

Secret Surveillance Measures in Criminal Procedure

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Summary

Legal framework for the application of secret surveillance measures (SSM) in criminal procedure has been largely harmonised with the case-law of the European Court of Human Rights (ECtHR) through the adoption of the new Criminal Procedure Code. Insight into call lists, not defined as a SSM in Montenegrin legislation, but rather as an operative data gathering and police competence in preliminary investigation, is not in line with ECtHR case-law.

Absence of practice of determining responsibility for unlawful procedures, administrative and procedural shortcomings in the application of SSM, is a cause for concern. By enhancing communication and coordination between the Police Directorate and the National Security Agency, the number of individuals kept under SSM twice, should be reduced to a minimum.

Although all levels of control have at their disposal certain mechanisms of oversight of the SSM application, they are all characterised by passivity in carrying out control and in performing other duties prescribed by law. Internal control does not perform its oversight duty, allegedly because the data in procedure are secret. Judicial inspectorates do not control the prescribed record-keeping of SSM. Committee for political system, judiciary and administration, and the Committee for Security and Defence have not used their control mechanisms for overseeing the application of SSM in criminal procedure. Complaints mechanism is not developed, while the Ombudsman has not performed any controls of the application of SSM in criminal procedure.

Availability of information is very limited, and the annual performance reports of the state institutions, competent for applying the measures, do not include information on SSM. Still, in the last report submitted by the Tripartite Commission, responsible for gathering data in the field of corruption and organised crime, it is stated that 'during 2011, SSM were approved for 113 individuals in 18 cases.' However, the number of processed individuals and the number of legally-enforceable decisions, based partly on the evidence gathered through the application of SSM, which would indicate the results achieved via this method, is not available.

It is necessary to regulate more precisely the legal framework for insight into call lists and to allow the Internal Police Control to exercise continuous oversight of the application of SSM in criminal procedure. Furthermore, parliamentary oversight of the application of SSM needs to be enhanced by having the institutions competent for the application of SSM in criminal procedure - courts, prosecutorial authorities and the police - deliver special reports on applied measures to the Committee for Security and Defence.

Introduction

Secret surveillance measures (hereinafter: SSM), applied in criminal procedure, represent a temporary curtailment of rights guaranteed by the Constitution of Montenegro and by the European Convention on Human Rights. They are applied in dealing with serious criminal offences and are used as an instrument for the fight against corruption and organised crime. Nevertheless, having in mind the possibilities for misuse of SSM, it is especially important to exercise continuous control and to develop oversight mechanisms for their application. Despite their importance, SSM applied in criminal procedure fall outside the sphere of interest of all levels of institutional control and, therefore, elude all forms of accountability.

SSM in criminal procedure are applied with the aim of providing evidence for precisely defined criminal offences for which these measures can be ordered. SSM are prescribed by the Criminal Procedure Code¹ (hereinafter: CPC), stipulating that, based on the 'written order by the investigative judge at the motion of the State Prosecutor containing a statement of reasons'², the following measures can be applied: 1. secret surveillance and technical recording of telephone conversations, i.e. other communication carried out through devices for distance technical communication, as well as private conversations held in private or public premises or at open; 2. secret photographing and video recording in private premises; 3. secret supervision and technical recording of persons and objects. Based on the motion of police authorities containing a statement of reasons, the following measures can be applied via a

¹ The use of SSM is prescribed by articles 157 - 162 of the Criminal Procedure Code ('Official Gazette of Montenegro', No. 57/09 of 18 August 2009, 49/10 of 13 August 2010). Criminal Procedure Code entered into force in its entirety as of 1 September 2011, while the implementation of provisions related to the application of SSM under the jurisdiction of the Special Prosecutor for the Fight against Organised Crime, Terrorism and War Crimes, started a year earlier. Article 158, which extended the number of criminal offences for which SSM may be ordered, began to be implemented the day of the Code's entry into force.

² Article 159 of the CPC

written order by the State Prosecutor: 1. simulated purchase of objects or persons and simulated giving and taking of bribe; 2. supervision over the transportation and delivery of objects of criminal offence; 3. recording conversations upon previous informing and obtaining the consent of one of interlocutors; 4. use of undercover investigators and collaborators.

Forms of control over the application of SSM in criminal procedure are: 1) *ex ante*: judicial/prosecutorial in the form of approving measures; 2) during the application of measures: the Internal Control of the Police possesses the most important oversight mechanisms; 3) *ex post*: control of the procedure before the courts; parliamentary oversight; civilian control of the police; independent institutions: Personal Data Protection Agency and the Ombudsman.

By analysing the legal framework and practice, the intent of the author of this research report is to indicate the shortcomings in exercising democratic and civilian control over the application of SSM, thereby providing recommendations for enhancing the oversight of their application.

The Issue of Call Lists

Insight into call lists is not defined as a SSM in Montenegrin legislation, but rather as an operative data gathering and police competence in preliminary investigation. For these reasons, the application of this measure³ does not correspond to the standards of the European Court of Human Rights (ECtHR) which are obligatory for Montenegro as a party to the European Convention on Human Rights.

Namely, the ECtHR, in its verdict in the case of *Copland vs. UK* of 2007, confirmed that call lists -

³ Article 257, paragraphs 1 and 2 of CPC defines the insight into call lists by stipulating that the police may request from the entity delivering telecommunication services to establish identity of telecommunication addresses that have been connected at a certain moment - where there are grounds for suspicion that a criminal offence which is subject to prosecution by virtue of office has been committed, the police shall inform the competent State Prosecutor and take necessary measures as a self-initiative or upon a petition by a State Prosecutor, with a view to discovering the perpetrator, discovering and securing traces of the criminal offence and items which may serve as evidence, and to gathering all information which could be useful for conducting the criminal proceedings successfully.

information on the date and duration of telephone conversations and dialed numbers - are also considered as electronic communication. As such, call lists are a part of the constitutional right to privacy to the same extent as the contents of telephone conversations. Call lists are, therefore, an 'integral part of the telephone communication'.⁴ In its verdicts the ECtHR forms a wider framework for the application of SSM, and hence of the insight into call lists, thereby stipulating that the following should be clearly defined: a) categories of individuals who are subject to the application of these measures based on the court decision; b) criminal offences for which these measures may be applied; c) precautionary measures to be undertaken so that the 'recordings are delivered intact and complete to the court or to defence; as well as the circumstances under which the recordings may or must be deleted or tapes destroyed, especially when the accused individual had been released by the court.'⁵

Montenegrin CPC does not define categories of individuals who can be subject to insight into call lists; it does not specify the criminal offences for which surveillance measures may be ordered; nor does it prescribe the procedure for destroying the gathered data if a criminal procedure has not been launched against the individuals who were subject to these measures. In addition, based on agreements with telephone operators, the Police Directorate has been receiving call lists of telephone conversations and text messages, as well as the data from base stations and IP addresses of internet users - without prior approval by the investigative judge - for three years, thereby violating the Constitution of Montenegro, the European Convention on Human Rights and the Law on Data Protection.⁶ Such practice ended in January 2011, after a control procedure had been carried out by the Personal Data Protection Agency.⁷ Since then, call lists are accessed only on the basis of a court decision. However, it remains unknown whether the unlawfully gathered material is destroyed.

⁴ Verdict available at <http://www.bailii.org/eu/cases/ECHR/2007/253.html>

⁵ Verdicts: *Krusling vs. France*, 1990; *Huvig vs. France*, 1997; *Venezuela Contreras vs. Spain*, 1996.

⁶ Law on Data Protection ("Official Gazette of Montenegro", No. 79/08 of 23 December 2008, 70/09 of 21 October 2009)

⁷ Personal Data Protection Agency acted *ex officio* in accordance with article 71 of the Law on Personal Data Secrecy and carried out control of the mobile operators and the Police Directorate, as regards verifying the legality of the use of databases by the Police Directorate, based on cooperation agreements with the operators. On 28 March 2011, the Agency made a decision on cessation of the Agreement's implementation (Decision of the Personal Data Protection Agency No. 52/11 - 181/11-3. Podgorica, 28 March 2011).

Control of the procedure - legally invalid evidence

Mistakes and unlawful processes in ordering and applying SSM bear the consequence of inapplicability of their results when delivering court decisions in criminal procedure.¹⁰ Shortcomings range from an incorrect assessment of the grounds for suspicion about the existence of an organised crime offence and other general presumptions, mistakes regarding the form and contents of the order on applying SSM, to incorrect calculation of deadlines for the duration of measures. These issues are resolved during the process - in other words, during the investigation itself, when the investigative judge is obliged to exclude the unauthorized evidence. In practice, they occur during the main hearing, when a decision must be made on the admissibility of controversial evidence gathered via SSM. This way, a certain kind of control of the procedure is carried out before the court. Incorrect decision on this issue may lead to a verdict based on the violation of CPC provisions.

Example: From the trial of individuals arrested during the police operation “Drina”

Defence attorneys of the four men, arrested during the police operation “Drina” for alleged smuggling of about half a ton of “skunk”, requested the exclusion of data gathered via SSM from the evidence material. The president of the Criminal Council accepted this request. Namely, the order to track the transportation and delivery was made by the police, even though the measure lies within the prosecution’s authority. Secretly recorded telephone conversations and video recordings were excluded from the court case documentation, since their recording and tracking lacked the relevant order of the investigative judge.⁸ When explaining his decision, the judge stated that ‘the order on secret tracking was issued by the prosecutor, while such evidence may be gathered only upon the prior order of the investigative judge, since this is his competence.’⁹

8 ‘Secret surveillance without judge’s order - skunk smuggling: lawyers at the trial objected the way of tracking the accused’, *Independent Daily Vijesti*, section: Society, Friday, 28 October 2011, p.17.

9 ‘Secret surveillance: during the trial for smuggling half a ton of skunk, telephone conversations heard - Extraordinary goods are more expensive’, *Independent Daily Vijesti*, section: Society, Saturday, 5 November 2011, p.13.

10 Article 161, paragraph 1 of CPC refers to legally invalid evidence: “If the measures ... were undertaken in contravention to the provisions of the present Code or in contravention to the order of the investigative judge or the State Prosecutor, the judgment may not be founded on the collected information.”

In such cases, following the exclusion of invalid evidence from the trial, the practice of determining the responsibility for unlawful processes, as well as for administrative and procedural shortcomings in the application of SSM, is lacking. Having in mind that the primary goal of the SSM application is to use as many data as possible in the form of valid evidence before the court, it is necessary to insist on accountability of all participants in the procedure of applying these measures. Finally, by violating the competences for applying the SSM of the court - the prosecution - the police, as prescribed by CPC, the following criminal offences, prescribed by the Criminal Code¹¹, are committed: infringement of privacy of mail and other correspondence; unauthorized wiretapping and recording; unauthorized photographing; unauthorized personal data gathering. For these offences, criminal sanctions of up to 3 years of imprisonment are prescribed if committed by a person acting in an official capacity while performing his/her duties.¹²

Control of the procedure before the court represents an important aspect of overseeing the application of SSM in criminal procedure. However, only those measures whose application resulted in the launching of a criminal procedure and indictment of individuals who were subject to their application, can be controlled in this manner. A significant number of measures - those whose application did not result in criminal procedure or indictment - remain uncontrolled due to underdevelopment of other forms of democratic and civilian control.

Double wiretapping

Data gathered via SSM application by the National Security Agency (hereinafter: NSA) cannot be used as evidence in court. Instead, they can only be used as clue NSA forwards to other relevant state bodies when it discovers threats to national security. Application of SSM by NSA,

11 “Official Gazette of the Republic of Montenegro”, No. 70/03 of 25 December 2003, 13/04 of 26 February 2004, 47/06 of 25 July 2006, “Official Gazette of Montenegro”, No. 40/08 of 27 June 2008, 25/10 of 5 May 2010, 32/11 of 1 July 2011.

12 Articles 172, 173, 174, 176 of the Criminal Code

therefore, only indirectly serves the purpose of criminal prosecution, while it does not necessarily lead to criminal prosecution - SSM are rather used “preemptively” in order to gather data of relevance for the protection of national security and to prevent potential threats to national interests. However, they can consequently result in establishing the grounds for suspicion against a particular individual or a group of individuals for a particular criminal offence. That is why in practice, based on clues gathered by NSA, SSM are applied anew in case of the same individuals, in order to gather the relevant data - as prescribed by CPC - needed for processing the individuals for whom the NSA had, in fact, already determined that they pose a threat to national security.

Example: ‘Eagle’s Flight’

Operation concerning the gathering of data and their evaluation vis-a-vis the potential terrorist activity of a group of persons from the Movement for the protection of rights of Albanians in Montenegro, who allegedly planned terrorist attacks on the day of parliamentary and local elections, was carried out by the NSA ‘based on all prescribed means and methods, while the gathered data were delivered continuously and timely to the Police Directorate for their further action.’¹³

For the individuals to be processed and for a criminal procedure to be launched against them, evidence must be gathered in accordance with the relevant provisions of the CPC. That is why Stojanka Radović, the-then special prosecutor for the fight against organised crime, suggested wiretapping and tracking of the suspects on 1 September 2006, while the investigative judge of the High Court, Miroslav Bašović, issued an order on ‘secret surveillance and technical recording of telephone conversations and private conversations carried out in private or public premises or outdoors’ from 4 to 8 September 2009.

Although this is a lawful procedure, the number of individuals who will be exposed to SSM application twice, should be reduced to a minimum, since such practice embodies a double violation of the right to privacy of individuals who will not be necessarily convicted of criminal offence for which they are indicted. Numerous cases from previous years, such as the control hearing regarding the police operation ‘Balkan Warrior’ and the affair ‘Call Lists’, showed that there are problems in communication, data exchange and coordination between these two institutions.¹⁴ A better quality of information-sharing would reduce the number of such cases and allow for better results in the fight against organised crime, as well as a more rational use of resources.

¹³ Annual Performance Report of National Security Agency - 2006.

¹⁴ Conclusion of the Committee for security and defence of the Parliament of Montenegro of the 16th session, held on 23 February 2010: “there had not been sufficiently good coordination between the competent state bodies in the case of “Šarić”. The Committee insists on greater involvement of the competent state bodies and their coordination.”

Internal Control of the Police

Department for internal control of the Police, in its hitherto work, has not carried out control of the application of SSM, nor has it received any complaints concerning the application of SSM.¹⁵ The reason for this - that the ‘data in procedure represent an official secret’ - must not be an obstacle for exercising internal control as it denies the concept of internal control established by law. Namely, according to the Law on Police,¹⁶ internal control’s competence is to ‘control the legality of police affairs, especially in terms of respect for and protection of human rights during the performance of police duties and exercise of police competences.’¹⁷ Authorized person may, inter alia, act ‘at his/her own initiative’ and is authorized to: ‘exercise insight into documents and databases which the police gathers, makes or issues in accordance with its competences; exercise insight into official facilities (...).’¹⁸ Police official is ‘obliged to allow the authorized official to exercise control and to offer him/her all the necessary professional help.’¹⁹

Having in mind the possibilities for abusing SSM, internal control should continuously perform oversight of the legality of SSM application and should have access to all police data, regardless of the level of secrecy. As regards legality, internal control should investigate whether the measures are applied in accordance with CPC and if the procedure for approving the measures has been properly applied. As regards legitimacy, internal control should investigate whether the measures are proportionate to the goals their application intends to achieve.²⁰

¹⁵ ‘Due to the fact that article 160, paragraph 7 of the CPC, prescribes that official and responsible persons, who participate in issuing an order and carrying out SSM, are obliged to keep as official secret all data discovered in this process, Department of internal control is not able to exercise control of the application of these measures with the aim of preventing any abuse, while in the hitherto work there had not been any citizen complaints regarding this issue, which would trigger ex post control of the legality of the measures’ application.’ - Decision on Institute Alternative’s request for free access to information: Government of Montenegro, Ministry of Interior, Department of Internal Control of the Police, 01/4 No.: 051/11-20232/1, Podgorica, 8 November 2011.

¹⁶ Law on Police (“Official Gazette of the Republic of Montenegro”, No. 28/05 of 5 May 2005, “Official Gazette of Montenegro”, No. 86/09 of 25 December 2009, 88/09 of 31 December 2009)

¹⁷ Article 95a, paragraph 1 of the Law on Police

¹⁸ Article 96, paragraph 1, point 1 and article 96a, paragraph 1, points 1 and 4 of the Law on Police

¹⁹ Article 961, paragraph 2 of the Law on Police

²⁰ i.e., whether they are in accordance with the proportionality principle (applied in the case of organised crime in the verdict *Malone vs UK*, 1985) - which includes the proportionality between the curtailment of human rights and the purpose of this curtailment. This principle also stipulates that the state bodies are obliged to achieve their goals with minimal curtailment of human rights or without any curtailment, if possible.

Other levels of control do not possess the authority to carry out oversight at the moment of the application of measures in a way the law prescribes it for internal control. Thanks to such provisions, internal control has a unique opportunity to determine unlawful application of SSM.

Judicial inspection of the prescribed record-keeping

Ministry of Justice, through its authorized official, exercises oversight of the State Prosecution²¹ and of the courts²² as regards acting upon petitions and appeals, as well as keeping prescribed official records. Bearing in mind that the 'Ministry has received no petitions or appeals by citizens as regards the use of SSM in the work of State Prosecution and courts, authorized officials of the Ministry of Justice did not carry out any oversight activities concerning the application of SSM. Hence, no irregularities have been discovered, nor procedures for determining responsibility launched.'²³ However, in the previous period, there were reasons for reaction. The case of 'Judge under surveillance'²⁴ and the possible disappearance from the Prosecution of a case in which SSM were applied, points to the need for an appropriate oversight of the record-keeping of cases in which SSM were applied, and therefore, for an indirect protection of the right to personal data protection, as guaranteed by the Constitution.

21 Article 101, paragraph 1, points 2 and 4 of the Law on State Prosecution. ("Official Gazette of the Republic of Montenegro", No. 96/03 of 25 December 2003, "Official Gazette of Montenegro", No. 40/08 of 27 June 2008, 39/11 of 4 August 2011).

22 Article 106, paragraph 1, points 2 and 8 of the Law on Courts ("Official Gazette of the Republic of Montenegro" No. 05/02, 49/04, 22/08, of 2 April 2008)

23 Decision on Institute Alternative's request for free access to information: Government of Montenegro, Ministry of Justice, No.: 01-7790/11, Podgorica, 8 November 2011

24 Journalist Petar Komnenić, in his article 'Judge under surveillance', based on the statement made by the judge Radovan Mandić, declared that the judges Ivica Stanković and Radovan Mandić himself, were under SSM. Judge Mandić received this information from the investigative judge Hamid Ganjola, who admitted having approved the application of SSM in the case of Mandić and 'half the number of judges of the High Court'. Because of this newspaper article, Stanković sued Komnenić for defamation. During the trial for defamation, Komnenić submitted the correspondence between the investigative judge Ganjola and the-then special prosecutor Stojanka Radović, who initiated the application of measures in the case of High Court judges. This correspondence clearly shows that the case led by judge Ganjola regarding the use of SSM "disappeared". Majority of witnesses at the trial denied the existence of this case and application of measures for judges within it.

Parliamentary Oversight

Parliament of Montenegro exercises parliamentary oversight of the work of State Prosecution, courts of Montenegro and the Police Directorate.

1) *Committee for political system, judiciary and administration* reviews the Supreme State Prosecutor's annual performance report of the State Prosecution as well as the Judicial Council's annual performance report of the courts. The Committee did not use the control mechanisms prescribed by the Parliament's Rules of Procedure which allow for oversight of the applied SSM.

2) *Committee for security and defence* reviews the annual performance report of the Police Directorate. The Law on parliamentary oversight in security and defence sector²⁵ regulates in detail the mechanisms of oversight, which are at the Committee's disposal for carrying out control over state bodies in security and defence sector.²⁶ That is an advantage of this Committee compared to other working bodies of the Parliament. However, in its hitherto work, the Committee for security and defence has not had any activities related to oversight of SSM applied by the Police Directorate. The Committee has not paid a single visit to the Police Directorate in order to carry out insight into the application of SSM in criminal procedure²⁷, nor has it requested a single special report on applied SSM²⁸ or delivery of information about this issue.

25 "Official Gazette of Montenegro", No. 80/10 of 31 December 2010

26 Committee 'reviews reports on the application of SSM by the institutions (...) used to limit the rights and freedoms guaranteed by the Constitution.' (article 7, paragraph 1, point 8). The Committee has the legal possibility to request the delivery of information on the activities and measures taken concerning any area of its competence in order to perform insight into documents, to carry out consultative and control hearings on certain issues and to initiate a parliamentary inquiry. When carrying out parliamentary oversight, the Committee cooperates with institutions and may use their regular reports or request carrying out control and gathering certain information about the subject of parliamentary oversight. Provision of the Law on Data Secrecy provides access to secret data to the Committee members without permission for access to secret data, if such data are necessary for performing their duties. Once during a regular sitting of the Parliament, the Committee may hold a session upon request of one third of the Committee members, with one issue on the agenda (article 12, paragraph 3).

27 Based on article 15, paragraph 2, point 2 of the Law on parliamentary oversight of the security and defence sector

28 Based on article 7, paragraph 1, point 8 of the Law on parliamentary oversight of the security and defence sector

Two control hearings, indirectly related to SSM, were carried out. The control hearing on the police operation “Balkan Warrior”²⁹ indirectly opened up the question of reasons for not applying SSM in the case of Darko Šarić by the relevant state bodies in criminal procedure. The control hearing³⁰ of the Police director, NSA director and of the special state prosecutor for the fight against organised crime, entitled “Call lists in cases ‘Keljmendi’ and ‘Šarić’”, was related to the activities of the relevant state bodies and was used to determine who was responsible for delivering call lists to the media.

Bearing in mind that the opposition members of the Committee constantly express their doubt about the misuse of SSM, reasons for the lack of initiative as regards oversight and the non-use of the possibilities given by the Law on parliamentary oversight in security and defence sector, remain unclear. It is particularly worrying that the Committee members do not possess the minimum information about the extent of the application of these measures in criminal procedure.

Annual Performance Report

Reviewing the annual performance reports of the state institutions represents one of the mechanisms of the parliamentary oversight of the institutions through which the deputies, belonging to the relevant Committees, assess the work of state bodies. The precondition for performing such an oversight role is reflected in the need for reports to provide comprehensive, clear and precise information. Nevertheless, having in mind that the law does not prescribe the obligatory contents of the report referring to SSM, references about SSM in annual performance reports are sporadic and incomplete or even absent - which limits the oversight of SSM, and impairs the ability of competent committees to provide an objective assessment of the results of SSM application.

1) Members of the Committee for political system, judiciary and administration, who should control the work of State Prosecution, are not able to discern from these reports the particularities of the State Prosecution’s work related to SSM. They are even less able to assess the extent

²⁹ 16th session of the Committee for security and defence, held on 23 February 2010

³⁰ 42nd session of the Committee for security and defence, held on 23 December 2011

to which the applied measures were justified, because they do not possess precise information on how many applied measures resulted in criminal procedure and legally-binding verdict.³¹

2) The Judicial Council’s performance report on courts in Montenegro does not contain data on approved SSM.

3) Police Directorate, in its annual performance report, when referring to the work of Department for special checks which directly applies oversight of electronic communication, provides information about “open cases upon requests of relevant organisational units of Police Directorate” from which it is impossible to find out how many orders were issued to apply SSM by type. Performance reports do not provide answers to the questions: how many individual criminal offences for which the measures were ordered; amount of financial resources spent on conducting SSM; number of cases in which measures were ordered. There is no information about the application of SSM in individual cases or possible complaints.

Implementation of Strategy for the fight against corruption and organised crime

Innovated Action Plan for the implementation of Strategy for the fight against corruption and organised crime for the period 2010-2012 2010³², under the goal of: “monitoring the Action Plan”, for the first time introduces the measure of: supervising the application of secret surveillance measures, for which the following bodies are competent: Supreme Court, Supreme State Prosecution and Police Directorate - i.e.

³¹ *It is correct that the reports do not contain such data about the number of detainees, nor about the number of SSM, nor about the number of individuals informed about being subjects to these measures. Those are all court decisions and such data must be requested from the court... I can tell you that we deal very restrictively with SSM and we demand a lot of reasons for the grounds for suspicion to propose the application of SSM to the court.* - Ranka Čarapić, Supreme State Prosecutor, answer to MP question, as reported in Independent Daily ‘Vijesti’, section: Politics, pp.1-2, of 2 July 2010.

³² *Innovated Action Plan for the implementation of the Strategy for the fight against corruption and organised crime for the period 2010-2012, Government of Montenegro, July 2011.*

Tripartite Commission.³³ Deadline foreseen by the action plan is the timeframe between the third quarter of 2011 and the fourth quarter of 2012. Indicators of successful completion of measures are:

- number of cases in which SSM were ordered;
- number of individuals for whom SSM were ordered;
- number of cases in which SSM were ordered, without an order for conducting the investigation;
- number of individuals for whom SSM were ordered, without an order for conducting the investigation.

In accordance with this, the following data were delivered to the National Commission: “During 2011, SSM were ordered against 113 individuals in 18 cases. In 12 cases, in which 26 SSM were ordered against 36 individuals, an order was issued to conduct the investigation. In 6 cases, in which SSM were ordered against 77 individuals, no order to conduct the investigation was issued, but the measures are currently being applied.”³⁴

That is a positive development bearing in mind that it is the first step for providing data which will allow for a part of the systemic oversight of the application of SSM in criminal procedure. However, apart from the fact that the four requested data represent the minimum information based on which lawfulness and justification of the SSM application would be assessed, it should be emphasised that the criminal offences for which SSM can be ordered in criminal procedure - are not just corruption and organised crime, which are the competence of the Tripartite Commission.³⁵ All

33 *Tripartite Commission was formed by the Decision of the Deputy PM for European Integration of the Government of Montenegro of 10 October 2007, with the aim of enabling the analysis of cases from the area of organised crime and corruption, as well the reporting and creating a common methodology of statistical indicators in the area of organised crime and corruption. Following the established common methodology, Tripartite Commission’s mission is to perform statistical analysis of the data necessary for assessing the extent and distribution of criminal offences related to corruption and organised crime, having in mind different criteria which the Police, the Prosecution and the courts take as a basis for their actions.*

34 *Form for the Report on the implementation of the Action Plan 2010 – 2012 of the Tripartite Commission for the period between 1 January and 31 December 2011. Available at: http://www.antikorupcija.me/index.php?option=com_phocadownload&view=category&id=23%3A4&Itemid=91*

35 *SSM may also be ordered for the following criminal offences: abduction, extortion, blackmail, mediation in prostitution, displaying pornographic material, usury, tax and contributions evasion, smuggling, unlawful processing, disposal and sorting of dangerous substances, attack on a person acting in an official capacity during performance on an official duty, obstruction of evidences, criminal association, unlawful keeping of weapons and explosions, illegal crossing of the state border and smuggling in human being and criminal offences against the security of computer data.*

applied measures must be subject to oversight, so the greatest responsibility for oversight and the request for all data on SSM remain at the level of the Parliament of Montenegro.

Free access to information

Constitution of Montenegro guarantees the right of free access to information, belonging to state bodies and organizations performing public authority, to everyone.³⁶

Institute Alternative sent a request for free access to information to the bodies competent for the application of SSM in criminal procedure. High Court in Podgorica and High Court in Bijelo Polje were asked to provide data referring to the number of approved SSM by investigative judges in the given timeframe, number of cases of misuse determined and the number of complaints. High Court in Podgorica refused to allow access to information on the grounds that “access to those information representing business secret is limited”³⁷, while High Court in Bijelo Polje allowed access to information and provided the following information:

High Court in Bijelo Polje, in the period from 2006 to 24 November 2011, ordered the application of:		
1) Secret surveillance measures and technical recording of telephone conversations, i.e., other communication conducted via means of technical communication at distance, as well as private conversations conducted in private or public facilities or outdoors.	11	Total: 62 individuals
2) Secret tracking measures and technical recording of individuals and objects	4	
3) Secret photographing measure and visual recording of individuals and objects		None
4) Number of individuals informed about the application of SSM in their case / number of insights into the material gathered via SSM application		None
5) Number of cases of misus		None
6) Number of complaints		None

Information on the number of approved SSM - under the Prosecution’s jurisdiction - was impossible to obtain –

36 *Article 51, paragraph 1 of the Constitution of Montenegro*

37 *Decision of the High Court in Podgorica, sent upon Institute Alternative’s request for free access to information: III Su.No. 90/11, Podgorica, 25 November 2011*

Complaints Mechanism

because they were 'not applied'³⁸. Information about how many SSM were applied by the Police Directorate was not possible to obtain because 'ordering SSM does not fall under the jurisdiction of the Police Directorate, but solely of the courts.'³⁹ Therefore, the Police Directorate was, allegedly, unable to provide such data. Decision of the High Court in Podgorica states that the "data represent official secret"⁴⁰, while the Judicial Council "does not possess the requested data because such acts did not occur in the timeframe indicated."⁴¹

Despite such decisions of the relevant bodies, some of the requested data certainly exist, since they appear occasionally in officials' statements reported in the media.⁴² It is necessary to establish the practice of free access to all data which do not jeopardise neither the investigation nor the security of citizens. The public has the right to know how many citizens of Montenegro were under SSM and how many legally-enforceable decisions, based on the information gathered via SSM, were made. This would justify the use of measures and would confirm the integrity of the institutions applying them.

Individuals claiming they were under unlawful application of special powers of the security services, must have some kind of a possibility for legal remedy.⁴³ Individuals considering that the state had violated their rights are entitled to file a lawsuit demanding compensation before the court. However, the efficiency of this right depends on the individual's knowledge about the unlawful application of SSM (which is further rendered impossible due to the practice of not informing the citizens that they are under SSM), and on the evidence which would be satisfactory for the court. Due to such circumstances, the capacity of regular courts to serve as an adequate legal remedy in the field of security, is limited. An alternative solution would be that an independent body, such as the Ombudsman, carries out the investigation process and investigates upon the receipt of a complaint against the security agency. Besides strengthening the control, complaints may help to improve the work of state bodies by indicating the administrative shortcomings.

In order to perform such activities, Montenegrin Ombudsman must develop internal capacity for oversight of the state bodies in the field of security for questions related to the violation of human rights - by carrying out regular oversight activities which are in his authority⁴⁴ and by initiating the procedures for investigating the violation of rights through the application of SSM. In the hitherto performance reports of the Ombudsman there has not been a single case of the violation of rights as a result of the SSM application. Furthermore, "until now, the Ombudsman has received no complaints on these grounds."⁴⁵

38 *Decision of the Supreme State Prosecution, TU No. 275/2011, Podgorica, 7 July 2011. RC/SS – Institute Alternative is allowed access to requested information, but 'we inform you that such special information were never specially analysed nor classified.'*

39 *Decision of the Police Directorate 09 No. 051/11-19690, Podgorica, 16 May 2011*

40 *Decision of the High Court in Podgorica, III Su. No. 42/11, Podgorica, 19 September 2011*

41 *Decision of the Judicial Council sent upon Institute Alternative's request: Su. R. No. 951-1/2011, Podgorica, 4 November 2011*

42 *'Government reported to the officials in Brussels that between 1 October 2008 and 31 June 2009, SSM were used in: 'fight against drugs' - 7 cases in total, 245 court cases and 78 individuals; 'fight against organised crime' - 16 cases in total, 199 court cases and 80 individuals; general crime - two cases, four cases and two individuals.'* (Daily Newspaper 'Dan', section: Society, 19 October 2009) – 'Government representatives, in a recent Report to international organisations, stated that until now, 160 individuals, suspected of various crimes, have been subjects to tracking and eavesdropping.' (Daily Newspaper 'Dan', section: Society, 19 October 2009) – 'Police Minister recalled that the prosecutorial and judicial authorities order the application of SSM, so the police is not competent to provide information on data about individuals who had not been processed yet. He reported on the data about individuals who had already been processed. Ivan Brajović: "Secret surveillance and technical recording of telephone conversations in 2006 - one case, in 2007 - four, in 2008 - 21, in 2009 - 19. Secret photographing and visual recording in private premises in 2006 - number of cases 1, supervision over the transportation and delivery of objects of criminal offence in 2006 - 3, in 2007 - 1, in 2009 - 5.'" (TV IN, 'Impuls 2', 28 October 2009)

43 *Constitution of Montenegro (article 20): 'Legal remedy - Everyone shall have the right to legal remedy against the decision ruling on the right or legally based interest thereof.'*

44 *Based on the Law on Ombudsman, the Ombudsman may request to have at its disposal all data that fall under the jurisdiction of state bodies, regardless of their level of secrecy, and to have free access to all premises, to invite individuals as witnesses or to hire an expert from a relevant area, may submit an initiative for launching a disciplinary procedure, i.e. procedure for dismissal of individual whose action or inaction violated human rights and freedoms. For misdemeanors prescribed by the Law on Ombudsman, the Ombudsman may submit a request for launching a misdemeanors procedure.*

45 *Decision made upon Institute Alternative's request for free access to information: No. 03-1069/11-1, Podgorica, 17 October 2011*

Recommendations:

- By amending the Criminal Procedure Code it is necessary to regulate the legal framework for insight into call lists in more detail, i.e., to adopt a special provision referring to the mode of insight into call lists, to the data gathered from the base stations and to IP addresses of internet users, in order to incorporate them into the domain of SSM. Aside from the approval by the investigative judge, the measure of insight into call lists must include other criteria for the application of SSM, i.e., it should be applied solely for criminal offences and for a limited time, defined by the CPC. CPC must also prescribe the procedure for destroying the gathered data.
- It is necessary to perform a control activity in order to determine whether all the data unlawfully gathered over the years by the Police Directorate were deleted/destroyed.
- Establish the practice of initiating disciplinary and criminal procedures for the shortcomings identified in the application of SSM after the removal of material gathered via SSM from the records during the investigation and the main court hearing.
- Establish a centralised system for downloading data for NSA and Police Directorate, which will react when the data about the individual who was already under SSM are requested, thereby being a signal for the intelligence or security agency to coordinate their work and exchange information.
- Enable the internal control of the Police to carry out continuous oversight of the SSM application.
- By amending article 26 of the Law on Data Secrecy allow the internal control of the Police to access secret data needed for exercising their powers without permission for access to secret data.
- Establish the practice of controlling the prescribed official record-keeping about the SSM by the authorized official of the Ministry of Justice.
- Parliamentary oversight:

It is necessary to centralize the overall system of parliamentary oversight of the SSM application in criminal procedure and to deliver all the necessary information, which are at disposal of the Supreme State Prosecution, courts and the Police Directorate, to the *Committee for security and defence* which would then be able to better perform its oversight duty.

In other words, by amending the Law on parliamentary oversight of the security and defence sector, to prescribe that:

- 1) *the Supreme State Prosecutor* prepares a special performance report on the State Prosecution as regards the applied SSM, whose obligatory contents shall contain:
 - number of proposals submitted to investigative judges for the application of SSM by type,
 - number of approved proposals,
 - number of proposals for extending the measure,
 - number of cases in which SSM were applied,
 - number of proposals received and measures approved for the application of SSM by the Police Directorate,
 - number of individuals who were under SSM and the type of SSM applied,
 - number of individuals processed based on the evidence gathered via SSM,
 - criminal offences of which the individuals are accused,
 - number of initiated criminal procedures on the grounds of information obtained via SSM application,
 - number of legally-binding decisions based partly on the information gathered via SSM application,
 - information about the initiated procedures of determining responsibility in cases of administrative shortcomings and unlawful procedures and misuses, especially after excluding the evidence from the court case, as well as about the controls carried out at all levels of oversight.
- 2) *the Judicial Council* prepares a special performance report on the courts with regard to the application of SSM, whose obligatory contents shall contain:
 - number of approved SSM by type,
 - number of individuals for whom the measures were ordered,
 - timeframe for which the measures were ordered,
 - number of cases in which measures were ordered,
 - number of approvals for extending the measure,
 - number of oral orders to apply the measures,
 - number of cases in which measures are applied which resulted in initiating the procedure and processing individuals,
 - in cases of non-initiation of the criminal procedure: number of individuals informed about the application

of SSM and the number of those who had insight into material gathered via SSM application,

- number of legally-binding decisions based partly on the evidence gathered via SSM application,
- information about the initiated procedures of determining responsibility in cases of administrative and procedural shortcomings and about the unlawful procedures and misuses, especially after excluding the evidence from the court case, as well as about the controls carried out at all levels of oversight.

3) *the Police Directorate* prepares a special report on applied SSM, whose obligatory contents shall contain:

- number of orders for the application of SSM by type,
 - timeframe of the SSM application,
 - number of orders for extending the measures,
 - number of individuals under SSM,
 - number of rejected proposals for the application of SSM,
 - number of individual criminal offences for which the measures were ordered,
 - amount of financial resources spent on implementing SSM,
 - number of cases in which SSM were applied,
 - information on measures that were not carried out; about the measures initiated before receiving an order in writing; about the identified irregularities in implementing the surveillance measures in individual cases or about possible complaints,
 - information about the initiated procedures of determining responsibility in cases of administrative and procedural shortcomings and of unlawful procedures and misuses, especially after excluding the evidence from the court case, as well as about the controls carried out at all levels of oversight.
- Establish the practice/policy of free access to information as regards the application of SSM by courts, State Prosecution and Police Directorate.
 - Establish a stronger complaints mechanism and promote a more powerful role of the Ombudsman in the field of security and defence.

Sources:

1. *Constitution of Montenegro*
2. *European Convention on Human Rights and Freedoms*
3. *Criminal Procedure Code*
4. *Criminal Procedure*
5. *Law on Personal Data Protection*
6. *Law on Police*
7. *Law on parliamentary oversight of the security and defence sector*
8. *Law on State Prosecution*
9. *Law on Judicial Council*
10. *Law on Courts*
11. *Law on Ombudsman*
12. *Rules of Procedure of the Parliament of Montenegro*
13. *Annual Performance Reports – Agency for National Security, Supreme State Prosecution, Police Directorate, Judicial Council on the work of courts in Montenegro*
14. *Notes from the 16th and 42nd sessions of the Committee for security and defence*
15. *Innovated Action Plan for the implementation of the Strategy for the fight against corruption and organised crime for the period between 2010 and 2012*
16. *Form for the report on the implementation of the Action Plan 2010-2012 of the Tripartite Commission*

Interviews with:

1. *MP Predrag Bulatović, representative of the Socialist People's Party in the Committee for security and defence*
2. *MP Borislav Banović, representative of the Social Democratic Party in the Committee for security and defence*
3. *Veselin Vučković, deputy Supreme State Prosecutor*
4. *Miroslav Bašović, investigative judge of the High Court in Podgorica*
5. *Miodrag Laković, Police Directorate*
6. *Aleksa Ivanović, member of the Council of the Personal Data Protection Agency*

Media articles:

1. 'Secret surveillance without judge's order - skunk smuggling: lawyers at the trial objected the way of tracking the accused', *Independent Daily Vijesti*, section: Society, Friday, 28 October 2011, p.17.
2. 'Secret surveillance: during the trial for smuggling half a ton of skunk, telephone conversations heard - Extraordinary goods are more expensive', *Independent Daily Vijesti*, section: Society, Saturday, 5 November 2011, p.13.

About Institute Alternative

Institute Alternative is a non-governmental organization, established in September 2007 by a group of young, educated citizens, with experience in the civil society, public administration and business sectors.

The mission of Institute Alternative is to strengthen the democratic processes in Montenegro by identifying and analyzing public policy options.

The strategic aims of Institute Alternative are to: increase the quality of development of public policy, contribute to the development of democracy and the rule of law, and to contribute to the protection of human rights in Montenegro.

The values we follow in our work are dedication to our mission, independence, constant learning, networking, cooperation and teamwork.

Institute Alternative acts as a think tank and a research centre, and its activities focus on the domains of good governance, transparency and accountability. Topics covered by the Institute's research activities, in which it exercises influence by providing its own recommendations are: parliamentary oversight of security and defense services, oversight role of the Parliament and its impact on the process of European integration, reform of public administration, public procurement, public-private partnerships, state audit and control of the budget of local authorities.

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- The Montenegrin parliament in the process of EU integration
- Regulatory impact assessment (RIA) in Montenegro – Towards “Better” Regulations
- Control of the local self-governments' budget
- The State Audit Institution in Montenegro - strengthening its influence
- Report on democratic oversight of security services
- Think Tank - The role of Independent Research centers in Public Policy Development
- Public-Private Partnerships in Montenegro - Accountability, Transparency and Efficiency
- Public Procurement in Montenegro - Transparency and Liability
- The Assessment of Legal Framework and Practice in the Implementation of Certain Control Mechanisms of the Parliament of Montenegro: Consultative Hearing, Control Hearing and Parliamentary Inquiry
- Parliamentary oversight of the defence and security sector: What next?
- The Lipci Case: How not to repeat it
- The Case of the First Bank - Lessons for the supervisor and other decision makers
- Public Administration in Montenegro: Salary schemes, reward system and opportunities for professional advancement

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IA also cooperates with a great number of organisations in Montenegro, as well as with numerous institutions and administrative bodies, such as the State Audit Institution, Directorate for Public Procurement, Parliament of Montenegro (especially its work committees, Committee for Economy, Finance and Budget and Committee for Security and Defence), Ministry of Finance, Commission for Concessions etc.

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