ABSTRACT

A brief short introduction on the procedural law institute of covert and technical measures of investigation and surveillance, which envisages the execution of these measures before or after authorization of criminal investigations, regardless if the suspect is known or not. Herewith we have mentioned also the types of covert measures of investigation and surveillance, the changes in the Criminal Procedure Code of Kosovo and manners for use and regulation of covert and technical measures of investigation, the contents of the application and procedures for issuance of the covert measures, the rights of persons against whom are applied the covert and technical measures of surveillance and investigation, the admissibility of evidence obtained by the order for covert technical measures of surveillance and investigation, the Review Panel for investigation and surveillance as well as other bodies which help in implementing these measures.

Keywords: covert and technical measures investigation and surveillance, investigation, State Prosecutor, pre-trial judge, prosecutor’s application for covert and technical measures of investigation and surveillance, Order of the judge for covert and technical measure of investigation and surveillance.

Introduction

Chapter IX of the Criminal Procedure Code of Kosovo provides the covert and technical measure of investigation and surveillance. Viewed from the procedural rules aspect, the covert and technical measures of investigation and surveillance are relatively new. The reason for drafting of these provisions same as provisions concerning protection of injured parties, the witnesses and
cooperative witnesses, stands on need of society to increase the procedural effectiveness in the fight of serious crimes, organized crimes and corruption.\textsuperscript{149}

Taking into account the need for prevention and fight of crime in Kosovo in order for improvement and effectiveness of criminal investigations these measures started to be applied through the UNMIK Regulation 2002/6, dated 18 March 2002. Further with the Provisional Criminal Procedure Code of Kosovo, UNMIK Regulation No. 2003/26, dated 6 July 2003, and recently also with the Criminal Procedure Code of Kosovo No. 04/L-123, which entered into force on 1 January 2013.

1. \textit{Types of covert and technical measures of surveillance and investigation}

According to the Criminal Procedure Code of Kosovo, Law no. 04/L-123, the following covert and technical measure of surveillance and investigation are provided:

1. Covert photographic or video surveillance in public places;
2. Covert monitoring of conversations in public places;
3. Undercover investigation,
4. Metering of telephone calls,
5. Covert photographic or video surveillance in private places;
6. Covert monitoring of conversations in private places;
7. Search of postal items;
8. Interception of telecommunications including text and other electronic messages,
9. Interception of communications by a computer network;
10. Controlled delivery of postal items;
11. Use of tracking or positioning devices;
12. A simulated purchase of an item;
13. A simulation of a corruption offence, or

The human rights and freedoms as constitutional categories, in particular the right to privacy of persons, are intruded and affected through implementation of covert and technical measures of surveillance and investigation. Therefore, with the Criminal Procedure Code of Kosovo under Chapter IX are provided the conditions, methods and manners for use, ordering and implementation of these measures. Any violation of these procedural provisions constitutes and infringement of individual, private and personal rights stipulated in the Constitution of the Republic of Kosovo, conventions and other international instruments.

The Constitution of Republic of Kosovo, Article 36, [Right to Privacy], stipulates:

\textsuperscript{149} Dr. Ejup Sahiti dhe Dr. Rexhep Murati, E Drejta e Procedurës Penale, Prishtinë 2013, faqe 211
"Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication. Whereas paragraph 2 provides: "Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law..."

The right to privacy in itself includes some other rights, in view of which the Universal Declaration of Human Rights (Article 12) and the International Covenant on Civil and Political Rights (Article 17), stipulate: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...".  

In addition, also the Criminal Code of Kosovo through Chapter XVII for the criminal offences against human rights and freedoms has envisaged as a special criminal offence "Violating orders for covert or technical measures of surveillance or investigation, Article 206 of the CCK". The criminalization of this criminal offence was stipulated in order not to abuse the covert and technical measures of surveillance and investigation, thus the object of protection of this criminal offence are the conditions and implementation of these measures.

In addition, Article 88, paragraph 1 of the Criminal Procedure Code of Kosovo, provides that covert and technical measures of surveillance and investigation may be ordered against a particular person or place if:  

Item 1.1. There is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, (in cases in which attempt is punishable), has attempted to commit a criminal offence which is prosecuted ex officio; and  

Item 1.2. The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

According to the Criminal Procedure Code of Kosovo, the covert and technical measures may be ordered against the suspects for criminal offences that are punishable up to five (5) years of imprisonment or more or against the suspects who are suspected for commission of one or more criminal offences provided under Article 90, paragraph 1, item 1.2 of this Code.

All evidence obtained by the State Prosecutor, prior or in the course formal implementation of investigations through implementation of covert measures that are lawfully ordered according to Article 888 of the Criminal Procedure Code of Kosovo, are admissible evidence during the main
trial, regardless if the evidence is or is not included in the indictment for the criminal offences listed under Article 90 of the CPCK.

According to Article 91, paragraph 2, is stipulated that the jurisdiction for issuance of covert and technical measures of investigation and surveillance rests with the Pre-trial judge, who upon the Application of the State Prosecutor may order implementation of these measure. Exceptionally, paragraph 1 of this Article, provides that the State Prosecutor in exigent circumstances may order any of the covert and technical measures of investigation and surveillance. In addition, in criminal proceedings that are investigated under Chapter XXIV (organized crime) or Chapter XXXIV (official corruption and criminal offences against official duty) of the of the Criminal Code or money laundering offences in necessary cases, if the delay that would result from a pre-trial judge issuing an order would jeopardize the security of investigations or the life and safety of an injured party, witness, informant or their family members. Such provisional order ceases to have effect if it is not confirmed in writing by a pre-trial judge within three (3) days of issuance. This is a novelty in the new Criminal Procedure Code of Kosovo compared to the previous PCPCK, where according to Article 258, paragraph 1, item 1, 2, 3, 4 of the Provisional Criminal Procedure Code of Kosovo, the public prosecutor may issue an order for each of the following measures: 1) Covert photographic or video surveillance in public places; 2) Covert monitoring of conversations in public places; 3) An undercover investigation; or 4) Metering of telephone calls.

Whereas, the pre-trial judge may issue an order for each of the following measures on the basis of an application by a public prosecutor: 1) Covert photographic or video surveillance in private places; 2) Covert monitoring of conversations in private places; 3) Search of postal items; 4) Interception of telecommunications; 5) Interception of communications by a computer network; 6) Controlled delivery of postal items; 7) Use of tracking or positioning devices; 8) A simulated purchase of an item; 9) A simulation of a corruption offence; or 10) Disclosure of financial data.\textsuperscript{151}

2. \textbf{The person who may be subject of implementation of covert and technical measures of surveillance and investigation}

I. \textit{Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial} data may be ordered against a particular person or place if:

\begin{itemize}
  \item[a)] There is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, in cases in which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and,
\end{itemize}

\textsuperscript{151} Article 258 of the Provisional Criminal Procedure Code of Kosovo UNMIK/RREG/2003/26
b) The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

II. Metering of telephone calls or disclosure of financial data may be ordered if there is a grounded suspicion that:

   a) such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or

   b) The suspect uses such person’s telephone.

III. Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or positioning devices, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation may be ordered against a particular person, place or item if:

   a) There is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of the CPC.

   b) The information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

IV. The search of postal items, the interception of telecommunications or the interception of communications by a computer network may be ordered against a person other than the suspect, if there is a grounded suspicion that:

   a) Such person receives or transmits communications originating from or intended for the suspect; or,

   b) The suspect is using such person’s telephone or point of access to a computer system.

3. The content of the Application and the Procedure for issuance of the order for Covert and Technical Measures of Investigation and Surveillance

An application from the State Prosecutor for issuance one of the covert measures shall be made in writing and shall include the following information:
a) The identity of the duly authorized police officer, officer of the body authorized to enforce criminal law or the state prosecutor making the application;
b) The formal designation and the legal grounds of the measure,
c) Reasons and facts that support the application and fulfill the criteria in Article 88 of the Criminal Procedure Code of Kosovo; and
d) Information about any previous application known to the applicant involving the same person and the action undertaken by the authorizing judicial officer on such application.

An order from the Pre-trial judge for implementation of covert and technical measures of surveillance and investigation contains the following:

a) The name and address of the subject or subjects of the order, if known the number of affected data subjects and the scene of the event;
b) The official designation of the measure and its exact legal bases;
c) In particular the current findings and the sound probability\textsuperscript{152};
d) The measure and its exact starting and closing time, if applicable; and
e) The person authorized to implement the measure and the officer responsible for supervising such implementation.

The order issued by the Pre-trial judge for any of the measures shall not exceed sixty (60) days from the date of the issuance and the duly authorized police officers shall provide the judge with the report on implementation of the order at fifteen (15) day intervals from the date of the issuance of the order.

The order for interception of telecommunications, interception of communications by a computer network, metering of telephone calls, and search of postal items, controlled delivery of postal items or disclosure of financial data shall include as an annex a separate written instruction to persons other than duly authorized police officers whose assistance may be necessary for the implementation of the order. Such written instruction shall be addressed to the director or the official in charge of the telecommunications system, computer network, postal service, bank or other financial institution and shall specify only the information, which is required for assistance in the implementation of the order.

The order for covert measures cannot be extended unless the preconditions for ordering a measure as set forth in Article 88 of the CPC, continue to apply and there is a reasonable explanation of the failure to obtain some or all of the information sought under the earlier order. The order for covert photographic or video-surveillance in public places, covert monitoring of conversations, search of postal items, interception of communications by a computer network, controlled delivery of postal

\textsuperscript{152} According to Article 19, paragraph 1, sub paragraph 1.11, the definition “Sound Probability” means -the basis for an order to search or otherwise justify a government intrusion into a person's privacy. Possession of admissible evidence which would satisfy an objective observer that a criminal offence has occurred is occurring or there is a substantial likelihood that one will occur and the person concerned is substantially likely to have committed the offence.
items, use of tracking or positioning devices, an undercover investigation, metering of telephone-calls or disclosure of financial data may be extended for a maximum period of sixty (60) days, which may be renewed up to a total period of three hundred sixty (360) days from the date of the issuance of the order.

The order for covert photographic or video-surveillance in private places or interception of telecommunications may be extended for a maximum of sixty (60) additional days, which may be renewed for a further maximum period of sixty (60) additional days.

The order for a simulated purchase of an item or a simulation of a corruption offence shall only authorize a single purchase of an item or a single simulation of a corruption offence, namely if implementation of this measure fails or becomes unsuccessful then a new order shall be issued as set forth in Article 88 of the CPCK and there is a reasonable explanation for that failure.

4. Suspension of the implementation of the order and the materials obtained through the covert and technical measure of surveillance and investigation

The authorizing judicial officer may terminate the order at any time if he or she determines that the preconditions for ordering a measure, as set forth in Article 88 of the CPC, cease to apply, for instance the information for which the measure is issued can now be obtained with another measure. The extension of an order for a measure ordered by a pre-trial judge may only be ordered on the motion of a state prosecutor.

On the completion of the implementation of the order of the Pre-trial judge, the duly authorized police officers shall send the collected materials, documentary records, tapes and other items relating to the order and its implementation to the state prosecutor.

Materials may be closed and held in secret if the state prosecutor considers that making them public would corrupt subsequent investigations or create a risk to the victim, witnesses, investigators or other persons. Also, the Pre-trial judge through the Application of the State Prosecutor may deny the access in the collected materials through covert measures also to the person against who is applied the measure. Postal items, which do not contain information that will assist in the investigation of a criminal offence, shall immediately be forwarded to the recipient.

5. The rights of persons against whom are implemented covert and technical measure of surveillance and investigation

With the provisions of Article 96 of the Criminal Procedure Code of Kosovo is provided that the persons who are subject of implementation of the measure of covert and technical measure of
surveillance and investigation as set forth from Article 86 to 100 of the present code shall be notified. This means that besides of the targeted persons shall also be informed the other persons significantly affected thereby; This comes in question in implementation of Article 87, sub paragraph 1.1 and 1.7 of the CPCK, covert photographic or video surveillance or use of location tracking devices. In addition, in cases of Article 87, sub paragraph 1.2 of the CPCK if there was covert monitoring of conversation in public places besides of the target persons shall also be informed the others that are significantly affected by this, namely persons who owned or lived in the private premises under surveillance at the time the measure was effected;

In the case of Article 87 subparagraph 1.3 of the CPC, the sender and the addressee of the postal item shall be notified, whereas in the case of Article 87 subparagraph 1.10, the person targeted, persons significantly affected thereby; Notification shall be dispensed with where overriding interests of an affected person that merit protection constitute an obstacle thereto.

Notification shall take place as soon as it can be effected without endangering the purpose of the investigation, the life, physical integrity and personal liberty of another, or significant assets. Were notification is deferred pursuant to the first sentence, the reasons shall be documented on the file. The notification shall take place 12 months after completion of the measure and any deferral of notification shall be subject to the approval of the court, which shall decide upon the duration of any further deferrals. If certain measures are implemented within the given time limit, the time limit shall start running after expiry of the last measure which shall be six (6) months.

Court decisions shall be taken by the court competent to order the measure. In all other cases the court situated where the competent state prosecution office is located shall be competent. Even after completion of the measure and for up to two weeks following their notification, the persons named affected by the measure may apply to the competent court a review of the lawfulness of the measure, as well as of the manner and means of its implementation. An immediate complaint against the decision shall be admissible. Where public charges have been preferred and the accused has been notified, the court seized of the matter shall decide upon the application in its concluding decision. All personal data acquired by means of the measure which is no longer necessary for the purposes of criminal prosecution or a possible court review of the measure shall be deleted without delay. The state prosecutor shall promptly inform in writing by registered mail each subject of an order pursuant to paragraph 4 of this Article that he or she has been the subject of that order and has a right to file a suit to the competent court within six (6) months of being informed.

6. Admissibility of Evidence Obtained through Orders for Covert and Technical Measures of Surveillance and Investigation

Evidence obtained by the covert and technical measures of surveillance and investigation shall be inadmissible if the order for the measure and its implementation are unlawful. After the filing of
the indictment, the single trial judge or presiding trial judge shall consider challenges by the defendant to the admissibility of the collected materials, if the challenge is filed prior to the second hearing. The decision on a challenge under this paragraph may be appealed.

At any time prior to the final judgment, the single trial judge or presiding trial judge may review the admissibility of materials collected under Article 88 of CPC ex officio for violations of the defendant's constitutional rights if there is an indication that the materials were collected unlawfully. When the ruling that an order or its implementation is unlawful is final, the single trial judge or presiding trial judge assigned to the proceedings shall remove all collected materials from the record and submit such materials through the President of the Basic Court to a Surveillance and Investigation Review Panel for a decision on compensation.

If a person considers that he or she has been the subject of a measure under the Chapter for covert and technical measures of surveillance and investigation, which is unlawful, or an order for a measure under this Chapter, which is unlawful, he or she may submit a complaint to President of the Basic Court who shall, if a violation of the law is alleged, appoint a Surveillance and Investigation Review Panel for adjudication.

The Surveillance and Investigation Review Panel shall:

- adjudicate on a complaint submitted under Article 98, paragraph 5 of the CPCK in respect of a measure or an order for a measure under this Chapter and decide on compensation where appropriate; or
- Decide on compensation for the subject or subjects of an order under this Chapter if a judge has made a final ruling under Article 97 paragraph 3 of the CPCK that the order or its implementation is unlawful.

The Surveillance and Investigation Review Panel shall be composed of three judges who shall be assigned by the President of the Basic Court to adjudicate on an individual complaint or to decide on compensation following an individual ruling under Article 97 paragraph 3. None of the three members of the Surveillance and Investigation Review Panel shall be professionally connected with the subject of the complaint or the collected materials, which are the subject of the ruling under Article 97 paragraph 3 of the CPCK. Authorized police officers and state prosecutors shall provide the Surveillance and Investigation Review Panel with such documents as the Surveillance and Investigation Review Panel shall require to perform its functions and shall, on request, provide oral testimony to the Surveillance and Investigation Review Panel. When a ruling of a judge that an order is unlawful is final, it is binding on the Panel.

If on adjudicating on a complaint the Surveillance and Investigation Review Panel finds that a measure is unlawful or an order for such measure is unlawful, it may decide to:

1. Terminate the order, if it is still in force;
2. Order the destruction of the collected materials; and/or
3. Award compensation to the subject or subjects of the order.

7. Assistance of other Authorities to Implement Measures

The provisions of the Criminal Procedure Code stipulate that the police may, where appropriate, seek the assistance of other authorities responsible for maintaining law, such as the assistance of custom officers and other similar services.

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