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Muhamet Racaj, PhD

**MASAT E VEÇANTA HETIMORE PËR PENGIMIN DHE
PARANDALIMIN E KRIMIT TË ORGANIZUAR DHE
KORRUPSIONIT NË REPUBLIKËN E MAQEDONISË**

**ПОСЕБНИ ИСТРАЖНИ МЕРКИ ЗА СПРЕЧУВАЊЕ И
ПРЕВЕНЦИЈА НА ОРГАНИЗИРАНИОТ КРИМИНАЛ И
КОРУПЦИЈАТА ВО РЕПУБЛИКА МАКЕДОНИЈА**

**SPECIAL INVESTIGATIVE MEASURES IN THE OBSTRUCTION
AND PREVENTION OF ORGANIZED CRIME AND
CORRUPTION IN THE REPUBLIC OF MACEDONIA**

Abstract

Special investigative measures in the prevention and detection of organized crime has a special importance in the system of evidentiary tools, considering the way these actions are executed, the value of the protective case, the perpetrators and the implications that arise from these works, whether they are individual or with a more general inquiry.

The research on this evidentiary tool expands the interest of the study on the possibility for misuse of these probation tools, the supervision of the application manner and eventual sanctioning, to disable them from the mechanism for individual and collective protection, and from asocial behaviors to turn into mechanisms that affect the fundamental rights of the citizens which are guaranteed by the International Constitution.

The utilization of special investigative means can be made only if the court gives an order which is established by the prosecutor's proposal.

It is obvious that the application of special investigative means, such as pursuing, photographing, recording and other measures, risk the democracy of a country as well as the rights and the fundamental freedoms of the people. On the other hand there is a fundamental belief that democratic values are threatened by the sophisticated forms of criminality, therefore states should possess various tools for countering this phenomenon⁵²⁶. Only for this reason this compromise is accepted, as long as the application of these special investigative measures is set in clear legal frameworks, so the possibility of their misuse will be reduced. It is a fact that these measures restrict the private life of citizens. The court for human rights in Strasburg admits that the application of special investigative measures as a special instrument of democratic societies is necessary in the prevention and persecution of criminality. But if their application is not adequately regulated, there is a possibility of a collapse of democracy with the justification that it is done for its protection.

1. Introduction

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Special investigative measures in the Republic of Macedonia were applied after the changes in the constitution of R.M. (amendment XIX), Law on Criminal Procedure (Official newspaper of R.M. nr: 15/2005) and the adoption of the Law on Communications and Tracking since 2006. Analysis of materials during the approval of parliamentary laws, reflect the fact that the same are permissible only as a last instrument (*ultimo ratio*), a kind of inalienable evil which is used only for the most serious forms of organized crime.

Law on Criminal Procedure of the Republic of Macedonia provides eight special investigative measures:

1. Tracking of communications and entering the house (flat) and other spaces, also in transport vehicles, to create conditions for

⁵²⁷ Kambovski V. Kriminaliteti I Organizuar, Shkup, 2005

monitoring the communications, in compliance and procedure established by law.

2. Investigation and research in computer system, by taking the computer system or part of it or the computer database.

3. Secret surveillance, tracking, tonic and visual recording of persons as well as objects with technical tools.

4. Simulated purchase of items, and simulated distribution of bribes, and simulated taking of bribes.

5. Controlled shipping and transportation of people and objects.

6. Utilization of persons with hidden identity for monitoring and gathering information and data.

7. Opening fictitious bank account in which can be transferred funds derived from committed criminal offenses

8. Fictitious registration of legal entity or utilization of existing legal entities for gathering data.

Special investigative measures on the pre-investigative procedure are defined by a decision in the form of Warrant by the public prosecutor or the investigating judge while in interrogation only with Warrant of the investigative judge. In pre-investigative procedure with justified written Warrant the Investigative Judges decide on the basis of a justified written proposal from the Public Prosecutor (by measures 2-8), while in case of disagreement between them, decides the Council (article 142-6 al. 1,2 and 4 and the new article 148, of Criminal Procedure Law)

For the application of special measures, except legal ratings and institutional capacities, technical tools are need too, such as: technical tools that deal with video and audio notes, tools for taking statement respectively for the hearing of a hidden witness and other tools, in order to provide adequate conditions for equal participation of all parties in criminal proceedings.

It is very important to emphasize that on 28.04.2005 for the first time in the Republic of Macedonia through a video link is obtained the testimony of a victim from the Republic of Moldova in

the judicial procedure before the competent court in the Republic of Macedonia, against the defendants for a criminal offense “Human Trafficking” from article 418 of the Penal Code. Such way of a victim witnessing is based on the fact that RM has signed and ratified “Convention for International Legal Assistance in Criminal Matters“. After the successful implementation of such testimony, a donation to the Public Prosecutor of RM is given - technical preparing for hearings in the Video- links direction, link that will help the witnesses in cases of organized crime and in the effectiveness of the procedures.

2. Special measures as an integrated need or a tool against sophisticated forms of serious crimes

Almost in all strategies of the fight against organized crime it is concluded that there is serious threat and if the organized criminals are not prevented, they will take all the economic and political force.

The financial criminals use advanced methods of technology, considering that transfers between banks are made electronically, because in a few seconds is enabled the transfer of money from one continent to another in an attempt to lose the trace of their origin

The cross- border dimension of this crime which exerts great multinational pressure towards the stream of the workforce and trade liberalization outside state borders makes the organized crime and the office crime different from ordinary criminality.

The organized crime is a dynamic process which adapts towards preventive tactics of the police and other investigative bodies. For that reason the perfection of investigative tools is needed on national level in order to increase the efficiency in detecting and proving of offences in this sphere, which are quite sophisticated and with a “permanent institutional logic” in the highest or the lowest hierarchy of the state.

The cooperation of criminal associations on transnational level requires adequate transnational responses with sophisticated tools, at least at the level of tools that they use during the commission of the offenses and losing of trace. These tools require a normative and technical- tactical unification, based on the support of international norms such as : “Convention of Transnational Organized Crime” and other acts which regulate the cooperation of national authorities in the detection of cross-border projects of the organized crime and its sanction, at the same time by establishing clear legal mechanisms for adequate supervision of the work of competent bodies for prosecution of crime, in particular the harmonization of need for crime detection and protecting the rights and freedoms guaranteed by international acts.

An incentive to harmonize and simultaneously to sophisticate the special investigative tools it is also included in “Agreement for stabilization and association” between RM and European Union as well as Member States.

- The question that deals with the effectiveness of the bodies and institutions that deal with the detection, argumentation and processing of offenses, from the field of economic and organized crime is closely connected with the question and the number of this type of crime. This is even more important because according to our performed analysis for volume, extension, dynamics and territorial (space) expansion and the typology of offenses, we come into the conclusion that the biggest number of crimes are detected after the submission (denunciation) by the aggrieved party, respectively after the consequences from the committed criminal act. A special and extremely important question for the criminological science is whether the number of denounced and resolved acts is a real number for this type of crime.

According to statistical data we can properly conclude that the effectiveness of the institutions in the Republic of Macedonia which deal with the disclosure, argumentation and processing of these offenses, is in a satisfactory level, and this is evident from the results

that show the number of detected offenses and by the number of identified perpetrators (submitted). Simultaneously from the parameters (indicators) for the caused material damages of offenses presented in the statistics of the Customs Administrations, seems to be highly expressed the effectiveness of the work of these institutions, but they also show the big material damage caused by these acts. These statistical parameters compared to the amount of damage that is caused to the Budget of the RM, only confirm the conclusion that the state should not spare material funds for perfection, education and professional training of the employees in these institutions, and to make personnel grouping, because this investment will be returned multiplied to the state.

From a conducted research, where 75 officials were involved from the Ministry of Internal Affairs, the Financial Police and Customs Directorate, as a key indicator that is compatible with our scientific work, can be mentioned:

- The cooperation between these bodies is not at the proper level, because there is still a rivalry about who of the highlighted bodies is more competent and efficient in its work

- Training of the potential of the general personnel which these institutions possess, is not in the proper level, therefore it does not meet the needs. The biggest negative factor is the inability to finance qualitative education by a specialist and competent expert from the European Union, and the other factor is the inability for several years to admit new staff in these institutions because of the limited budget resources.

- The training level of all members dealing with criminal persecution, of employees which utilize special investigative measures is low, therefore the surveyed agreed that training is necessary, not only for executors but also for prosecutors and judges. This is more emphasized because the implementation of legal obligation for the usage of special elements (measures) is few years in power, while the experience is gained by their daily use.

- The need for a faster and more efficient adaptation of legal norms with the new forms and categories of this type of crime with a more frequent implementation of measures such as: Ban of leadership (management) availability and overloading of the property of the persons who are under target.

For a successful war against organized crime and corruption Macedonia actively cooperates with International Organizations and various initiatives. Macedonia actively participates in “ Stability pact initiatives against organized crime” (SPOK); “ Stability pact initiatives against corruption” (SPAI) ; “ Country group of the European Council for the fight against corruption” (GREKO) and “ Committee of experts on the evaluation of anti-money laundering measures “ (MANIVAL) ; also cooperating with UN and European Union

According to Ministry of Interior, from organized crime offenses and corruption a damage in the amount of 3.1 billion denars or 50 million Euros is caused to the budget of the Republic of Macedonia. During this year a special emphasis is set to the discovery of cases where elements of corruptive behavior are proven. In total 116 (47) cases are documented where the submitted have damaged the budget of the Republic of Macedonia for 2.9 billion denars. As the report emphasizes, the right positioning of the police showed that in our country can be detected even the so-called classical forms of corruption, namely in taking and giving bribes, where a quadruple enlargement of the detection of these acts is registered. 10 offenses of money – laundering were detected. Activities for detection of organized forms such as legal migration and trafficking of migrants are taken. A total of 38 offenses are discovered therefore the number of detected acts has increased for 46 %⁵²⁸. The number of detected offenses in the sphere of human trafficking is the same as the one in the previous year⁵²⁹.

During a period of sixth months of the year 2008, a reduction of 30 % is marked in the number of criminal offenses on the sphere of organized crime and corruption in comparison with the same

⁵²⁸ Report of Internal Affairs

⁵²⁹ Strategic Plan for the period 2009-2011, MI of RM, September, page 10

period of the year 2007. This refers to the reduction of criminal offenses in the area of counterfeiting money by 50%. Results are achieved in the area of detection and prevention of organized forms of legal migration namely in trafficking of migrants where an increase in their detection for 15.3% is marked.

In the part of detection of perpetrator of criminal acts, from the Ministry of Internal Affairs of Republic of Macedonia, special explorations are made for some offenses that are characteristic for setting the connections between the Organized Crime and Economical Crime, especially crimes that are related to acts (offences) like: money laundry, smuggling, custom fraud, concealing smuggled goods and other customs frauds, bribe, insurance fraud etc., and by the total number of offences 1223, more frequent offenders are males 1124, 99 are females, 11 juvenile, whereas the number of those that repeat the acts reaches 70. These values contribute for ascertaining that these crime types are mostly performed by males between ages of 25 to 50 and mostly with the social status of: directors, managers, as well as other managerial positions like commercialists, accountant, storeman etc. In the following tables statistical data about offenders are presented, extracted from the analytical sector, documented and investigated by Ministry of Internal Affairs, whereas other institutions dealing with this problematic have not yet started with this kind of statistical maintenance. However there are announcements from their part that they will soon surpass these issues and shortly their analytical centers will maintain and provide this kind of statistics, all this possible as a result of the reforms made in these institutions which also leads to increased number of individuals dealing with this problematic in their analytical centers.

CENTRUM 2

Table 1 Total number of offenders from article 249 and 251 during 2002-2009

Heading 23-Perpetrator	2002	2003	2004	2005	2006	2007	2008	2009	Total
Fraud, taking loan or other suitability's, article 249	3	3	1	31	10	39	168	136	391
Damage and unauthorized entry into the computer system, article 251	2	3	7	1	4	11	30	73	131

Table 2 the total number of offenders from heading 25 of the Criminal Law of R.M during the period 2002-2009

Heading 25-i Perpetrator	2002	2003	2004	2005	2006	2007	2008	2009	Total
Money counterfeiting, article 268	236	139	133	175	152	144	96	119	1194
Money laundry, article 273				87	63	28	15	40	233
Smuggling, article 278	65	41	44	37	48	38	62	24	359
Customs fraud, article 278-a								6	6
Concealing smuggled goods, article 278-b						13	17	25	55
Tax evasion, article 279	91	134	125	178	68	65	107	89	857

Table 3 Total number of offenders from heading 30 of Criminal Law of R.M during 2002-2009

Heading 30- Perpetrator (Offences against official services)	2002	2003	2004	2005	2006	2007	2008	2009	Total
Official position abuse, article 353	221	1130	631	346	360	742	567	466	4663
Taking bribe, article 357	13	5	15	16	7	66	18	77	217
Giving bribe, article 358	8	11	17	7	5	19	15	28	110

3. Analysis of cases where special investigative measurements are applied in prevention and detection of organized crime

In one of the biggest court cases, as the public prosecutor of organized crime calls it with the nickname “The snake eye 1“ with number of judicial administration III KOK.NR.8/08 where 72 people are accused for committing two offenses and that ”Abuse of official position and authority “ and “ Criminal Society” according to the Criminal Code of the Republic of Macedonia, special investigative measures were used: Covert monitoring of a visual and tonic recording of people and objects with technical tools, from the article 142 b al.1 p.3 of LPP; simulated purchase of items, and taking and giving simulated bribe from the article 142-b al.1 p.4 from LPP; the utilization of persons with hidden identity for monitoring and gathering information and data from the article 142-b al.1 p.6 from LPP

At the session for main examination before the Basic Court Skopje 1 Skopje, for the “Snake Eye 1“ case was taken as evidence, namely a recorded audio and video material was broadcasted as well

as the testimony of the hidden witness under the pseudonym XX, registered in the minutes of IV KIOK NR.11/07, taken in the presence of the investigative judge and the public prosecutor. The brought evidence are found by the defense from the fact that the video materials in some part are not accompanied by audio records as well as due to the time differences in cameras, that has to do with the time of recording and the real conditions shown in the video record, which raises doubt regarding the authenticity of the collected material, specifically the possibility of its reprocessing.

For this type of indicative instruments the duration of their use is in particular importance. According to LLP they can mostly be used initially within 4 months with the right of their extension for another three additional months. Law on Tracking Communications provides duration up to one year, which is in contradiction with the Law on Criminal Procedure as the basic law which regulates this matter.

If the special investigative measures are applied without the order of the Investigating judge and the public prosecutor, or they are ordered in contradiction with LPP norms, the evidence gathered through them will be excluded, namely will be separated from the case files. Such a decision can be found in the K.BR 599/07 case of the Basic Court of Kumanovo, at the KZH.BR.1746/09 case at the Court of Appeals in Skopje, by which the gathered evidence are canceled namely are excluded by the usage of special investigative means, because they are applied in contradiction with the LPP norms.

4. Conclusions

The Republic of Macedonia has a new parliamentary democracy with a constitutional tradition in creation, with a harmonization tendency namely an approximation of national legislation with that of the European Union and euro atlantics institutions, by manifesting a sustainable partnership in the fight against organized transnational crime which threatens the national and international social order. Macedonia is moving with rapid steps in this journey,

with the desire of perfecting legal instruments despite general international trends, in the fight against criminality and protection of national security from the risks that time carries. By favoring the penal legal side in the terms of the protective function of the penal justice, the latest novels of the Law on Tracking and Communication not only bypass the guarantee component of the penal justice, but also create a general confusion regarding the value of legal acts and their hierarchical ranking. This situation is expressed during the practical application of special investigative instruments by creating a space for state voluntarism and legal insecurity of citizens.

- Special investigative measures are categories of international criminal law. Almost all international mechanisms have approved documents that affirm the need to use special investigative measures in the fight against organized crime, by affirming the principle of proportionality between the purpose that justifies their application and the need to protect the freedoms and the fundamental human rights, by creating clear legal mechanisms for overseeing the application of measures and adequate protection from their misuse. The “European Court of Human Rights“ guarantees such a designation by ensuring judicial protection of human rights and their fundamental freedoms and the creation of a wider professional opinion, as basis for national judicial actions of state Members of the Council of Europe and the creation of national legislation that regulates this issue.

- Unfortunately we can assume that Macedonia lacks a civilian control with executive powers for the protection namely prevention of the violation of human basic rights and freedoms during the application of special investigative measures, with a particular emphasis on surveillance application explicitly in the monitoring of communications. The normative guarantees on the Law on Tracking and Communications are insufficient despite the categorical elections which regulate the mode of application of these measures.

We think that a systematic surveillance exists in Macedonia which is proceeded only in cases when a trial should be made against

a particular individual. In cases when the gathered material by means of surveillance for procedural or substantial matters (if it is illegally gathered and does not contain necessary content) cannot be used as an evidence which means that it does not have any evidentiary value in the criminal proceeding, then it can be used as an indication to provide evidence of other types, or indication with impact on decision making during the review of the case by the court, that represents a precedent of the judicial practice of the RM, because proofs such as these on the basis of LLP should be primarily presented by the files of the judicial case.

- Regarding the institutional surveillance on the application of special investigative measures, the Parliamentary Committee is not functioning. If the judicial surveillance lately marks a progressive movement in terms of evaluation and decision making against the commandments and way of application of special investigative means by suspending their use in criminal proceeding as an evidence. But this ends here. The law does not contain clear mechanisms for compensation to the person, for an unauthorized and unreasonable surveillance. On the other hand given the mentality of citizens and the awareness of the functioning of the judicial system in the Republic of Macedonia, the injured people which are subject to surveillance usually do not initiate a special procedure for compensation by remaining satisfied by the fact that evidence is removed from the criminal proceeding against him. The nongovernmental organizations have an important role in the surveillance of the application of the special investigative measures through non institutional surveillance with an expressed effect in the promoting of competent bodies to fulfill their legal obligations.

- The institutional protection of human rights and freedoms is enabled by the national courts and in particular the European Court for Human Rights, whose decisions not only affirm the European Convention for Human Rights but also contribute in the harmonization of legislation and the judicial practice of the State Members of European Council and beyond. The Court aims the

application of special investigative measures only in the frameworks on national laws, which must be clear and precise, will notify the citizens in advance about the manners and the conditions for application of measures and their right to dispute the authenticity of the gathered material and the right for legal defense from a procedural treatment of this kind in illegal conditions.

- Macedonia has minimal normative and institutional capacities for a successful fight against the organized crime and corruption. The legal institutions which are the topic of this paper allow a direct access of the competent institutions against the Crime trace, detection of perpetrators and the collection of evidence for the realization of a successful proceeding which is proportional with the need to protect fundamental human rights and freedoms which are guaranteed by the international constitution.

5. Recommendations:

1. Legislative modernization in the procedural penal law field with particular emphasis for the Law on tracking and communication with his novels and LPP, created a legal hierarchical confusion and further a state where they return Macedonia to the beginning because these laws allow total privacy breach turning the country into a “big ear” same as 2001. Initiatives raised before the Constitutional Court express the concern of the citizens and other non-governmental organizations despite state apparatus that ensure procedural labyrinths.

2. We recommend that the legal confusion regarding the application of special investigative measures to be overcome by the Courts of Republic of Macedonia, by applying the international Conventions ratified by the Republic of Macedonia as part of the legal system, for the needs of which clear mechanisms are provided, the way of application and privacy protection of the citizens, which clearly envisage an advanced solution in favor of citizens.

3. The need for a national normative harmonization is initially recommended, which would be the basis of harmonization with acts and international norms, towards the efficiency of the fight against transnational organized crime within the legal mechanisms, by putting into focus the protection of fundamental human rights and freedoms which are guaranteed by universal acts.

4. The Republic of Macedonia as a candidate for integration in the European Union, needs an institutional and technical cultivation towards the perfection of mechanisms and investigative measures despite the technical and technological development without derogating the need to protect the defense and victim witnesses.

5. The application of surveillance is conditioned with judicial guarantees that in the shortest period the collected evidence will be destroyed which do not have any procedural value and the interested party to be informed for the same. The legislation and institutions to establish confidence that the evidence collected by surveillance will not be used for any purpose other than the one mentioned in the request namely warrant for interception.

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