require the use of special evidentiary actions.[7]

Considering that special evidentiary actions temporarily restrict the constitutional rights of citizens, they can be ordered only if there is no prospect that relevant facts can be determined by other means of proof or would have been possible only with great difficulties. This legally prescribed restriction constitutes a guarantee that the measures are not imposed negligently, irregularly or without due consideration (see ESLJP Klass and Others v. Germany, 6 September 1978, paragraph 24, Dragojević v. Croatia, 50, Series A No. 28, Ekimdzhiev v Bulgaria , No. 62540/00, § 77, 28 June 2007, Kennedy v. United Kingdom, No. 26839/05, §§ 153, May 18, 2010). (From the decision of the Supreme Court, VSRH No. I Kž-Us 59/16-5, p.5.)

The formal requirement for the application of special evidentiary actions also consists two cumulative elements. The first element is the processional initiative of the State Attorney through a written request with a statement of reasons, while the acceptance of such a request of a State Attorney by the investigating judge, in the form of written order with the statement of reasons, for carrying out special evidentiary actions, is the second element of the formal condition.[8]

The statement of reasons for order is a single entity and therefore it is necessary to consider all its parts carefully in order to make thoroughly assessment of its quality and validity. (From the decision of the County Court in Zagreb No. Kž-435/16-3 and No. Kž-1080/16-3).

The circumstance that some orders have more wide statement of reason does not call into question the legality of those orders that are not reasoned in that way, but contain clear and sufficient reasons. (From the Supreme Court's Decision, VSRH No. I Kž-Us 111/16-7).

In order for a court to make a decision for the application of special evidentiary actions, the State Attorney has priorly to convince the court, with its request with a statement of reasons, that the conditions prescribed by law for the determination of special evidentiary actions are

[4] International treaties 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.
[5] Adopted at the General Assembly of the United Nations on December 16, 1966 (Resolution 2200A /XXI), entered into force on March 23, 1976.
[6] Adopted and proclaimed at the General Assembly of the United Nations by resolution no. 217 / III on December 10, 1948.
[7] If the investigation cannot be carried out in any other way or would be accompanied by great difficulties; the existence of the grounds for suspicion against the person that he committed or has taken part in committing an offence referred to in Art. 334 of CPA/08.
[8] Compare Ignjatović, Đ.; Škulić, M.; *Organizovani kriminalitet*, Beograd, 2010, p. 275.

fulfilled and that the application of special evidentiary actions is indispensable and useful for the purpose of detecting, proving and suppressing criminal offenses.

The State Attorney's interest is to presents to the investigating judge all the relevant circumstances and facts about the existence of these assumptions, so it is notoriously that he will include, the above mentioned facts, into the content of the request for the determination of special evidentiary actions. Since the special evidentiary actions are limited to those procedures where there is a factual grounds for suspicion that a person, alone or together with other persons, has participated in committing a certain offenses, thus the statement of reasons for order must indicate the existence of the grounds for suspicion as a necessary precondition to carry out these actions, and therefore the statement of reasons for order must be logical and lawful. (From the decision of the Zagreb County Court No. Kž-1080 / 16-3)

The fact that the investigating judge, after careful analysis of the contents of the USKOK's[9] *request and the documentation submitted to it, has issued the orders referred to Art. 332 para. 1 of the CPA/08 implies that he has accepted the reasons for their issuance from the written request with a statement of reasons of USKOK, which were based on very detailed arguments that encompassed all the prerequisites for their issuance, and all that was corroborated by the documents. Therefore, investigating judge's statement of reasons for order, in which the arguments of the USKOK were mentioned first, and then it was determined that those requirements were substantiated, is a sufficiently comprehensive and fully compliant with the requirements of the USKOK* (From the Supreme Court's Decision, VSRH No. Kž-Us 3/18 -4). *The statement of reasons for order is important for the purpose of concluding whether the investigating judge has thoroughly considered the existence of legally prescribed preconditions for the determination of special evidentiary actions*. (From the decision of the Zagreb County Court Kž-1080/16-3)

In the case of Kruslin v. France[10] of 1990, the European Court of Human Rights (ECtHR) took the stand that one of the minimum standards provided by the Convention[11] (ECHR) for the application of special evidentiary actions (telecommunications surveillance) was to provide adequate guarantees against various possible misuse through precise law text. In the aforesaid case, the Court concluded that eavesdropping and other forms of telephone conversation tracking are "serious interference in private life and correspondence" and, as such, must be based on a law that is particularly precise. „The law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity ... to give the individual adequate protection against arbitrary interference." (§ 30).

Art. 8. of the European Convention (ECHR) provides that public authorities may interfere in the individual's right to privacy and family life and correspondence, if this is "in accordance with the law" and if necessary in a democratic society.[12] (From the Supreme Court's Decision, VSRH No. I Kž-Us 131/16-4 p.4)

[9] Anti-Corruption and Organized Crime Prevention Office

[10] Kruslin v. France, Application No. 11801/85, Strasbourg judgment of April 24, 1990.

[11] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, International Treaty, Official Gazette 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10

[12] Art. 8. of the Convention provides that everyone has the right to respect for their private and family life, home and correspondence and that the public authority will not interfere in the raelization of that right except in accordance with the law and if it is necessary in a democratic society for the interests of public security, public order and peace or economic well-being of the country, and to prevent riots and crimes for the protection of health or morals or for the protection of the rights and freedoms of others.

Ordering special evidentiary actions, there was indeed a temporary restriction of the fundamental constitutional rights and freedoms of the defendant. By issuing such orders a inevitabe infiltration was occured into the rights guaranteed by Art. 35 and Art. 36 of the Constitution of the Republic of Croatia, which guarantee the respect and legal protection of personal life and the freedom and confidentiality of correspondence in all forms. However, such a violation of these fundamental rights did not occur without a prior assessment of the existence of the presumption of lawfulness by the investigating judge, as there was no unreasonable and unrestricted state interference in the individual's right to respect for their aforementioned fundamental rights. (From the Supreme Court's Decision, VSRH No. I Kž-Us 131/2017-5 p.27; VSRH I Kž-Us 165/2017-4)

3. LEGISLATIVE GUIDELINES FOR APPLICATION OF SPECIAL EVIDENTIARY ACTIONS

The legislator has foreseen precise "guidelines" for the implementation of special evidentiary actions. Non-compliance by those guidelines is resulting in the inadequacy of evidence in criminal proceedings. The 2008 Criminal Procedure Act (CPA/08) sets certain postulates of the proceeding as follows;

- Forms of special evidentiary actions must be strictly defined by legislative provisions;
- The application of special evidentiary actions is allowed only in situations of inability to carried out the investigation in any other way;
- Respectively, it would be possible carried out the investigation by applying other measures, but would be accompanied by great difficulties;
- A certain degree of probability, certainty, in the sense of grounds for suspicion, is required that the person, alone or together with the other persons, has participated in the committing of a catalog listed criminal offense;
- Prior taking of special evidentiary actions, a written statement of reasons for order must be issued by investigative judge;
- Judge order must be initiated by the State Attorney's request with a statement of reasons on the necessity of taking the special evidentiary actions;
- The legislator provides a detailed and precise list of criminal offenses in relation to which special evidentiary actions may be ordered;
- The length of time for which special evidentiary actions may be ordered is limited by the circumstances of the particular case and the legislator, as a prerequisite for its extension, requires that special evidentiary actions are giving good results in their application and that there is a reason to continue with their implementation in order to collect evidence. Respectively, their (further) implementation is necessary to achieve the purpose for which they were ordered.

CPA/08 for orders issued pursuant to Art. 332, as well as all other orders issued in criminal proceedings, does not prescribe the right to appeal.

The court omission to explicitly state this, in the situation in which, therefore, ex lege there is no right to appeal, has no character of the essential violation of criminal procedure provisions. (From the Supreme Court's Decision, VSRH No. I Kž-Us 3/18-4 p.5.)

4. LIMITED TIME APPLICATION OF SPECIAL EVIDENTIARY ACTIONS

Special evidentiary actions are determined for a period of three months. At the request of the State Attorney, they may be extended for another three months. After passes the peroid of six months, special evidentiary actions may be extended for a further six months, but only for criminal offenses referred in Art. 334 item 1 and item 2.

Exceptionally, for offenses referred in Art. 334 item 1 special evidentiary actions, after expiry of the above mentioned deadlines, may be extended for a further six months if it is necessary to achieve the purpose for which they were ordered. That is, the maximum duration of time aplication of special evidentiary actions is limited to 18 months. (Art. 335 para. 3 CPA/08). The limited time application of special evidentiary actions is a consequence of the mechanism of criminal law protection against possible misuse and arbitrariness in the conduct of the criminal prosecution body. The carrying out of particular special evidentiary actions requires time involvement of different intensity, and accordingly, given the timing of the implementation of certain special evidentiary actions, we could classify them as:

1. Long-lasting special evidentiary actions, results that are possible and realistic only in the months of implementation and involvement, such as, for example:
   a) Surveillance and interception of telephone conversations and other means of remote technical communication;
   b) Interception, gathering and recording of electronic data;
   c) Entry on the premises for the purpose of conducting surveillance and technical recording at the premises;
   d) Covert following and technical recording of individuals and objects;
   e) Use of undercover investigators and informants.
2. Short-term special evidentiary actions, requiring shorter engagement time (eg several days to a month) such as:
   a) Simulated sales and purchase of certain objects, simulated bribe-giving and simulated bribe-taking;
   b) Offering simulated business services or closing simulated legal business;
   c) Controlled transport and delivery of objects from criminal offences.[13]
3. Expeditious special evidentiary actions (urgent, indisputable) requiring urgency of action as they don't tolerate the delay, such as, in some cases, the simulated sale or purchase of objects, eg. purchase of psychotropic substances on the street, accompanied by arrest at the scene of the incident under Art. 107, item 3 CPA/08.

5. DIFFERENT TYPES AND SCOPE OF APPLICATION OF SPECIAL EVIDENTIARY ACTIONS

The Ordinance on the Manner of Conducting Special Evidentiary Actions [14] provides and elaborates a more detailed way of its implementation.[15]

5.1. Surveillance and interception of telephone conversations and other means of remote technical communication

The legislator, by allowing an exception to Art. 35 (in the Art. 36 para. 2) of the Constitution of the Republic of Croatia,[16] in a very restrictive way, in the forme of law (CPA), had determined when such recording is still permitted and the video/tape itself can be used as

[13] Compare Usporedi Karlović S., *Posebne istražne radnje u krivičnom procesnom zakonodavstvu Bosne i Hercegovine*, p. 30.
[14] Official Gazette 102/09
[15] II. METHODS OF IMPLEMENTATION OF SPECIAL EVIDENTIARY ACTIONS
1) Surveillance and interception of telephone conversations and other means of remote technical communication (Art. 2 to 5);
2) Interception, gathering and recording of electronic data; (Art. 6 to 9);
3) Entry on the premises for the purpose of conducting surveillance and technical recording at the premises (Art. 10 to 15);
4) Covert following and technical recording of individuals and objects (Art. 16 to 19);
5) Use of undercover investigators and informants (Art. 20 to 23);
6) Simulated sales and purchase of certain objects, simulated bribe-giving and simulated bribe-taking (Art. 24 to 27);
7) Offering simulated business services or closing simulated legal business (Art. 28 to 30);
8) Controlled transport and delivery of objects from criminal offences (Art. 31 to 34).
[16] In accordance with Art. 36, para. 2 "Only the law may prescribe the restrictions necessary for the protection of the security of the state or the conduct of criminal proceedings".

legitimate proof. Their significant part, prescribed in Art. 334 CPA/08, refers to the criminal offenses that are only possible in the context of performing certain services or business activities (receiving bribes, giving bribes, misusing positions and powers, trading in influence, etc.).

It is precisely that the suspicion of committing or preparing criminal offenses is related to the work of a person that is performing certain official or business activities. Since it is always the case of acts concealed within legal or business activities, the legislator has made, precisely for these potential criminal acts intertwined with lawful acts, an exception of the constitutional rule on the protection of "freedom of communication" and allowed, under the legally prescribed conditions, the recording of such a "communication" - even without the knowledge of the person being recorded. (From the Supreme Court's Decision, VSRH No. I Kž-Us 151/15-4 pp. 3 - 4)

The content of the conversation is crucial for distinguishing the participants roles in commission of the criminal offense[17] as well as the level of their involvement.[18]

5.2. Interception, gathering and recording of electronic data

In its recent decisions ECtHR dealt with search and seizure of computer data. Decisions were concerned with the principle of proportionality in order to prevent abuse and arbitrariness when applying them, as well as to protect the right to privacy. Thus, in one of its decisions ECtHR concluded that the search and examination of all electronic data was "more than was necessary to achieve a legitimate aim, which led to the conclusion that, in this case, Art. 8 of the Convention was violated".[19]

5.3. Entry on the premises for the purpose of conducting surveillance and technical recording at the premises

Entry on the premises for the purpose of conducting surveillance and technical recording at the premises is conducted in a disguised manner that doesn't expose or jeopardize the carrying out of special evidentiary actions, using the necessary tools and electronic gadgets.
Surveillance and technical recording of the premises is carried out using the appropriate technical devices for monitoring, recording and transmission of audio and video signals. Upon expiry or termination of the imposed measures the police, in an appropriate manner, removes the applied technical means from the premises.

5.4. Covert following and technical recording of individuals and objects

During the implementation of this special evidentiary actions, the police use appropriate technical devices for positioning, motion control, transmission and recording of audio and video signals.

Special evidentiary actions of the monitoring and technical recording of persons and objects were carried out on the basis of the Order of the County Court in Karlovac dated July 2, 2012, No. Kir-5/12. According to it, so-called daily reports from Art. 337 para. 1 CPA/08 were made, which are not unlawful evidence, nor may such reports be equated with an official note of an informed interview. (From the County Court's Decision, VSRH No. I Kž-434/13-7)

[17] "By the evidence presented, first of all from the content of conversations between def. M.K. and def. B.G. with the undercover investigator, has been found that there was an agreement between the accused B.G. and M.K. for resale of narcotic drugs, which included a plan for the commission of several future proceeds of the resale." (From the Supreme Court's Decision No. I Kž - 560/07-5 of December 23, 2008.)

[18] "In spite of the undisputed fact that this accused brought in connection of the defendant A. B. and the undercover investigator, from the listened conversation, by applying the measure from the Art. 180. of the CPA, arises not only that he was present in full agreement but participated in it very actively, suggesting to get half a pound on the first test. (From the Supreme Court's Decision No. I Kž-Us 131/09-6 of January 26, 2010.)

[19] ECtHR Robathin v. Austria, Application No. 30457/06, Strasbourg judgment of July 3, 2012 (final October 3, 2012), § 52

5.5. Use of undercover investigators and informants

Application of the measures such as use of undercover investigator or informants should be referred to situations of gathering available evidence, ie. their application should be absent in the situations where their use is a substitute for some ordinary actions such as examination.[20] The specificity of this special evidentiary actions is that it is particularly suitable for detecting and proving criminal offenses that fall into the so called consensual and conspiracy crime. Also, the legislator specifically warns that simulated actions shouldn't be abetting of the defendant for committing a criminal offense (Art. 332 para. 10 CPA). The abetting would exist in the situation where the undercover investigator makes a verbal or some other action in order to put a defendant into position to created or to strengthen his decision to commit a criminal offense. „The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place (see the Delcourt v. Belgium judgment of January 17, 1970, § 25) that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Art. 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement" (Teixeira de Castro v. Portugal, § 36).[21] The Guidelines for the application of special evidentiary actions involving undercover investigators are stated in the case Ramanauskas v. Lithuania[22] by means of provisions of relevant international law (§35-§ 37).[23] The Court also considers that the situation of reopening of the offer, despite the initial defendant's rejection, (Ramanauskas v. Lithuania, § 67) and raising the price above the usual price (Malininas v. Lithuania, § 37)[24] are the abetting circumstances. Unlike abetting, "infiltration" in criminal activities doesn't violate the right to a fair trial. For example, the situation „when the police, in order to catch the defendant into action, has provided financial means and technical equipment for recording a conversation with a private person, who had previously complained that the defendant is seeking a bribe" is not considered as abetting (Milinienė v. Lithuania, § 38).[25]

The use of undercover investigators and informants as well as the simulated sale and purchase of certain objects shouldn't be an abetting to committing a criminal offense. However, as the undercover investigator has expressed the intent to buy drugs, it can not be considered as an abetting to the committing a criminal offense, because the simulated purchase, in its nature, presupposes the need for the undercover investigator to declare himself as a buyer and express his intent to buy. In order to be an abetting, it must be persistent, long-lasting, and as such, represent the main, decisive factor in creating the will to commit a criminal offense. (From the Supreme Court's Decision, VSRH, No. KŽ-Us 127 / 2017-7)

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[20] Compare Schünemann, Bernd, Polizei und Staatsanwaltschaft, Kriminalistik, Vol. 53, No. 3/1999, p. 151.

[21] Application No. 44/1997/828/1034, Strasbourg judgment of June 6, 1998.

[22] Application No. 74420/01, Strasbourg judgement of February 5, 2008.

[23] Council of Europe Corruption Convention on Corruption (ETS No. 173, January 27, 1999), Art. 23
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, provides in Art. 4, para. 2 (Special Investigative Authorizations and Techniques)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No.198, Warsaw, 16/05/2005, Art. 4. (Investigative and and Provisional Measures) states that each Party shall adopt such legislative and other measures as are necessary to enable it to identify, trace, freeze or quickly seize the property for which seizure is to be executed.
The use of special investigative techniques such as controlled deliveries in the context of illicit trafficking in narcotic drugs is also provided for in Art. 73 of the Convention implementing the Schengen Agreement of June 14, 1985 on the gradual abolition of checks at a common border signed at Schengen on June 19, 1990. (Ramanauskas v. Lithuania, § 37)

[24] Application No. 10071/04, Strasbourg judgment of July 1, 2008 (final October 1, 2008)

[25] Compare Martinović, I., Kos, D.; *Nezakoniti dokazi: teorijske i praktične dvojbe u svjetlu prakse Europskog suda za ljudska prava,* p. 326.

The simulated purchase requires the undercover investigator first to declare himself as a buyer of a certain type and amount of narcotic drug, before a price agreement is arranged. This does not mean that he has persuaded the co-perpetrator to commit the criminal offense. (From the Supreme Court's Decision, VSRH No. KZ-429/03-7 of September 2, 2003, and Kž 3702-7 of November 23, 2005).

5.6. Simulated sales and purchase of certain objects, simulated bribe-giving and simulated bribe-taking

Objects that can be used during the implementation of this special evidentiary actions are the objects temporarily seized in accordance with the provisions of a special law and the objects that are permanently seized on the basis of a final court decision. Simulated purchase of objects may refer to all objects that may be the subject of a criminal offense. Objects obtained through simulated purchase become the property of the Republic of Croatia, while the realized funds become funds of the state budget.

5.7. Offering simulated business services or closing simulated legal business

Legal entities can be established for the purpose of realizing the implementation of the special evidentiary actions. Funds for the business of the aforementioned legal entities are secured from specially intended means of police or State Attorney's office. Offering simulated business services or closing simulated legal business are carried out by undercover investigators or informants.The funds obtained become funds of the state budget, and the acquired objects become the property of the Republic of Croatia used by the Ministry of Internal Affairs.

5.8. Controlled transport and delivery of objects from criminal offences

Controlled transport and delivery of objects from criminal offences shall be carried out in a suitable, covert manner that doesn't expose or jeopardize the implementation of special evidentiary actions. During the implementation of controlled transportation and delivery of objects from criminal offenses, the police use appropriate technical facilities for positioning, supervision and documentation.

6. THE PRACTICE OF THE SUPREME COURT OF THE REPUBLIC OF CROATIA AND THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

The imbalance between the legislative arrangement of the institute of special evidentiary actions and their implementation in practice has arisen in the domain of the statement of reasons for the investigating judge's order by which their implementation is required. While the standard of legal certainty and predictability requires the concrete circumstances of why investigation couldn't been carried out in any other way (rather then encroaching into fundamental human rights), domestic jurisprudence was only relied to the ascertainment that the general terms of application were realized (by mere specification of the legal statement) without specification of circumstances characteristical for a particular case.

When an investigative judge is deciding on the State Attorney's request, he must take into consideration general assumptions for issuing an order. However, as an absence of the statement of reasons for order doesn't entail the illegality of the evidence gathered, it means that the very circumstance of issuing an order at request of State Attorney presupposes the existence of these general conditions. (From the Supreme Court's Decision, VSRH No. I-Kž-61/09-3 of February 3, 2009)

In the following years, the Supreme Court of the Republic of Croatia has revisited its stance as stated in its (recent) decision;

Such a statement of reasons for order without concretization which facts indicate the grounds for suspicion (that the act was committed), and the legal ascertainment itself that the investigation could not be carried out in other ways or would be accompanied by great difficulties, without giving reasons for this, is (...) incomprehensible and contradictory. (From the Supreme Court's Decision, VSRH No. I-Kž-437/13-4 of August 21, 2013).

However, the Croatian Constitutional Court in its Decision No. U-III-2781/2010 of January 9, 2014. has accepted the Supreme Court's stance from Decision No. I-Kž-61/09-3 of February 3, 2009, pointing out: *"According to the relevant provisions of the CPA/97, the investigating judge's orders had to contain (a) a valid assessment of "the grounds for suspicion that he committed or has taken part in committing an offence" in one of the offenses referred to in Art. 181 of the CPA/97, b) the assessment that investigation „could not be carried out in any other way or would be accompanied by great difficulties"(...)The Constitutional Court has considered the statement of reasons for Supreme Court's judgment and found that the Supreme Court has correctly applied the aforementioned provisions of the CPA/97, and concluded that, if orders for undertaking special evidentiary actions were without the statement of reasons, they may, under certain conditions, be explained in the statement of reasons of the First Instance verdict or when a ruling is made, in the case when the party suggests that the evidence should be found unlawful.*

In spite of detailed legal regulations for issuing a court order for special evidentiary actions, which requires a detailed statement of reasons for order before its issuance, the Supreme Court's decision, endorsed by the Croatian Constitutional Court, has introduced the possibility of retroactive statement of reasons for order, which was contrary to the standards of legal certainty. With reference to the above-mentioned decisions of the highest instances, the ECtHR, in the case Dragojević v. Croatia,[26] has warned of the following; "Although that apparently conflicted with the requirements of the relevant domestic law and the case-law of the Constitutional Court, it appears to have been approved through the practice of the Supreme Court and later endorsed by the Constitutional Court. In particular, the Supreme Court held, dealing with the matter in the context of the admissibility of evidence, that a lack of reasons in the secret surveillance orders, contrary to Art. 182 para. 1 of the Code of Criminal Procedure, could be compensated by retrospective specific reasons with regard to the relevant questions at a later stage of the proceedings by the court being requested to exclude the evidence thus obtained from the case file. This appears to be accepted by the Constitutional Court, which, in its decision no. U-III-2781/2010 of January 9, 2014, held that if the secret surveillance orders did not contain reasons, under certain conditions reasons could be stated in the first-instance judgment or the decision concerning the request for exclusion of unlawfully obtained evidence." (§ 96)

7. ECTRH DECISIONS CONCERNING THE VIOLATIONS OF ART. 8. CONVENTION RELATING TO THE IMPLEMENTATION OF SPECIAL EVIDENTIARY ACTIONS

As the special evidentiary actions are taken latently, or secretly, as otherwise the realization of their very nature and the purpose would be thwarted, the main guarantee of the protection of the defendants rights, from disproportionate interferes into his fundamental rights, lies precisely in the role of the Court. The Court as an impartial body of state authority must determine whether the interference with the right to respect for private life and correspondence was "necessarily in a democratic society" for the „achievement of a legitimate aim" through the form of a written reasoned order.

[26] Application No. 68955/11, Strasbourg judgment of January 15, 2015.

7.1. ECtHR decision in case of Dragojevic v. Croatia

The ECtHR found in the judgment Dragojević v. Croatia (para. §§90-101) a violation of Art. 8 of the Convention, stating that "in spite the fact that the legislature envisaged prior detailed judicial scrutiny of the proportionality of the use of special evidentiary actions, a circumvention of this requirement by retrospective justification, introduced by the courts, can hardly provide adequate and sufficient safeguards against potential abuse since it opens the door to arbitrariness by allowing the implementation of secret surveillance contrary to the procedure envisaged by the relevant law" (§98). „The Court had specially emphasized that the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the 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" (§ 101). As ECtHR's decisions represent a legal source with its explanation in interpreting the question of whether there are violations of the Convention right protected by that Court, in the last decisions of the Supreme Court VSRH (I Kž-Us-26/2917 of May 4, 2017 and VSRH I Kž-Us-94 / 2917 of July 13, 2017), the previous stands of the Supreme Court VSRH have been revised.

„It is correct that the order isn't lawful if there is insufficient statement of reasons for order, ie. if it is based solely on the claim that there is a USKOK request and rewriting the legal expression that "investigation of criminal offenses could not otherwise be carried out ..." without further explanation. (From the Supreme Court's decision, VSRH No. I Kž-Us 26 / 17-5 of May 4, 2017 and VSRH No. I Kž-Us 116/17 of September 5, 2017).

7.2. ECtHR decision in case of Bašić v. Croatia and Matanović v. Croatia

In the case of Bašić v. Croatia[27] and Matanović v. Croatia,[28] ECtHR retains the same standards in assessing court decisions affecting personal and family life, protected by Art. 8 of the Convention, referring also to case Dragojevic v. Croatia. (From the Decision VSRH I Kž-US 2 /2017-5). The Court refers to the general principles relating to the use of the measure of secret surveillance mentioned in the Dragojević judgment (Dragojević v. Croatia, §§ 78-84, §§86-89). Also, as in the Dragojević case, Court notes that „the investigating judge's orders on the use of secret surveillance measures referred to an application for the use of secret surveillance by the competent State Attorney's Office and indicated the statutory phrase that "the investigation could not be conducted by other means or that it would be extremely difficult (to do so)". They did not, however, provide relevant reasoning as to the particular circumstances of the case and in particular why the investigation could not be conducted by other, less intrusive, means" (Bašić v. Croatia, §33; Matanović v. Croatia, §113, also see Roman Zakharov v. Russia, Application No. 47143/06, Judgment of December 4, 2015, § 260).

8. CONCLUSION

In the time of conspiracy and latent forms of criminal offenses, the application of contemporary mechanisms of their suppression, through the forme of special evidentiary actions as a module of intrusive penetration into the most sensitive sphere of individual citizen rights, is inevitable.

[27] Application no. 22251/13, Strasbourg judgment of 25 October 2016.
[28] Application no. 2742/12, Strasbourg judgment of 4 April 2017.

It is also a correct response to the distraction of the realization of the interests of criminal persecution in the context of increasing accent on the protection of individuals' rights. The Croatian criminal justice system has adequately responded to the challenge of detailed legal regulation of special evidentiary actions, but disharmony is detected within the behaviors that are contradictory to the circumstances envisaged by the law, particularly in the situations that requires an effective assessment of whether or not the use of special evidentiary actions was necessary and justified. After the ascertained violation of Art. 8 of the Convention, by a decision of the ECtHR in the Dragojević v. Croatia case, certain changes, through revised standing of the highest instances of the Supreme Court, VSRH and the Croatian Constitutional Court, have been made. Not just through the legal texts, but also through realization in practice, through the increased sense of necessity of control with a more detailed approach and a sense of achieving a legitimate goal with the preservation of democratic institutions. Corrective dynamics as a result of this is a positive atmosphere in the domain of such sensitive rights as respect for private and family life guaranteed by Art. 8 of the Convention (ECHR).

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