



# SPECIAL INVESTIGATIVE MEASURES IN THE PRACTICE OF COURTS IN BOSNIA HERZEGOVINA

# **SPECIAL INVESTIGATIVE MEASURES IN THE PRACTICE OF COURTS IN BOSNIA HERZEGOVINA**

Special Investigative Measures in the practice of Courts in Bosnia Herzegovina is a collection of case-law that illustrate how intrusive methods are used for the collection of evidence in criminal proceedings.

The publication brings an important contribution to improved documentation of local jurisprudence; the original volume in Bosnian/Croatian/Serbian gathers 45 cases from all BiH jurisdictions, clustered around the seven different types of Special Investigative Measures (SIMs) defined by the BiH Criminal Procedure Codes; besides the brief summary of each case, a commentary highlighting the relevance of each case and keywords are provided. The collection aims to become a useful resource for justice practitioners, deepening their understanding of challenges and constraints in the use of SIMs, and allowing for a critical analysis of how particular standards and legal principles have been interpreted and applied in judicial reasoning.

The authors are legal assistants supporting the adjudicative work of judges from the five courts of BiH which play an important role in the authorisation and supervision of SIMs: the Constitutional Court of BiH, the Court of BiH, the Supreme Courts of the Federation of BiH and of Republika Srpska, and the Appellate Court of Brčko District.

Developed within the Justice and Security programme in Bosnia Herzegovina, this volume is a follow-up, complementary product to the Benchbook on Special Investigative Measures (SIM), published in December 2020, and synthesizing the legal criteria derived from the jurisprudence of the European Court of Human Rights and the local procedure and practice in the judicial authorization of SIMs.

**This is a short compilation of English extracts from the Collection. References to pages in the original Collection are made for each cited case.**

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## **Project Background and Acknowledgements**

In September 2018, the Geneva Centre for Security Sector Governance (DCAF) has launched a project designed to support the judicial system of Bosnia Herzegovina (BiH) in its mission to uphold the rule of law and individual liberties, through an independent supervision of the use of special investigative measures (SIMs). The project provided opportunities for justice practitioners to analyze the differences existing in the regulation, procedure and practice across BiH jurisdictions, and to acknowledge the paramount role of judicial authorization in preventing the misuse and abuse of information collection techniques conducted in secrecy by state authorities.

The most remarkable process undertaken by this project was the development of the ***Benchbook on Special Investigative Measures*** by a group of 20 senior judges, prosecutors and academics. The Benchbook synthesizes local procedure and practice, and the legal criteria derived from the jurisprudence of the European Court of Human Rights that are indispensable for the admissibility of SIM collected evidence in court and thus for ensuring the success of criminal investigations.

Produced in a yearlong collective effort, the Benchbook was a response to the situation of legal uncertainty that followed the 2017 decisions of the Constitutional Court that ruled as unconstitutional several legal provisions regulating the use of SIMs. The slow pace of the legal amendments that followed these decisions, the absence of an updated Commentary to the Criminal Procedure Code of BiH and the laborious attempts to harmonize criminal procedure among the BiH four different jurisdictions, have left the responsibility to interpret the law (or the lack of law) and ensure that SIMs are used in a manner compliant with the principles and standards of the European Court of Human Rights in the hands of prosecutors, judges and legal advisors involved in different procedural stages of requesting and issuing a warrant.

The publication of the Benchbook in December 2020 was therefore received with a lot of interest. By June 2021, more than 900 copies of the Benchbook were distributed to judicial institutions, practitioners, libraries, and law faculties across BiH; throughout 2021, DCAF has supported FBIH Judicial and Prosecutorial Training Centre in the delivery of a series of six courses on judicial authorization of SIMs using the Benchbook as standard training resource. The Benchbook has also been made the subject of an elective law class at the Faculty of Law in the University of Sarajevo.

While the Benchbook provides a comprehensive overview of principles, standards and legal procedures relevant for the use of SIMs in criminal investigations, it remains a theoretical text. On several occasions, judges, prosecutors and legal experts recommended the development of a follow-up product, to document the implementation of these norms in local judicial practice.

With the support of the main courts involved in the authorization and supervision of the use of SIMs in BiH, DCAF has steered the formation of a Working Group composed of seven legal assistants who support judges and panels of judges in their adjudicative work. The legal assistants brought together valuable and diverse perspectives representing all jurisdictions in BiH, and engaged in two intensive months of research, text drafting and review, under the methodological guidance of professor Hajrija Sijerčić-Čolić, from the Law Faculty of the University of Sarajevo and editor of the Benchbook on SIM.

The result of their work, titled ***Special Investigative Actions in the practice of Courts in Bosnia Herzegovina*** is a case-law collection gathering 45 cases carefully selected to illustrate the use of different types of SIMs

in collecting evidence in judicial proceedings. The volume contributes to improved documentation of local jurisprudence in BiH and will hopefully become a useful resource for justice practitioners, deepening their understanding of challenges and constraints in the use of SIMs, and allowing for a critical analysis of how particular standards and legal principles have been interpreted and applied in judicial reasoning.

The importance and main added value of this publication relies in the fact that **all jurisdictions in BiH are represented in the volume**, with examples of cases which are not always easy to access, analyze and categorize. We are extremely grateful to the presidents of the five courts who responded positively to DCAF invitation to participate in this project, appointing legal assistants in the Working Group and facilitating their access to relevant case-law. These courts are the Constitutional Court of BiH, the Court of BiH, the Supreme Court of Republika Srpska, the Supreme Court of the Federation of BiH, and the Appellate Court of Brčko District.

The co-authors of this publication, **Mirela Adžajlić Hodžić, Edin Čengić, Ermina Dumanjić, Biljana Janković, Srđan Marković, Tanja Miletić** and **Đana Podžić** have undertaken this work with remarkable dedication and professionalism. Their impressive legal expertise has proven that our choice to involve legal assistants in this project was a very fortunate one, and showed us again why these professionals are considered to be the backbone of a court. We are thankful for their commitment and enthusiastic work in the make of this publication.

Professor **Hajrija Sijerčić-Čolić** provided leadership and academic guidance throughout the process. Her reflections and methodological advice were instrumental in the conceptualization, design and internal peer review of the volume, and her editorial work was nimble and expedient. We are very grateful to have had her knowledge and rich experience put at the service of this project.

Our colleague **Said Hrelja**, DCAF consultant in Sarajevo, ensured that our thinking and action are well in tune with local realities and needs. He led the communication within the project team and with external partners and has provided review and editorial support indispensable to the completion of this publication. In Geneva, **Jennia Jin**, provided an astute management of financial, logistical and publication activities.

Thanks are also due to our colleagues from the **Judicial and Prosecutorial Training Centre of FBIH**, who provided valuable support to this publication, as they did in previous joint initiatives in the support of BiH judiciary. We trust that they will play a vital role in promoting and ensuring a high visibility for this publication, using it in judicial and prosecutorial training in complementarity with the Benchbook on SIM. We hope that this collection of case-law will answer the expectations and needs of practitioners, becoming a useful and informative tool for their work.

Finally, we would like to extend our gratitude and appreciation to the project donor, the Norwegian Ministry of Foreign Affairs, who made our project and publications possible.

Dr. Teodora Fuior,  
Principal Programme Manager, DCAF  
Geneva, December 2021

## Foreword

A temporary restriction of human rights by the use of special investigative measures, or the balance between the aspiration for effective use of special investigative measures and awareness that only the necessary restrictions of human rights are allowed, is surely one of the major challenges for judicial systems across Europe and the world.

This balance, along with the need for preciseness of legal provisions regulating the ordering and length of special investigative measures, is at the core of decisions of the Constitutional Court of Bosnia and Herzegovina in cases U-5/16 and U-21/16, in which specific provisions of the Criminal Procedure Code of BiH and the Law on Intelligence and Security Agency of BiH have been declared unconstitutional, ultimately leading to the amendment of relevant provisions of the Criminal Procedure Code of BiH.

It is these amendments to the procedural code that led to the creation of the Benchbook on Special Investigative Measures – the predecessor publication to the present one developed through joint efforts and cooperation between DCAF and the entity judicial and prosecutorial training centers. The Benchbook was authored by a group of eminent experts – both theoreticians and practitioners in this area from Bosnia and Herzegovina who by their dedicated effort ensured that the Benchbook, to the maximum extent possible, met the needs of judges and prosecutors, as well as other persons interested in this subject matter.

Encouraged by the success of the Benchbook and following ‘from the theoretical to the practical’ principle, we set out to develop the present Case-Law Collection, which is a unique overview of domestic court decisions and the existing case-law in relation to the use of evidence obtained through special investigative measures. The Collection is the fruit of labor of the selected group of legal advisors/assistants from the Constitutional Court of BiH, the Court of BiH, the Supreme Courts of FBiH and RS and the Appellate Court of Brčko District of BiH, who painstakingly and professionally collected and analysed the case-law and finally presented it through 45 decisions of the higher-level courts in BiH (the Constitutional Court of BiH, the Court of BiH, the Supreme Court of FBiH, the Supreme Court of RS, and the Appellate Court of Brčko District of BiH). Naturally, these legal advisors/assistants received extensive support in terms of the coordination of their work from DCAF’s project staff and the publication’s editor – Prof. Hajrija Sijerčić-Čolić, who had a key role in the selection of judgments and final contents of the Collection. In this context, we are greatly indebted to professor Hajrija Sijerčić-Čolić, as well as all the DCAF staff involved in this project.

Finally, given the specific nature of this subject-matter a need for development of a new edition of this Collection will most likely arise in due time, which will not find us unprepared as publishers.

Dr.sc. Arben Murtezic  
Director of the FBiH Judicial and Prosecutorial Training Center  
Sarajevo, December 2021

## Authors' Note

Before you is the publication titled "Special Investigative Measures in the Case-Law of Courts in Bosnia and Herzegovina" that came about as a product or continuation of the "DCAF's Benchbook on Special Investigative Measures", which it complements in terms of its subject matter and contents and with which it forms a coherent whole.

The rationale behind the development of this publication was the need to conduct a comprehensive analysis of issues related to the use of special investigative measures in Bosnia and Herzegovina in light of the more recent decisions of the European Court of Human Rights, in particular the ECtHR's judgment in the case of *Dragojević v. Croatia*, which caused numerous repercussions in our legislation too and put before legal practitioners new practical challenges concerning the lawfulness of the use and implementation of special investigative measures.

In terms of its content, the predecessor publication to the present one, "DCAF's Benchbook on Special Investigative Measures" was based on legal-normative analysis of each individual special investigative measure prescribed in the criminal legislation applicable in Bosnia and Herzegovina, while the publication before you focuses content-wise on the practical aspect of the use of special investigative measures, incorporating relevant cases from the judicial practice, in which results obtained through the use of special investigative measures were used as evidentiary means.

The Collection is structured in such a way that each of the seven types of special investigative measures stipulated in the law: 1) surveillance and technical recording of telecommunications, 2) access to the computer systems and computerized data processing, 3) surveillance and technical recording of premises, 4) covert following and technical recording of individuals, means of transport and objects related to them, 5) use of undercover investigators and informants, 6) simulated and controlled purchase of certain objects and simulated bribery, 7) supervised transport and delivery of objects of criminal offense, is addressed in a separate chapter with a few selected, most interesting cases that resolved some practical issues and dilemmas.

The authors find it relevant to note here that in the course of our work on collection and analysis of the relevant judicial practice, we observed that the special investigative measure of "access to the computer systems and computerized data processing" was not used in any criminal proceedings conducted before courts in Bosnia and Herzegovina, or more specifically, we did not document that this particular special investigative measure was ever ordered or implemented in practice.

On the other hand, as readers will see for themselves, in the criminal proceedings conducted before courts in Bosnia and Herzegovina the most frequently used special investigative measures are "surveillance and technical recording of telecommunications" and "surveillance and technical recording of premises", for which we found many cases in which they had been used.

The judicial practice that forms the core of this publication includes the case-law extracted from databases of five courts covering all jurisdictions in Bosnia and Herzegovina, including the case-law of the Court of Bosnia and Herzegovina, Supreme Court of the Federation of Bosnia and Herzegovina, Supreme Court of Republika Srpska, Appellate Court of Brčko District of Bosnia and Herzegovina, and the Constitutional Court of Bosnia and Herzegovina. Given the specific jurisdiction of the above-noted courts, it is important to note that this

publication indirectly contains decisions of the lower-level courts that were the subject of review in the appellate proceedings conducted before one of these five courts.

With the aim of optimizing its practicality, this publication is conceptualized in such a way that in the relevant chapter pertaining to each individual special investigative measure, after mention of the court that rendered the decision in question and the number under which the case was conducted and before the essence or analysis of the given court decision, there is a highlighted reference to “keywords” whose purpose is to detect shortly the issue addressed in the relevant decision. This was done for better usability and to facilitate a more efficient use of the Collection by future users who in this way will hopefully be better able to find solutions to an individual practical problem. Additionally, we find it important to stress that the relevant part does not refer to legal summaries or digests, but rather to “keywords” that are a product of identification and individual assessment by the team of authors who worked on the collection of relevant judicial practice.

Content-wise, the key part of the publication or overview of the relevant case-law, is preceded by general introduction about special investigative measures in the presently applicable procedural legislation in Bosnia and Herzegovina, as well as interpretation of the methodology applied in our research. Here, we would like to state that we are greatly indebted to Prof. Hajrija Sijerčić-Čolić, full professor of the Law Faculty of the University of Sarajevo – who is the author of these two parts of the publication – and who, perhaps even more importantly, with her knowledge, experience and selfless support to us directed and modelled the process of development of the present Collection.

Finally, the team of authors proudly presents the publication titled “Special Investigative Measures in the Case-Law of Courts in Bosnia and Herzegovina”, which came about as a result of the several months long steadfast and dedicated effort of all its authors. We hope that this publication will find its way to a great number of users, primarily young lawyers faced with theoretical and practical challenges in the use of special investigative measures.

Team of authors,  
Sarajevo, December 2021

## I. Surveillance and technical recording of telecommunications

### 1. Constitutional Court of BiH, p. 9

#### **Constitutional Court of BiH, Case no. AP 2400/11**

*In this case, the Constitutional Court of BiH found a violation of the right to a fair trial under Article II/3.e) of the BiH Constitution and Article 6(1) of the ECHR because regular courts based the convicting judgment in relation to the appellant on, inter alia, evidence obtained through surveillance of the appellant's telecommunications given that they relied on 'incidental finding' while the criminal offense in question was not classified as a criminal offense for which special investigative measures could be ordered. Therefore, in the present case the information and data obtained through special investigative measures could not have been used as evidence. It is important to note that the Constitutional Court held that the intention of the legislator, bearing in mind the prescribed sentencing range, could not have been such that special investigative measures can be ordered for the majority of criminal offenses. This position of the Constitutional Court was confirmed three years later in the Decision no. U 5/16, which declared as unconstitutional specific provisions of the Criminal Procedure Code of BiH, including the provision contained in Article 117(d), for which the Constitutional Court established that it was unconstitutional because it allowed for the possibility to use special investigative measures for almost all criminal offenses envisaged in the Criminal Code of BiH.*

*The Constitutional Court recalled the practice of the ECtHR in the case of Schenk v. Switzerland (1988), in which the ECtHR found that the admission of unlawfully obtained evidence may lead to unfairness depending on the circumstances of individual case. The ECtHR expressed a position that Article 6 of the ECHR did not contain a single rule regulating the issue of admissibility of evidence because this issue was within the exclusive remit of the national legislation, and that the admission of unlawful evidence did not necessarily per se entail a violation of Article 6 of the ECHR. It was also stressed that the ECtHR examined the proceedings as a whole, that is, if courts, by using that unlawful evidence, deprived the person of the right to a fair trial, and especially if the unlawful evidence was the only evidence on which courts based their decision.*

Keywords: evidence, incidental finding, right to a fair trial

### 2. Next item, p. 13

#### **Constitutional Court of BiH, Case No. AP 4393/11**

*According to the position of the ECtHR, in assessing whether the proceedings as a whole were fair, inter alia, it has to be taken into consideration if rights of the defense have been respected. It has to be examined if the applicant was given the opportunity to challenge the legality of evidence and to oppose their use. In addition, the quality of evidence has to be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Although the problem of fairness will not necessarily arise in cases where the obtained evidence is not supported by other material, it should be born in mind that when the evidence is very strong and when there is no risk of it being unreliable, the need for supporting evidence is correspondingly weaker. The ECtHR pointed to these standards, inter alia, in its judgments in cases Khan v. the United Kingdom (2000) and Allan v. the United Kingdom (2002).*

*Here, in the circumstances of this concrete case, the Constitutional Court concluded that the existence of the criminal offense and criminal responsibility was based on facts established through a comprehensive analysis and evaluation of evidence presented at trial, whose lawfulness was not brought into question, and*

*with respect to which the appellant was given the possibility to respond to and contest in the proceedings before regular courts.*

Keywords: evidence, collection of evidence, European Convention on Mutual Assistance in Criminal Matters, right to a fair trial

### 3. Next item, p. 16

#### **Constitutional Court of BiH, Case no. AP 1274/13**

*This is one of the first cases in practice of the Constitutional Court in which the Constitutional Court held that there is no obstacle for evidence, which was obtained through implementation of one of the special investigative measures in relation to a group of persons against whom these measures can be ordered, to be used in the proceedings involving a person in relation to whom no such measure was ordered by the court, provided that the evidence concerns information and data related to the criminal offense for which special investigative measures can be ordered and that the evidence was obtained under the conditions and in the manner prescribed in the law. In this decision, the Constitutional Court recalled the ECtHR's standards presented in the Schenk judgment, which was already commented on above. Additionally, the Constitutional Court made reference to the ECtHR's standards presented in its judgment in the case of Lisica v. Croatia (2010) in which the ECtHR noted, inter alia, that the quality of evidence has to be taken into consideration, including whether circumstances in which the evidence was obtained cast doubt on its reliability or accuracy. Although the problem of fairness will not necessarily arise in cases where the obtained evidence is not supported by other material, it should be born in mind that when the evidence is very strong and when there is no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.*

Keywords: evidence, court order, right to private life, right to a fair trial

### 4. Next item, p. 18

#### **Constitutional Court of BiH, Case no. AP 2980/16**

*In its practice of examining allegations related to the violation of the right guaranteed under Article 8 of the ECHR in the context of implementation of measure of secret surveillance in the criminal proceedings, the Constitutional Court is guided by the basic principles that the ECtHR defined in the case of Dragojević v. Croatia (2015). In the present case, the Constitutional Court analyzed the appellant's arguments about a violation of the right under Article 8 of the ECHR and Article II/3(f) of the Constitution of BiH through the following questions: whether there was interference; whether the interference was justified; legitimate aim and proportionality. The basic question which the Constitutional Court had to answer in light of practice established in the judgment in the Dragojević case was: "(...) 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... Since the existence of adequate safeguards against abuse is a matter closely related to the question whether the 'necessity' test was complied with in this case, the Court will address both the requirement that the interference be 'in accordance with the law' and that it be 'necessary'.<sup>1</sup> The Constitutional Court also recalled that it was noted in the Dragojević case: "(...) [ECtHR] has also emphasized that verification by the authority empowered to authorize the use of secret surveillance, inter*

<sup>1</sup> See *Dragojević v. Croatia* (2015), paragraph 89.

*alia, that the use of such measures is confined to cases in which there are factual grounds for suspecting a person of planning, committing or having committed certain serious criminal acts and that the measures can only be ordered if there is no prospect of successfully establishing the facts by another method or this would be considerably more difficult, constitutes a guarantee of an appropriate procedure designed to ensure that that measures are not ordered haphazardly, irregularly or without due and proper consideration... It is therefore important that the authorising authority - the investigating judge in the instant case - determines whether there is compelling justification for authorising measures of secret surveillance.”<sup>2</sup>*

Keywords: evidence, report on the implemented special investigative measures, notification of the implemented special investigative measures, legitimate aim, right to private and family life

## 5. Next item, p. 23

### Case no. AP 4935/16

*This case discusses the lawfulness and admissibility of evidence obtained through international legal assistance. In doing so, the international legal framework for “takeover” or “importing of evidence” obtained outside of the national criminal justice system is explained, and along the way it is stressed that “admissibility” of actions of another state and obtained evidence stems from the national law, international treaties and conventions, unless it is contrary to basic principles of the domestic legal order and international documents on the protection of human rights. As for issues of whether the interference that is lawful had a legitimate aim and whether it was necessary in a democratic society for achieving those aims, the Constitutional Court noted that it clearly took a position through its practice that the fight against crime, organized crime in particular, is in itself a legitimate aim to limit basic human rights and freedoms. The ECtHR’s standards applied by the Constitutional Court in this decision have already been presented above. These are the ECtHR’s judgments in cases: Schenk v. Switzerland (1988), Teixeira de Castro v. Portugal (1998), Bykov v. Russia (2009), Lee Davies v. Belgium (2009), Szilagyi v. Romania (2013), and Lisica v. Croatia (2010).*

Keywords: order for implementation of special investigative measures, European Convention on Mutual Assistance in Criminal Matters, “imported evidence”, right to a fair trial, right to a private life

## 6. Next item, p. 26

### Case no. AP 3229/19

*This is one of the cases in which the Constitutional Court affirmed its position from the Decision no. AP 1274/13, which is that there is no obstacle for evidence, which was obtained through implementation of one of the special investigative measures in relation to a group of persons against whom these measures can be ordered, to be used in the proceedings involving a person in relation to whom no such measure was ordered by the court, provided that the evidence concerns information and data related to the criminal offense for which special investigative measures can be ordered and that the evidence was obtained under the conditions and in the manner prescribed in the law. Additionally, the Constitutional Court recalled the ECtHR’s case-law in cases Schenk v. Switzerland (1988) and Khan v. UK (2000), whereby the fact that the applicant was not successful in each step does not alter the fact that he had effective opportunity to challenge such evidence and to oppose their use. The Constitutional Court concluded that there was no violation of the right to a fair trial under Article II/3.e) of the BiH Constitution and Article 6 of the ECHR in the instant criminal proceedings, viewed as a whole, because of the fact that material obtained through special investigative measures in*

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<sup>2</sup> Ibid, paragraph 94.

*another case, in which the investigation was conducted against the appellant for the same criminal offense, was used as evidence given that in the concrete case all rights of the appellant's defense have been respected.*  
Keywords: "incidental findings", grounded suspicion, right to defense, reasoned decision, right to a fair trial

## 7. Court of BiH, p. 29

### **Court of BiH, Case no. S1 2 K 013737 14 Kž**

*In this case, over the course of the trial, defense raised objections concerning the lawfulness and relevance of evidence obtained through special investigative measure of surveillance and technical recording of telecommunications, contesting the claim of the Prosecutor's Office of BiH that the voice recorded on the system for lawful interception of communications belonged to the defendant. Similar arguments were raised in the defense's appeal against the first-instance judgment, claiming that no evidence was presented at trial as to who were actual participants in the intercepted communications; that is, that the prosecution arbitrarily concluded that the voice in question belonged to the defendant.*

*The court of first instance refused this defense objection as unfounded, noting that it clearly follows from evidence obtained through special investigative measures that the voice belonged to the defendant, which was established through the analysis of content of intercepted communications, as well as by comparing intercepted communications with evidence obtained through special investigative measure of covert following and technical recording of persons.*

*Responding to the identical defense objection in the proceedings on appeal, the Appellate Panel fully endorsed and further elaborated the argumentation contained in the reasoning of the first-instance judgment.*

Keywords: identification of the defendant's voice

## 8. Next item, p. 31

### **Court of BiH, Case no. S1 2 K 012891 15 Kž<sup>3</sup>**

*In this case, during the trial defense raised objections concerning the lawfulness of evidence obtained through special investigative measure of surveillance and technical recording of telecommunications, arguing that conversations recorded on the system for lawful interception of communications, as well as all documentary evidence stemming from it, were not lawful given that all analyzed communications originate from objects (mobile phones), in relation to which the prosecution failed to carry out the action of opening of temporarily seized objects, as clearly prescribed under Article 71 of the CPC of BiH.*

*In response to the defense objection, the first-instance panel reviewed the contested evidence and found that it follows from the court casefile that objects have not been opened by the prosecution and inspected in line with the provision contained in Article 71 of the CPC of BiH. Accordingly, the court accepted defense objection, and objects seized during the searches which had not been opened and inspected in the manner prescribed by the law were considered as unlawfully obtained evidence, which resulted not only in the unlawfulness of this evidence but also unlawfulness of the evidence stemming from the original evidence. As for intercepted phone communications, the court held that they constituted lawful evidence because surveillance and technical recording of telecommunications was carried out in accordance with the law, while communications were registered on the system for lawful interception of telecommunications prior to objects (mobile phones) even being seized from defendants, that is, before the legal obligation of opening and inspection of evidence*

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<sup>3</sup> See the Case of the Constitutional Court of BiH, no. AP 3459/16.

*by the prosecution. Accordingly, the court refused the defense objection in the part concerning relevant recordings of intercepted phone communications, finding that the committed violation of Article 71 of the CPC of BiH did not contaminate this evidence.*

*The Appellate Panel confirmed the position by the court of first instance.*

Keywords: failure to meet the obligation of opening of temporarily seized objects in accordance with Article 71 of the CPC of BiH, unlawfulness of evidence, unlawfulness of evidence stemming from the original evidence

#### 9. Next item, p. 33

### **Court of BiH, Case no. S1 2 K 019757 17 Kž**

*In this case, in the course of the trial defense objected to the lawfulness of evidence obtained through the special investigative measure of surveillance and technical recording of telecommunications, arguing that the evidence was obtained in another, completely different criminal case ('incidental findings'), that there was no information that implementation of special investigative measures was requested in relation to the defendant, nor that the obtained evidence was mentioned or used during the investigation against the defendant. Defense argued that according to the principle of 'fruit of the poisonous tree', all other evidence related to this evidence is unlawful too. The court refused this defense objection and held that there is no obstacle for evidence, which was obtained through one of the special investigative measures in relation to a group of persons in relation to whom such investigative measures can be ordered, to be used in the proceedings in relation to a person against whom such measure was not ordered by the court, provided that the evidence concerns information and data about a criminal offense referred to in Article 117 of the CPC of BiH, along with compliance with other provisions of the law related to the ordering and implementation of special investigative measures. It was noted in the reasoning that the same position was taken in the Decision of the Constitutional Court of BiH, no. AP-1274/13 dated 20 July 2016.*

*The defense raised the same objection in the proceedings on appeal and additionally argued that the evidence related to incidental findings must be submitted to the preliminary proceedings judge, so that based on that evidence a new case is formed in relation to a new perpetrator of criminal offenses that until then have not been investigated. Responding to the defense objection, the panel of the Court's Appellate Division reiterated argumentation provided in the first-instance judgment and held that in light of the judicial practice and based on the case-file information in the instant case, the course of action in relation to 'incidental findings' was sound and the prosecution properly formed a new case in relation to the suspect and issued the order for conducting the investigation; based on this evidence, the panel sought from the court the ordering of special investigative measures.*

Keywords: incidental findings, fruit of the poisonous tree doctrine, Constitutional Court of BiH, AP-1274/13

#### 10. Next item, p. 36

### **Court of BiH, Case no. S1 2 K 024760 19 Kž 12**

*In the course of the trial, defense objected to the lawfulness of orders for implementation of special investigative measures issued by the Cantonal Court in Sarajevo, as well as orders issued by the Court of BiH, in relation to the alleged non-existence of 'grounds for suspicion' for issuing of the order for implementation of special investigative measures and lack of reasoning why evidence cannot be obtained in another way or why obtaining it would be accompanied by disproportionate difficulties. Ruling on these defense objections, the court found all 13 orders for implementation of special investigative measures issued by the Cantonal*

*Court in Sarajevo and 5 orders by the Court of BiH to have been unlawful.*

*As for orders issued by the Cantonal Court in Sarajevo, the Court of BiH found that they did not contain reasoning of cumulative requirements for issuing this type of order - explanation of the grounds for suspicion that a person against whom special investigative measures have been ordered has taken part on his own or along with other persons in the commission of criminal offense for which special investigative measures can be ordered, and reasons why evidence cannot be obtained in another way.*

*With respect to orders by the Court of BiH, the court primarily found that they were issued for a completely different criminal offense (compared to the one charged against defendants in the indictment), and that they did not contain even the minimum reasoning as to why evidence could not be obtained in another manner. In its reasoning, the court held that the existence of the prosecution's motion for the ordering of special investigative measures, which contains elements prescribed in the law, cannot in any way reinforce the orders in question because the order constitutes a separate act and it is exclusively based on such order that special investigative measures can be ordered and implemented. The procedure of retroactive justification of orders is not envisaged in provisions of the CPC of BiH, with the court finding support for its position about the necessity for the court order to contain reasoning of requirements set out in the law in the case of *Dragojević v. Croatia*. The position of the first-instance court was confirmed by the panel of the Appellate Division of the Court of BiH.*

*In relation to the defense objection concerning the lawfulness of evidence obtained through special investigative measures carried out in the Republic of Serbia and the report based on these measures and admitted into evidence, the Court refused the objection reasoning that it had no authority to assess and review the lawfulness of special investigative measures carried out based on orders of another state given that they have been issued by the relevant body of another state in accordance with the procedural code of that state.*

Keywords: lack of reference to grounds for suspicion in the court's order, reasoning why evidence cannot be obtained in another way, lawfulness of special investigative measures carried out in another state

#### 11. Appellate Court of Brčko District, p. 40

##### **Case no. 96 O K 010073 12 Kž**

*In this case, special investigative measures prescribed under Article 116(2) of the CPC of BD BiH were not ordered in relation to the defendant found guilty of having committed the criminal offense of unauthorized production and distribution of narcotics. The judgment finding the defendant guilty was rendered, inter alia, on the basis of evidence obtained through special investigative measures ordered by the lawful court order against another person who participated in the commission of the same criminal offense.*

Keywords: fruit of the poisonous tree, lawfulness of evidence

#### 12. Next item, p. 41

##### **Case no. 96 O K 047692 13 Kž 2**

*In this case, request for review of the Order on implementation of special investigative measures by the Basic Court of BD BiH was filed and subsequently dismissed by the court as unfounded. The court held that the applicant's arguments, namely that there were no conditions to order special investigative measures under Article 116(1) of the CPC of BD BiH in relation to him, had no merit because prior to issuing the order, the court of first instance, based on the evidence enclosed with the prosecution's motion, established with a sufficient*

*degree of reliability the existence of grounds for suspicion that the applicant incited another person to commit criminal offenses. Additionally, the court considered as unfounded the applicant's invoking of Article 9(1) of the Law on Delegates of the BD BiH Assembly, which in the applicant's view barred the possibility of intercepting phone communications of delegates without a prior approval of the BD BiH Assembly.*

Keywords: request for review of court order, existence of grounds for suspicion, interception of phone communications of persons with immunity from criminal prosecution

### 13. Next item, p. 44

#### **Case no. 96 O K 050046 14 Kž**

*In this case, "background conversation", which was recorded during the implementation of special investigative measure of surveillance and technical recording of telecommunications in cases of unrealized phone communication, was used as evidence. The court refused the defense objection that such evidence (background conversation) was obtained contrary to the law, with the defense arguing that special investigative measure under Article 116(2)(a) of the CPC of BD BiH can only refer to the audio recording of conversation between the person against whom special investigative measures have been ordered and any other person who calls that number or who is called from the phone number that is subject to special investigative measures. More specifically, since the telecom operator has a technical capacity to record communication of the person against whom special investigative measures have been ordered with his/her environment until the connection is established with the dialed number, then the communication recorded in such manner with persons who said anything during this short period of time, especially if the communication is of such nature that it points to the commission of the criminal offense with respect to which special investigative measures were ordered, is to be considered as lawfully obtained evidence.*

Keywords: "background conversation" and surveillance and technical recording of telecommunications, lawfully obtained evidence

### 14. Supreme Court of the Federation BiH, p. 45

#### **Case no. 04 O K 003788 18 Kžk**

*In this case, it was found that the Municipal Court in Tuzla acted contrary to Article 132(1) of the CPC of FBiH because orders on special investigative measures did not contain concrete reasons concerning the existence of grounds for suspicion that suspects committed the criminal offense and that the evidence obtained by their apprehension could not be obtained in another way or obtaining them would be accompanied by disproportionate difficulties. Applying the EctHR's standards from the case of Dragojević v. Croatia (2015), the FBiH Supreme Court found that orders on implementation of special investigative measures did not contain adequate reasoning that would justify intrusion into privacy of persons against whom these measures were ordered. Accordingly, pursuant to Article 11(3) of the CPC of FBiH that prescribes that the court shall not base its decision on evidence stemming from the evidence from paragraph (2) of the same article of the CPC of FBiH, the FBiH Supreme Court considered as fruits of the poisonous tree all evidence obtained based on these court orders, so they were resultantly excluded from the evidentiary material.*

Keywords: fruit of the poisonous tree, unlawful evidence, contents of the court order, specific reasoning

15. Next item, p. 48

**Case no. 09 O K 027665 20 Kž 30**

*The FBiH Supreme Court held in the instant case that orders on special investigative measures in relation to NN persons contained sufficient individual data that present the basis for their identification. The orders in question ordered the use of special investigative measures primarily in relation to suspects with full personal data, then in relation to NN persons using specified phone numbers for whom the orders stated, apart from the phone number, a nickname of individual persons. The FBiH Supreme Court held that all this indicated that orders contained sufficient individual data for identification of NN persons too.*

Keywords: NN person, personal data, identification of persons, specified phone numbers, notification, violation of the right to defense

16. Next item, p. 50

**Case no. 07 O K 009679 15 Kž**

*In the instant case, the defense challenged lawfulness of the evidence obtained through special investigative measure of surveillance and technical recording of telecommunications because the orders for their use did not specify names of individual police officers in charge of implementing these measures. The FBiH Supreme Court held that stating the names of police officers in court orders did not constitute an important circumstance for the purpose of implementation of investigative measures given that this is decided by the body entrusted with these activities within the scope of duties in their sectors and the scope of duties of police officers in these sectors.*

Keywords: names of police officers, bodies entrusted with implementation of special investigative measures

17. Next item, p. 51

**Case no. 09 O K 016134 17 Kž 19**

*The FBiH Supreme Court held in the instant case that the decision of the first-instance court was not based on unlawful evidence given that the defense, apart from alleging the unlawfulness of the implemented special investigative measure under Article 130(2)(a) of the CPC of FBiH, failed to concretize which specific evidence originated from such order and also failed to point to the relevant court orders on the extension and expansion of special investigative measures. Additionally, the appeal failed to specify evidence originating from these orders that the first-instance judgment was based on, as a result of which these defense arguments were deemed as arbitrary and unfounded.*

Keywords: concretization of evidence, extension and expansion of special investigative measures

18. Supreme Court of RS, p. 52

**Case no. 13 O K 003795 16 Kž 7**

*The RS Supreme Court held in this case that there were no procedural obstacles for the evidence, which was obtained through one of the special investigative measures ordered in relation to a group of persons against whom they can be ordered, to be used in the proceedings in relation to the person against whom no such*

*measure was ordered by the court provided that the evidence concerns information and data about the criminal offense for which this measure can be ordered, that the measure was carried out upon the court order, and that the evidence was obtained under the conditions and in the manner prescribed under Article 240 of the CPC of RS. Since there was a court order in this case for the use of special investigative measure of surveillance and technical recording of telecommunications and since the measure was carried out in accordance with the court order, which resulted in the recorded phone communications that were played at trial and used as evidence, it was concluded that the evidence in question was not unlawful.*

Keywords: "incidental findings", conditions for ordering special investigative measure, use of evidence obtained through special investigative measures, right to defense, lawfulness of evidence

19. Next item, p. 54

#### **Case no. 11 O K 007386 13 Kž 3**

*In the instant case, the RS Supreme Court held that the information and data (phone communications and SMS messages), which had been obtained prior to the issuance of orders on the use of special investigative measures in relation to defendants, were "incidental findings" and could be used as evidence, with respect to incidentally detected criminal offense too, because they were obtained based on special investigative measures against suspects conducted earlier upon orders of the preliminary proceedings judge and they concern a criminal offense for which, in the light of prescribed sentence, special investigative measures can be ordered within the meaning of Article 235(g) of the CPC of RS.*

Keywords: "incidental findings", criminal offenses for which special investigative measures can be ordered, lawfulness of evidence

20. Next item, p. 56

#### **Case no. 11 O K 006949 12 Kž 8**

*In the instant case, the RS Supreme Court held that in order for a procedural action carried out in another state to be valid, the requirement that the action was sought by the request of the requesting state, in this concrete case the request of the Special Prosecutor's Office in Banja Luka to the Prosecutor's Office of the Republic of Serbia, had to be met. The Prosecutor's Office of the Republic of Serbia was to move the relevant court to order the use of special investigative measures of technical recording and surveillance of communications (phone communications, SMS messages, and other) of the person, in relation to whom the order was sought, with other persons against whom the criminal proceedings were conducted. Having found that the evidence in question was obtained through special investigative measures before the relevant judicial bodies of the Republic of Serbia, upon the motion of the Prosecutor's Office for Organized Crime of the Republic of Serbia, and in the proceedings conducted in the Republic of Serbia, the RS Supreme Court found that the evidence was unlawful and that the rendering of the impugned judgment based on this evidence constituted an essential violation of the criminal procedure provisions under Article 311(1)(z) of the CPC of RS.*

Keywords: requirements for the validity of procedural action carried out in another state, unlawful evidence

## II. Surveillance and technical recording of premises

### 21. Constitutional Court of BiH, p. 59

#### Case no. AP 3236/18

*In examining the alleged violation of rights guaranteed under Article II/3.f) of the BiH Constitution and Article 8 of the ECHR in relation to the use of measures of secret surveillance in the context of criminal proceedings, the Constitutional Court was guided by the principles defined by the ECtHR in the case of Dragojević v. Croatia (2015). The Court of BiH did the same. In the instant case, apart from referring to conclusions from its Decision in the case U-5/16 and bringing them in the context of this concrete case, the Constitutional Court made reference to the rich case-law of the ECtHR: Klass and Others v. Germany (1978), Malone v. the United Kingdom (1984), Lambert v. France (1998), Niemietz v. Germany (1992), Bărbulescu v. Romania (2017), Köpke v. Germany (2010), Antović and Mirković v. Montenegro (2017), Kvasnica v. Slovakia (2009), Kennedy v. the United Kingdom (2010), Roman Zakharov v. Russia (2015), Moskalev v. Russia (2017). In addition to the analysis of the above noted rights, having analyzed the issue of the right to a fair trial the Constitutional Court concluded that there was no violation of the appellant's right under Article II/3.e) of the BiH Constitution and Article 6(1) and (3)(d) of the ECHR because in the circumstances of the present case there was nothing pointing to the conclusion that the appellant's right in relation to presented evidence was not respected and that in assessing the evidence the regular court acted arbitrarily. With respect to the right to a fair trial, standards that have already been analyzed in the earlier examples from the case-law of the Constitutional Court were used.*

Keywords: criminal offenses with elements of serious criminal offenses, extension of measures of secret surveillance, right to private life, "necessary in a democratic society", report on the implemented special investigative measures, reasoned decision

### 22. Supreme Court of FBiH, p. 62

#### Case no. 07 O K 007413 15 Kž 5

*In the instant case, the FBiH Supreme Court held that the arguments raised on appeal, namely that there was no need or legal justification for the use of special investigative measure of technical recording of premises in which defendants stayed at the relevant time and that evidence could have been obtained by search of the defendants' apartment, were without merit given that at the time of undertaking these and other special investigative measures approved by the Municipal Court in Mostar, there was a grounded suspicion that on a daily basis, in the apartment secured by reinforced entrance door, through the fixed iron bars behind the door they were selling narcotic drugs to drug users and taking money for themselves.*

Keywords: time period covered by the indictment, search of the defendants' apartment, time of undertaking special investigative measures

### III. Covert following and technical recording of individuals, means of transport and objects related to them

#### 23. Constitutional Court of BiH, p. 63

##### Case no. AP 3459/16

*In examining the alleged violation of rights guaranteed under Article II/3.f) of the BiH Constitution and Article 8 of the ECHR in relation to the use of special investigative measures in the context of criminal proceedings, the Constitutional Court was guided by principles defined by the ECtHR in the case of Dragojević v. Croatia (2015). The interference of public authority in the realization of individual rights guaranteed under Article 8(1) of the ECHR is justified, within the meaning of paragraph (2) of the same article of the ECHR, only if it is “in accordance with the law”, pursues one or more of the legitimate aims set out in paragraph (2), and is “necessary in a democratic society” to achieve the aim or aims concerned. It is through these standards that the Constitutional Court analyzed this case too and established that the rights guaranteed under Article II/3.f) of the BiH Constitution and Article 8 of the ECHR have not been violated.*

Keywords: right to private and family life, legitimate aim, “necessary in a democratic society”

#### 24. Next item, p. 66

##### Case no. AP 680/20

*This case too addressed the issue of alleged unlawfulness of the order for implementation of special investigative measures and arbitrary application of procedural law in the context of ordering of special investigative measures. Having applied standards from the ECtHR’s case already noted above (Schenk v. Switzerland (1988), Bykov v. Russia (2009), Lee Davies v. Belgium, Szilagyi v. Romania (2013)), the Constitutional Court of BiH concluded there was nothing pointing to the conclusion that impugned judgments of the regular court were based on unlawful evidence, that is, that the provisions of the CPC of BiH were applied arbitrarily and that the proceedings as a whole were unfair. The appellant’s allegations about the violation of the right to a fair trial were deemed as unfounded.*

Keywords: evidence, GPS device, reasoned decision, analysis of evidence, right to defense, right to a fair trial

#### 25. Court of BiH, p. 70

##### Case no. S1 2 K 017854 16 Kž 10

*In this case, the defense objected on appeal to the lawfulness and authenticity of evidence obtained through special investigative measure of covert following and technical recording of individuals, means of transport, and objects related to them, arguing that the report on when and how the GPS device, which was used for secret tracking of the vehicle, was placed and removed was not tendered into evidence.*

*The panel of the Appellate Division of the Court dismissed these objections as unfounded, noting that a detailed analysis of the presented evidence (in particular, the report on implemented special investigative measures of covert following and technical recording of individuals and objects) clearly revealed which order of the Court of BiH provided the basis for placing of the GPS device, as well as when and how the device was placed on the vehicle.*

Keywords: absence of the accompanying material documentation about the manner of implementation of special investigative measure, GPS, unlawful evidence

#### 26. Appellate Court of Brčko District, p. 71

##### **Case no. 96 O K 005060 14 Kž 12**

*In this case, special investigative measures set out in Article 116(2)(a) (surveillance and technical recording of telecommunications) and paragraph (d) (covert following and technical recording of individuals) of the CPC of BD BiH were used. The implementation of these measures removed any doubts as to whether the defendant was providing taxi services, which was his primary profession, or whether he was in fact selling heroin because the interception of phone communications was followed by covert following of the defendant, recording of the handover of drugs, and finally "cutting off" the delivery of drugs. The use of special investigative measures in this manner prevented the possibility of the defendant arguing that it was not him because even without the expert voice analysis, it could be concluded with certainty that in the instant case the voice in the recorded phone communication belonged to the defendant.*

Keywords: establishing one's identity without the expert voice analysis, interception of telecommunications

#### 27. Supreme Court of FBiH, p. 73

##### **Case no. 09 O K 024169 17 Kž 18**

*The FBiH Supreme Court concluded in the instant case that orders on the use of special investigative measures violated the privacy of the person in relation to whom the measures were approved and that such conduct of courts contained elements of arbitrariness, which the ECtHR found in its Judgement of 15 January 2015 in the case of Dragojević v. Croatia (2015). In this judgment, the ECtHR concluded that there was a violation of Article 8 of the ECHR to the detriment of the applicant. More specifically, it was established that each order by which the preliminary proceedings judge approved the use of special investigative measures has to be reasoned adequately, that is, it has to be clearly visible from its reasoning what is it in the concrete case that justifies the court's position in relation to grounds for suspicion that the person against whom the order is issued participated or is participating alone or along with other persons in the commission of criminal offense referred to in Article 131 of the CPC of FBiH. Moreover, reasoning of the order has to contain reasons as to why evidence cannot be obtained in another way or why obtaining them would be accompanied by disproportionate difficulties.*

Keywords: elements of arbitrariness, violation of Article 8 of the ECHR, reasoning of the court order

#### 28. Supreme Court of RS, p. 75

##### **Case no. 11 O K 021103 18 Kž 2**

*The RS Supreme Court held that the court of first instance correctly found and reasoned in its judgment that police officers acted within the scope of their official duties when they tracked the motor vehicle for the purpose of carrying out a regular check. The actions taken by police officers – stopping and control of the vehicle and persons found in it – should not be confused with observation and surveillance of persons and vehicles as special investigative measures of covert following and technical recording of individuals, means of transport and objects, or technical recording of telecommunications under Article 234(2)(a) and (g) of the*

*CPC of RS, which is why it was not necessary to obtain the relevant court orders within the meaning of Article 236(1) of the same code.*

Keywords: operative actions of police officers, lawfulness of evidence

#### IV. Use of undercover investigators and informants

##### 29. Constitutional Court of BiH, p. 77

###### Case no. AP 1158/10

*The Constitutional Court concluded in this case that there was a violation of the right to a fair trial under Article 11/3.e) of the BiH Constitution and Article 6(1) of the ECHR because regular courts arbitrarily applied provisions of the procedural code and found the appellant liable of the criminal offense based on the evidence obtained through special investigative measure - undercover informant, which, according to the law, could not have been ordered for the criminal offense in question. This conclusion of the Constitutional Court points to the obligation of courts to be mindful of the lawfulness of actions during the proceedings, especially when it comes to the use of special investigative measures that in themselves constitute intrusion into basic human rights and freedoms.*

Keywords: criminal offense, “incidental finding”, arbitrary application of the law, right to a fair trial

##### 30. Next item, p. 81

###### Case no. AP 1655/11

*In the instant case, the Constitutional Court dealt with examination of the issue of reasoned court decision in relation to objections concerning the lawfulness of actions; checking of the completeness of evidence (whether the judgment is based on other evidence apart from the evidence obtained through special investigative measures); the use of transborder cooperation; and finally, the assessment of the use of legitimate aim and broader interest of the society. In the analysis of these issues, the Constitutional Court invoked the case-law of the ECtHR in the following cases: Schenk v. Switzerland (1988), Klass and Others v. Germany (1978), Lambert v. France (1998), Malone v. the United Kingdom (1984), Lüdi v. Switzerland (1992).*

Keywords: evidence, transborder cooperation, reasoned decision, right to a fair trial, legitimate aim, right to private and family life, European Convention on Mutual Assistance in Criminal Matters

##### 31. Next item, p. 84

###### Case no. AP 5746/10

*The key issue facing the Constitutional Court in this case was the issue of where the conduct of informant crosses the line and becomes impermissible or turns into incitement. The ECtHR's judgment in the case of Bannikova v. Russia (2010) used as a standard clearly drew that line. In considering complaints about incitement to commit the criminal offense, the ECtHR, as part of the first step of substantive test of incitement, considered in particular the following issues: whether the prosecution authorities were ‘passive’; are there circumstances indicative of ongoing criminal activity of the person; whether the prosecution authorities merely ‘joined’ the criminal offense or instigated it; existence of clear rules of conduct by investigators and informants. As part of the second step, the procedural aspect, the following issues are relevant: consequences of incitement (arguable complaint or exclusion of evidence); procedural guarantees in deciding on incitement claims.*

Keywords: incitement, reasoned decision, right to a fair trial

### 32. Next item, p. 87

#### Case no. AP 3081/19

*This case is another example from the case-law of the Constitutional Court indicating how the court relies on the standard of reasoned court decision, which is decisive in assessing whether there is a violation of appellant's rights or not.*

Keywords: court order, evidence, reasoned decision, right to a fair trial

### 33. Court of BiH, p. 90

#### Case no. S1 2 K 018423 16 Kž 2

*In this case, the Court considered the lawfulness of evidence obtained through special investigative measures prescribed under Article 116(2)(e) of the CPC of BiH. The court did not accept defense arguments that during the investigation, contrary to Article 116(5) of the CPC of BiH, the defendant was incited by the informant and undercover investigator to commit the criminal offense. The panel of the Appellate Division of the Court of BiH refused the identical objection raised by the defense on appeal, reasoning that the defense failed to offer any evidence that would bring into question the lawfulness of conduct of the undercover investigator.*

*Additionally, the court refused as unfounded the defense objection that the informant was not heard as a witness in the course of the proceedings and that as a result the defense was denied the right to a fair trial given that the testimony of this witness would confirm or refute the testimony of undercover investigator. The panel of the Appellate Division of the Court of BiH refused the identical objection raised by defense on appeal, providing a similar reasoning to the one in the first-instance judgment.*

*Finally, the Court refused as unfounded the objection concerning the lawfulness of actions by undercover investigator and informant, reasoning that the lawfulness of their actions was confirmed by the order of the Court that approved their use, as well as later orders on the extension of these special investigative measures.*

Keywords: incitement by informants and undercover investigators, examination of informant at trial, lawfulness of actions

### 34. Appellate Court of Brčko District, p. 93

#### Case no. 96 0 K 044992 14 Kž 6

*In this case, the defense unsuccessfully complained that the witness acted as informant within the meaning of Article 116(2)(e) of the CPC of BD BiH, that is, that this investigative measure was implemented without the court order, thus bringing into question lawfulness of the obtained evidence. The court held that the person in question acted in this case exclusively as a witness who had relevant insight into the incidents and acts charged against defendants. Additionally, the defense argued that undercover investigators incited the defendant to commit the criminal offense. As for this claim, the defense failed to offer adequate argumentation. In contrast to this, the court of first instance provided convincing reasoning as to why it did not accept such defense arguments raised several times during the trial.*

*In its Decision on admissibility and merits, the Constitutional Court of BiH dismissed as unfounded the appeal against judgments of the Appellate Court of BD BiH and the Basic Court of BD BiH in this case.*

Keywords: testimony of a person who is not an informant, incitement of defendant to commit a criminal offense

### 35. Next item, p. 94

#### Case no. 96 O K 050046 14 Kž

*As part of the implementation of the order on special investigative measures by the Basic Court of BD BiH, authorized officers of the Police of BD BiH and the State Investigation and Protection Agency (SIPA) carried out all actions in accordance with directions given to them by the prosecutor of the Prosecutor's Office of BD BiH within the meaning of Article 37 of the CPC of BD BiH. Based on these actions, the police officers prepared official notes and other documents that were later used as documentary evidence in the evidentiary proceedings. The court held that in these circumstances, it is not necessary at the investigation stage to obtain witness statements from them because when it comes to police officers taking part in the implementation of special investigative measures, the taking of such statements is not a procedural precondition for them to be proposed and heard as witnesses in the course of the first-instance proceedings.*

Keywords: taking of statements from police officers, examination of police officers as witnesses

### 36. Supreme Court of FBiH, p. 95

#### Case no. 07 O K 017415 20 Kž

*The FBiH Supreme Court held that the defense position, namely of equating insights obtained from police informer with the special investigative measure of the use of undercover investigators and informants, was wrong in light of the fact that "informer" (a term primarily related to the operational part of evidence collection) in the procedural sense is a witness providing information about a criminal offense and perpetrators (Article 95(1) of the CPC of FBiH), while "informant", within the meaning of Article 130(1)(e) of the CPC of FBiH, is a person engaged beforehand to obtain information about a criminal offense and perpetrators whilst acting in the criminal environment.*

Keywords: police informer, undercover investigator, informant, operational collection of information about a criminal offense

### 37. Supreme Court of RS, p. 97

#### Case no. 11 O K 010796 15 Kž 3

*In this case, the RS Supreme Court held that informant can be any person who has information from different sources of relevance for detecting and proving the offense or who, given his or her position, can take part in the operational work. The court also held that the fact that the person is an injured party from the commission of criminal offense and witness with immunity is not a legal obstacle for the person to act as an informant within the meaning of Article 234(2)(d) of the CPC of RS. Additionally, it was established that informant is not obliged to comply with the Instruction on the manner of operation of police officers in the crime prevention and suppression by using operational and technical means and methods because contrary to the defense arguments raised on appeal, the obligation to comply with the Instruction refers to police officers of the RS Mol in their operational work.*

Keywords: verbal order of the preliminary proceedings judge, informant as a witness, lawfulness of evidence

**Case no. 118-0-Kž-07-000 028**

*The RS Supreme Court held that it follows from the evidence obtained through special investigative measures that there were no activities of the undercover investigator, or any other person, that would constitute incitement to commit a criminal offense. Given that incitement implies willful prompting or reinforcing of the incited person's will to commit a criminal offense, the RS Supreme Court held that such action did not follow from the report of the undercover investigator - given that the undercover investigator contacted the defendant by phone without mentioning drugs and that it was the defendant who of his own initiative offered to him heroin and cocaine for sale, so that the undercover investigator's initiative only enabled the detection of an already ongoing criminal offense - or from any other evidence presented in the proceedings.*

Keywords: requirements for ordering special investigative measures, order on implementation of special investigative measure, activities of undercover investigator, lawfulness of evidence

## V. Simulated and controlled purchase of certain objects and simulated bribery

### 39. Constitutional Court of BiH, p. 102

#### Case no. AP 3225/07

*This case too featured prominently the requirement of respect for the principle of “reasoned decision” under Article 6 of the ECHR because the legal issue in question was of essential importance for the outcome of the case. In relation to this principle, the Constitutional Court stressed the position that, according to the case-law of the ECtHR, national courts are obliged to reason their judgments and in doing so they do not have to respond in detail to each and every allegation, but if a legal issue is of essential importance for the outcome of the case, the court in such a case has to specifically explain reasons on which it based its decision. Otherwise, there is a violation of Article 6(1) of the ECHR.<sup>4</sup>*

Keywords: evidence, plan of investigative measures, reasoned decision, right to a fair trial

### 40. Next item, p. 104

#### Case no. AP 3332/18

*In this decision, the Constitutional Court recalled its practice in which it stressed that, as a rule, it is not authorized to check established facts and the manner in which regular courts interpreted the relevant legislation “unless decisions of these courts violate constitutional rights”, and that it is outside of its jurisdiction to assess the quality of conclusions of regular courts in terms of the evaluation of evidence “unless this evaluation seems manifestly arbitrary”. The Constitutional Court stressed that “arbitrariness” noted above does not refer to conclusion of the court about factual and legal findings in cases when the decision is reasoned in the manner that meets requirements from Article 6(1) of the ECHR. This case too put to the fore the issue of reasoned court decision in relation to objections concerning the lawfulness of conduct.*

Keywords: court order, reasoned decision, right to a fair trial

### 41. Court of BiH, p. 109

#### Case no. S1 2 K 018423 16 Kž 2

*This case concerned the issue of relevance of the prosecution evidence – recorded material obtained during the implementation of special investigative measure of simulated and controlled purchase of certain objects and simulated bribery – which the defense raised arguing that the content of the recorded material was not related to the acts of commission of the criminal offense charged against defendants. The court refused the defense objection, finding that the analysis of the recorded video footage clearly showed the defendant talking to the undercover investigator, while the other (audio) recording revealed that the defendant on several occasions counted the money handed over to him by the undercover investigator for the sale of narcotic drugs.*

*Moreover, the panel of the Appellate Division of the Court of BiH refused as unfounded the objection in relation to lawfulness raised by the defense on appeal, arguing that there were some omissions at the stage of implementation of special investigative measures concerning the simulated purchase of narcotic drugs.*

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<sup>4</sup> See *Van der Hurk v. The Netherlands* (1994).

*Namely, the money used by the undercover investigator to pay for the drugs was not marked and the order for the money to be seized upon the completion of the special investigative measure was not issued, and in the defense's view, there was no other evidence to corroborate the evidence of undercover investigator that the simulated purchase even happened. The Appellate Panel refused the defense objection, reasoning that apart from the unsubstantiated defense objection there is nothing else casting doubt on the lawfulness of the work of authorized officers who acted in the present case.*

Keywords: relevance and lawfulness of implemented special investigative measures

#### 42. Appellate Court of Brčko District, p. 110

##### Case no. 96 O K 083774 18 Kž 2

*In this case, a person was selected to carry out special investigative measure of simulated bribery of the defendant. As the defendant claimed that he suspected this person to have planted the money in the outer pocket of his jacket without his knowledge, following the defendant's apprehension police officers should have first inspected his fingers and palms under the UV light. Based on this course of action, it could have been reliably concluded if the defendant had contact with the marked money before the search.*

Keywords: marked banknotes, examination of the defendants' hands

#### 43. Supreme Court of FBiH, p. 113

##### Case no. 01 O K 008390 14 Kž 2

*The FBiH Supreme Court held that the court is not obliged to deliver to the defense evidence or copies of evidence relevant for the assessment of lawfulness of custody, but instead to inform the defense of this evidence, within the meaning of Article 61(2) of the CPC of FBiH, or to provide it with access to this evidence based on its request. Since the FBiH Supreme Court established in the present case that the defense had been informed of the court orders for implementation of special investigative measures, defense objections about the violation of the suspect's right to defense were deemed as unfounded. Moreover, the FBiH Supreme Court concluded that the suspect was not deceived by implementation of special investigative measure prescribed under Article 130(2)(f) of the CPC of FBiH, given that the aim of this special investigative measure is indeed to give bribe to the suspect in order to collect evidence about the commission of a criminal offense, in such a way that bribery is carried out through an intermediary.*

Keywords: delivery of evidence, notification of evidence, notifying the defense of court orders, deception in relation to bribery, right to defense

#### 44. Supreme Court of RS, p. 115

##### Case no. Kž-252/05

*In the instant case, the RS Supreme Court concluded that actions of the police officers, as part of the special investigative measure of simulated purchase of objects, were not limited to their passive role in the criminal activity of trafficking of narcotic drugs, but by their concrete actions they instigated the defendant to commit the offense charged against him. Having found that as part of the special investigative measure of simulated purchase of objects, the police officer initiated, organized and determined actions within the criminal activity that have the character of active conduct in the sense of forming of defendant's decision to commit the*

*offense, and by doing so clearly incited the defendant to commit the criminal offense, this court held that the court of first instance correctly concluded in its judgment that there were circumstances within the meaning of Article 289(d) of the CPC of RS that preclude criminal prosecution of the defendant for the offense charged against him under the indictment.*

Keywords: police officer's incitement of a suspect to commit a criminal offense, circumstances that preclude criminal prosecution of the incited person

## **VI. Supervised transport and delivery of objects of criminal offense**

45. Constitutional Court of BiH, p. 118

### **Case no. AP 3224/11**

*Given that the appellant contested the lawfulness of collected evidence and their evaluation which he associated with the alleged lack of reasoning about decisive facts and the right to defense, the Constitutional Court reviewed the instant case in the context of following issues: whether the proceedings in that sense were fair as a whole, that is, whether in the proceedings that resulted with the impugned judgments the appellant was given the opportunity to contest the lawfulness of collected evidence or to oppose the presentation of any evidence. The Constitutional Court recalled that according to the position of the ECtHR, in assessing whether the proceedings as a whole were fair, it has to be taken into consideration whether the rights of defense were respected; it has to be examined whether the applicant was given the possibility to challenge the legality of evidence and to oppose their use; the quality of evidence has to be taken into consideration, including whether circumstances in which it was obtained cast doubt on its reliability or accuracy.*

Keywords: transborder cooperation, reasoned decision, right to a fair trial, non-existence of court order on special investigative measure, unlawfulness of conduct of authorized officers during the implementation of special investigative measure

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