



OVERSIGHT ACTORS OF THE USE OF SPECIAL INVESTIGATIVE MEASURES

From the security point of view, we can identify two main purposes as to why state authorities seek to use the secret data collection.

The use of secret data collection may be to improve national security, prevent risks and threats to the security of citizens, national security, society, institutions, economic and other vital interests of society and the state from the various terrorist and extremist groups. Considering that this is a preventive activity, these actions are characteristics of intelligence and security agencies. It is important to emphasize that with these kind of activities, intelligence and security agencies are reaching "for collection of data and information on the activities, plans and intentions of various domestic and foreign, state and non-state actors, their processing and analysis are a very important segment that is often neglected in our country, which is the timely dissemination of information to the different users" (Petrovic 2015: 15).

The second purpose of the use of special investigative measures is in the prosecution and detection of various crimes before the appropriate courts. Although some authors link these activities to the police authorities and law enforcement bodies, modern threats (such as organized crime, terrorism, cyber crime, violent extremism and radicalism, proliferation,



corruption and migration), require the support and inclusion of intelligence-security services in the activities of collecting data for processing and detection of various crimes. In our country, as well as in countries with developed democracy, procedures under which the police authorities may apply special investigative measures to prevent and prosecute serious crimes, as well as the possibility that intelligence and security agencies can secretly collect information, are legally defined.

The Law on the Intelligence and Security Agency of BiH (OSA), in chapter VII, - "Collection of Information" provides that OSA takes measures of secret data collection which require the approval of the Director-General (when it is considered necessary in order to fulfill the duties of the OSA). Also, OSA may undertake measures of secret data collection with judicial authorization or approval, issued by the President of the Court

or a judge designated by the President of the Court. On the other hand, the Law on the State Investigation and Protection Agency (SIPA) and the Law on Police Officials of BiH does not provide such measures, i.e. measures of secret data collection are being undertaken in accordance with the Criminal Procedure Code of BiH, the entity Criminal Procedure Codes and the Criminal Procedure Code of Brcko District of BiH.



ACTORS WHO APPROVE THE USE OF SPECIAL INVESTIGATIVE MEASURES

Actors who approve the use of special measures of secret data collection are stemming from the very purpose of these measures. Thus, activities of secret data collection for the purpose of fulfilling the responsibilities of the Intelligence and Security Agency are authorized by its Director-General. However, in the case of measures which are in the framework of the Criminal Procedure Codes, special investigative measures as well as the use of these measures by both police officers and the OSA, require the approval of the independent instances, i.e. the authorization of an institution that does not apply these measures, which in almost all cases in BiH is the Court (judge for preliminary proceedings). Therefore, when it comes to collecting information for the purpose of prosecuting serious crimes, the initiative to determine the use of special investigative measures (seven of them), comes from the prosecutor, whose initiative containing properly reasoned motion in written form is submitted to the judge for preliminary proceedings.

The preliminary proceedings judge issues a written order for the use of special investigative measures.

The Criminal Procedure Codes in BiH stipulate that that police authorities must execute a court order. When it comes to the approval of the use of secret data collection by the OSA BiH, approval for the use of these measures is issued by the President of the Court or a judge designated by the President of the Court.

OVERSIGHT AND CONTROL OF USE OF SPECIAL INVESTIGATIVE MEASURES

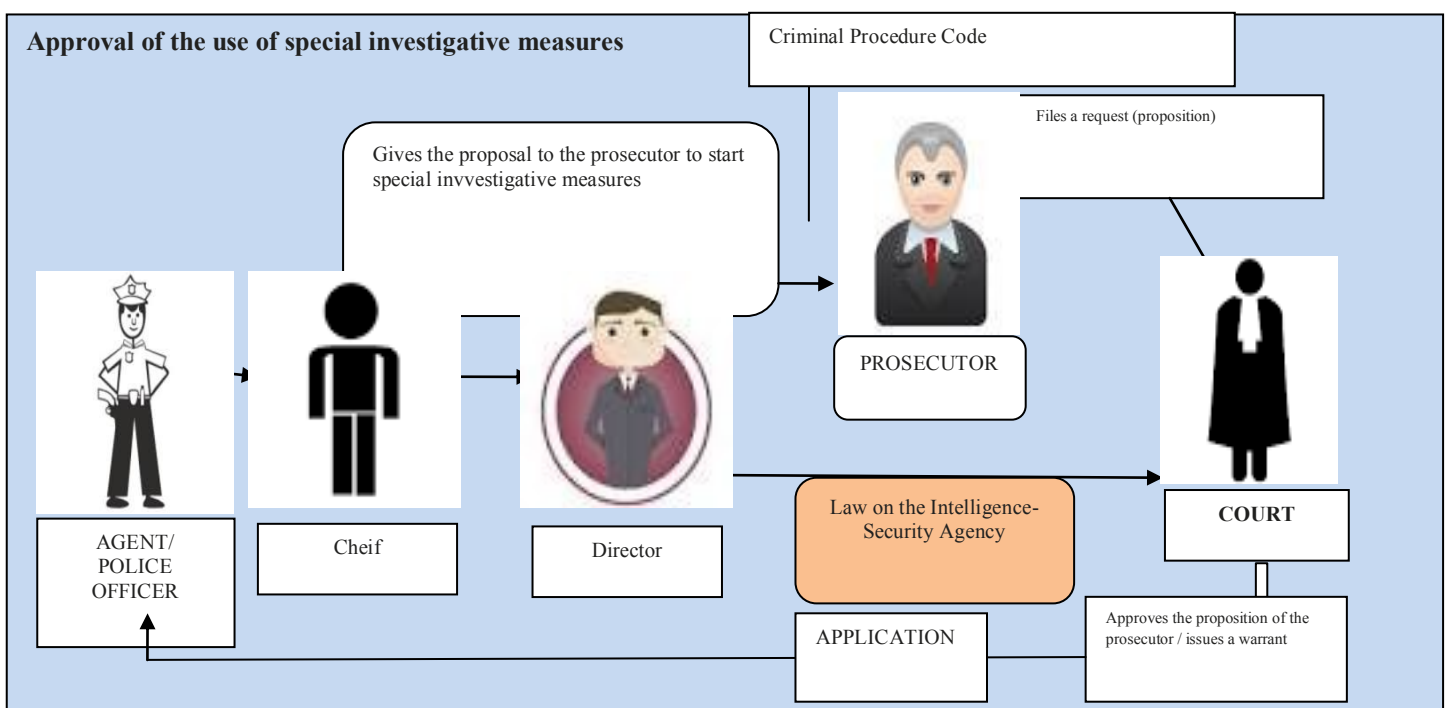
Judicial control

In the process of initiating and using special investigative measures the competent courts are the most important institutions for oversight and control over the use of special investigative measures.

Why are the courts the most important institutions in this process, i.e. the judge for preliminary proceedings?

First of all, the judge for preliminary proceedings is the last authority which grants the use of special investigative measures, and he/she may reject the prosecutor's reasoned motion if all legal requirements are not met. This means that the judge for preliminary proceedings bears the greatest responsibility for approving the use of special investigative measures and he/she is the person who should review whether all legal conditions are met for the proposal initiated by the Prosecutor. The judge for preliminary proceedings approves or rejects the prosecutor's motion to order the use of special investigative measures. In this relationship, we see that the legislator, through judicial control and oversight of the use of special investigative measures, envisaged the prior judicial control (*ex-ante control*) before the beginning of the use of special investigative measures.

The courts have the power to order the destruction of the materials obtained by using special investigative measures due to certain circumstances, such as criminal proceedings were not initiated or the use of special investigative measures were contrary to law.



Thirdly, the function of court supervision and control of the use of special investigative measures is reflected in monitoring the compliance with its order - control during the use of special investigative measures. As a result, police are required to submit a written report to the courts on the compliance with the order, as well as the materials obtained by using the ordered special investigative measures. The police are obliged to submit the said materials after the completion of the order or during the proceedings if the judge requested.

It can be concluded that the Criminal Procedure Codes in BiH predict and define the judicial control as well as the oversight of the use of special investigative measures before the start of their use (*ex-ante*) and after the completion of their use (*post factum*). There is a possibility of control during the implementation of the court order itself. It should be noted that the evidence collected by illegal means, i.e. illegal use of special investigative measures can not be used in court and will be treated as illegal evidence.

Subsequent control (*post festum*)

This type of control is applied upon the completion of the use of special investigative measures by the police authorities. The subsequent control stems from the legal obligation on the police authorities that after the cessation of the use of special investigative measures, all materials (eg. videos, information, reports, articles) must be submitted to the Prosecutor. Police authorities are required to submit a written report to the prosecutor on the undertaken measure. As a rule, the report should include information on covered person/persons, a crime for which the special investigative measure was undertaken with the factual and legal description of the offense, a description of the circumstances, i.e. the manner and scope of the measure, information on the time of the use of special investigative measures, information on the results of the implemented measures and data on the official who had conducted them. On the basis of the obtained information, the prosecutor has the opportunity to evaluate the methods used to apply special investigative measures, respect for human rights and freedoms as well as the conduct of police officers upon his reasoned proposal, i.e. court order.

This is the first step of subsequent control on the use of special investigative measures. However, when it comes to this control, it is evident that the Criminal Procedure Codes do not impose an obligation on the police authorities to submit a report to the judge for preliminary proceedings, who approve these measures. Their obligation of reporting ends by submitting the report to the Prosecutor.

However, the second step of subsequent control is reflected in the obligation of the Prosecutor to submit a written report on the measures undertaken to the judge for preliminary proceedings. This means that the Criminal Procedure Codes still provides subsequent control over the use of special investigative measures by the judge for preliminary proceedings, as the person who approves them. The judge for the preliminary proceedings evaluates the compliance with his order. The judge will have an insight into the procedure on the basis of a written report submitted by the prosecutor. The law does not specify the content of the written report but, essentially, it should contain identical data as a written report that police authorities submits to the prosecutor.

This kind of subsequent control over the use of special investigative measures provides insight into the conducts of police authority pursuant to the order approved by the judge. This approach will offer insight on whether a certain measure was applied exclusively towards the person for whom it is granted and all the other details of the order. Through the two-steps of the subsequent control, the intention of the legislator was to prevent possible abuses in the conduct of police authorities on the orders of the judge for preliminary proceedings, as well as autocracy in acting beyond what was ordered. The courts in Bosnia and Herzegovina i.e. judges for preliminary proceedings should understand the role of control during an acceptance or rejection of evidence in connection with special investigative measures. This should be emphasized because the special investigative measures are applicable only when the prosecutor assess that certain evidence could not be reached otherwise, or when the standard investigative methods could not achieve the objective in the particular case. The preliminary proceedings judge who approved the use of special investigative measures must have special attention to these conditions. The previous practice shows that judges almost always only confirm the prosecution reasoned proposal without additional controls of those elements. Such actions result in annulment of certain indictments for serious crimes by the higher courts. (Dragojevic against Croatia, Application No. 68955/11).

Self-control

Within the police institutions, there are organizational units responsible for internal control. The internal control should be the "first line of defense of the police institution's integrity", and should control the use of special investigative measures. However, current practice shows that the results of the internal control are modest and that their capacities are not developed to a sufficient extent.

Parliamentary control and oversight

When it comes to the secret data collection by use of special investigative measures carried out by the Intelligence and Security Agency, in addition to the Court of BiH, control and oversight of these operations are implemented by the Joint Commission for the Supervision of the work of Intelligence and Security Agency of BiH Parliamentary Assembly. The Commission can control the use of special investigative measures in *post festum*, i.e. upon their completion.

The control can be requested at the personal request of any member of the Commission if there is knowledge of any violation of human rights in the process or the approval of the use of special investigative measures. The Commission should focus on the identification and elimination of systemic weaknesses and procedural flaws. Oversight and control of the use of special investigative measures by police officers can be also carried out by a parliamentary security committees at lower levels (entity and cantonal levels).

WHAT THE PROSECUTION'S PROPOSAL FOR THE USE OF SPECIAL INVESTIGATIVE MEASURES SHOULD CONTAIN

- Data on the person, group, or organization against which measure is to be taken;
- Grounds for suspicion for these persons, group, or organization/terms and reasons for applying the measures;
- The type of the required measure;
- The extent and duration of the special investigative measures.

THE COURT ORDER CONTAINS THE SAME DATA AS THE PROSECUTOR'S MOTION, AS WELL AS THE ASCERTAINMENT OF THE DURATION OF THE ORDERED MEASURE.

HOW THE CITIZENS SHOULD ACT IF THEY BELIEVE THEIR RIGHTS HAVE BEEN VIOLATED BY THE USE OF SPECIAL INVESTIGATIVE MEASURES?

In the first place, citizens can file complaints to the organs of internal control within the ministries of internal affairs, at the first appellate instance. It should be noted that at the first appellate level, citizens can exclusively complain about the procedures used for special investigative measures or threats to any other rights or freedoms by the police. Laws on internal affairs and the laws on police officers in BiH envisages that the Bureau for complaints and submissions in the Republika Srpska entity and the units for internal control in the FBiH entity and Brcko District conducts an internal investigation after receiving the complaints about the misconduct of police officers. As for the complaints about the misconduct of the cantonal police, the entity police or the Police of Brcko District, citizens can complain to the ministry or its organizational unit in the place of residence or temporary residence. The complaints should be submitted in writing, verbally or in electronic form. The complaints on the conduct of the BiH police officers (Border Police, SIPA) are submitted to the internal control of these organizations and the Citizens' Complaint Board on Work of the Police Officers in Police Bodies of BiH. When considered that their rights have been violated regarding the activities of the Intelligence Security Agency (OSA), the Law on OSA in Article 33, paragraph. 2. guarantees the right to anyone who is considered to be impaired, to appeal to the OSA Inspector General.

When it comes to subjects who did not appeal to the institution which violated the law and freedoms of citizens, the citizens are able to appeal to parliamentary committees for citizens' complaints, the Ombudsman and the higher judicial instances. When it comes to appeals to higher court judgments, the appeal can go all the way to the European Court of Human Rights, as the last appellate court instance.

Established mechanisms for complaints about the violation of the rights of citizens when using the special investigative measures, indicates that police, prosecutors, courts and the OSA, must apply them in accordance with the Criminal Procedure Code and the Constitution of BiH.



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