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Review article

FINANCING AND OVERSIGHT OF THE APPLICATION OF INVASIVE MEASURES FOR THE PURPOSE OF SECURITY AND DEFENSE

Abstract:

Invasive measures, as special investigative measures are defined, are ante delictum measures. They are applied only in situations in which the evidence cannot be obtained by conventional methods, and are needed for the smooth conduct of criminal proceedings. The financial means for the application of these invasive measures for the needs of defence and security are allocated with a budget by the legislative authority.

The main hypothesis of this paper states that: supervision over the application and financing of the implementation of special investigative measures has a positive impact / or is in direct correlation with the effective construction/development and functioning of the security-defence system, especially from the aspect of the principles of: good governance, transparency, accountability, proportionality, and efficient application of financial resources.

Starting from the indicated hypothesis, the research in the paper is based on two variables: independent variable, i.e., the supervision over the application and financing of the implementation of the special investigative measures, and a dependent variable, i.e., the effective development and proper and efficient functioning of the security-defence system.

From a methodological point of view, the paper uses a combined approach of qualitative and quantitative analysis, through research, measurement, and comparison of: adopted international standards regarding the application of special investigative measures, the regulations in the Macedonian normative framework, the content of the instructions and the implementation manuals of the special investigative measures by the relevant institutions in the Macedonian society.

Keywords: *invasive measures, special investigative measures, reforms, financing, security sector.*

Introduction

In essence, the special investigative measures represent a deliberate violation of specific human rights and freedoms guaranteed by the Constitution and international legal documents, in order to achieve higher goals: protection of society and citizens and effective and successful fight against serious forms of crime, as well as in the interest of the national security, public safety and economic well-being of society. Hence, these measures are also synonymous as invasive measures.

A central challenge regarding the application and financing of invasive measures (SIM), which are on the one hand necessary, but at the same time prone to abuse under the guise of confidentiality, is the respect of the principle of transparency and accountability by the authorized institutions. From the aspect of the definition and normative-legal regulation of the application of SIM in an international context, the internationalization and increasing sophistication of crime is emphasized. For this purpose, according to the European Union Agency for Cooperation in Criminal Justice (Eurojust), national authorities in member states can use special investigative techniques in investigations to detect crimes and prosecute suspects. Techniques such as telecommunications monitoring, surveillance and covert operations are widely recognized as cross-border investigative measures in the member states of the European Union, and within national legislations, countries have prescribed different legal conditions for their application. As defined by the Council of Europe, the implementation of special investigative means is necessary when it is carried out in the interest of national security. The United Nations Office on Drugs and Crime (UNODC) in the elaboration of conventional policing emphasizes its reactive nature, which highlights the need for a proactive approach for successful investigations of organized crime, which are primarily based on criminal intelligence analysis, where most often required searches through financial records and other types of surveillance activities to determine whether a crime has occurred. Special investigative techniques must balance the competing interests of ensuring public safety through the arrest and detention of criminals with the need to protect individual rights.

From a chronological point of view, the analysis of the normative regulation of the application of PIM measures in the Macedonian society covers the period from 2004 to 2023. In that direction, the focus of the research is placed on: the Law on Criminal Procedure, the Law on Amendments to the Law on Criminal Procedure, the Criminal Code, the Law on Monitoring Communications, the Law on Operational Technical Agency, the Law on the National Security Agency, and the Law on Defence. The results of the analysis of the content of the indicated laws, enable the creation of a clearer picture of the development and the current situation in relation to the regulation of the issue of the application of SIM measures in the security-defence sphere in the Macedonian society.

Legal provisions and definition of special investigative measures (invasive measures)

At the beginning of December 2004, the Law on Amendments and Supplements to the Law on Criminal Procedure was adopted, with which several new institutes were accepted, among which special investigative measures can be singled out as the most important. The initiation of special investigative measures is of great importance, especially in the fight against organized crime, corruption, and terrorism, and since 2008 the Basic Public Prosecutor's Office for Prosecution of Organized Crime and Corruption has been applying special investigative measures with the aim of more effective detection and thus easier proof of criminal charges. Works in the field of organized crime, corruption, and terrorism (Бакрески, О., Деаноска, Трендафиловска, А, 2021).

The special investigative measures are provided for in Chapter IX, Article 252 of the Law on Criminal Procedure, where it is emphasized that these measures are used when there is a probability of securing the data and evidence needed for the successful conduct of the criminal procedure, which cannot be obtained in any other mean (DCAF, 2019).

The so-called invasive measures, i.e. special investigative measures, are listed according to the following taxonomy: monitoring and recording of telephone and other electronic communications, monitoring and recording in a home, closed or enclosed premise belonging to a home or business premise marked as private or in a vehicle and entering those premises in order to create conditions for monitoring communications, covert monitoring and recording of persons and objects with technical means outside the home or business premises marked as private, covert examination and search of a computer system, automatic or with other means search and comparison of personal data, insight into telephone and other electronic communications, simulated purchase of items, simulated giving and receiving bribe, controlled delivery and transport of persons and objects, using persons with a hidden identity to monitor and collect information or data, opening a simulated bank account and simulated registration of legal entities or use of existing legal entities for data collection.

In particular, the order for monitoring and recording communications from the same law should also contain the type of telecommunication system, telephone number or other data for identification of the telecommunication connection. The order determining one or more special investigative measures contains: legal name of the act, the person, or objects on which the measures will be applied, the technical means that will be applied, the scope and location of implementation of the measures, the knowledge and evidence on which the grounds of suspicion and reasoning are based for the reasons why the data or evidence cannot be gathered in any other way, the authority that will execute the order and the duration of the measure.

Invasive measures may be imposed when there is a well-founded suspicion that the following crimes have been committed: unauthorized production and trafficking of narcotic drugs, psychotropic substances and precursors, extortion, blackmail, money laundering and other criminal proceeds, smuggling, customs fraud, abuse of official position and authority, embezzlement, fraud, receiving a bribe, giving a bribe, illegal mediation, unlawful influence on witnesses, criminal association, terrorist organization, terrorism, crimes against the state, crimes against humanity and international law, as well as criminal acts committed through means of electronic communication.

An order for the application of special investigative measures can refer to a person who committed a crime from the above, takes actions to commit such a crime or prepares to commit such a crime when the preparation is punishable according to the provisions of the Criminal Code (Official Gazette of the Republic of Macedonia number 37/96).

The person whose communication is monitored and tracked has the right to dispute the reliability of the collected data and the legality of the procedure for monitoring its communications, in a procedure determined by the Law on Criminal Procedure of the Republic of North Macedonia.

Special investigative measures can last up to four months, with the possibility of extending the measures. The measures can be continued until the achievement of the purpose for which the measure is being implemented, and at the latest until the end of the investigation, upon a reasoned written request of the public prosecutor. After the request for the implementation of the special investigative measure, the judge of the preliminary procedure decides within 48 hours from the submission of the request at the latest.

The issued order for the special investigative measure, with the anonymous copy of the order for the needs of the OTA and the anonymous copy of the order for the needs of supervision and control, is delivered to the judge of the preliminary procedure by the competent public prosecutor, who immediately delivers them to the OTA.

Definition of the legislature that determines the procedure for monitoring communications, the method of processing, storage and use of data, metadata and evidence obtained by monitoring communications and control of the legality of monitoring communications, is regulated by the Law on Interception of Communications (" Official Gazette of the Republic of Macedonia" No. 71/2018).

The Law on interception of communications regulates the procedure for implementing a special investigative measure: monitoring and recording of telephone and other electronic communications, the conditions and procedure for implementing measures for monitoring communications for the purpose of protecting the interests of the security and defence of the state, including metadata, supervision and control over the implementation

of measures to monitor communications and obligations of the Operational Technical Agency (OTA).

The OTA is established as an independent state body with the capacity of a legal entity with competence determined by a special law, the Law on Operational Technical Agency (“Official Gazette of the Republic of Macedonia No. 71/2018).

The agency was established in order to activate and maintain conditions for monitoring communications for criminal investigations and for the needs of national security, and at the same time it is in charge of performing operational-technical coordination between telecommunication service providers and the authorities authorized to monitor communications. Providers of telecommunication services are obliged to provide the Agency with autonomous and exclusive access to data on intercepted communications. In its domain of protection are only electronic forms of communication between citizens. OTA does not have the technical ability to access the content of the intercepted communication. The Operational-technical agency is the technical service of all legally authorized institutions for monitoring communications:

- Public Prosecutor’s Office
- Ministry of Interior - Public Security Bureau
- National Security Agency
- Ministry of Defence - Military Security and Intelligence Service and the Centre for Electronic Reconnaissance of the Army of Republic of North Macedonia, in the part of the frequency spectrum of radio waves at high, very high and ultra-high frequencies (HF, VHF and UHF)
- Ministry of Finance - Customs Administration and Financial Police Administration

According to the Law on the National Security Agency (“Official Gazette of the Republic of North Macedonia”, No. 108 of 28.5.2019), Article 4 defines the following acts as security threats (and risks) to the national security of the state:

- espionage
- terrorism and its financing
- violent extremism
- all forms of serious and organized criminal activities directed against the state;
- prevention of crimes against humanity and international law
- illegal production and proliferation of weapons of mass destruction or their components, as well as materials and devices needed for their production
- disruption of the vital economic interests and financial security of the state

- violation of the security of holders of high state functions and of facilities that are of strategic importance for the state and
- detection and prevention of other activities related to security threats and risks for the national security of the state

The Law on Defence (“Official Gazette of the Republic of Macedonia” no. 42/2001) on the other hand, defines the invasive measures applied to respond in the form of preventive actions to the defined threats in the context of the following activities:

- Detection and prevention of intelligence and other subversive activity of foreign military intelligence and intelligence services that is carried out in the country or from abroad, and is aimed at the defence of the state.
- Detection and prevention of all forms of terrorist activity aimed at the defence of the state, and
- Implementing counterintelligence protection of tasks and plans, documents, material and technical means, areas, zones, and objects of interest for the defence of the state.

Application of invasive measures for protection against threats to national security and defence

The term national security in the Republic of North Macedonia is legally defined for the first time in the Law on Coordination of the Security-Intelligence Community (Official Gazette of the RNM, No. 108 of 28.5.2019).

The concept of national security refers to state values: territory, sovereignty, foreign policy interests and the national economy that are protected from external armed attacks, internal armed rebellions, and intelligence subversive activities by internal and external actors. Article 8 of the European Convention on Human Rights explicitly mentions the term “national security” as one of the legitimate grounds for the application of special investigative measures and the restriction of fundamental rights and freedoms protected by paragraph 1 of the same article (Article 8) in the interest of national security.

Measures for monitoring communications in order to protect the interests of the security and defence of the state are:

- monitoring and recording of telephone and other electronic communications
- supervision and technical recording of the interior of the facilities, closed rooms and facilities, entry into those facilities, as well as closed rooms and facilities, in order to create conditions for the implementation of the measure(s)
- monitoring and observation with light recording of persons in open space and in public places and
- monitoring and surveillance with sound recording of the content of communications of persons in open space and in public places

According to the general provisions in the Rulebook on the manner of activities of operators when implementing measures to monitor communications and the manner of performing professional supervision by OTA, a mediation device (LEIMD) is an intermediary technical equipment and appropriate software support that enables the activation of the monitoring measure and recording of telephone and other electronic communications.

Communications monitoring equipment (LEMF) are means of monitoring communications on which the content of the intercepted communication and the information related to the intercepted communication are transmitted from the technical equipment of the operators through OTA to the workstations owned by the authorized authorities.

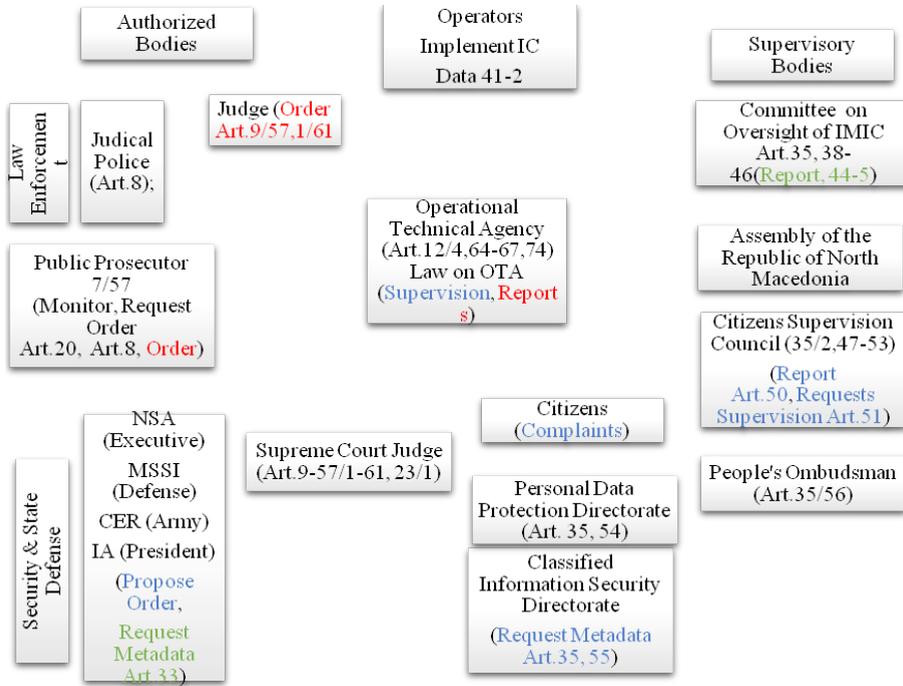
Authorities authorized to implement measures to monitor communications for the purpose of protecting the interests of security and defence of the state are: the National Security Agency and the Military Security and Intelligence Service. In the part of the frequency spectrum of radio waves at high, very high and ultra-high frequencies (HF, VHF and UHF), the authorized authority for the implementation of the communication monitoring measure is the Electronic Reconnaissance Centre of the Army of the Republic of North Macedonia, which are designated for defence purposes.

A request for the issuance of an order for the implementation of a measure to monitor security and defence communications is submitted by the Public Prosecutor of the Republic of Macedonia at the proposal of the Minister of Internal Affairs or a person authorized by him or at the proposal of the Minister of Defence or a person authorized by him.

Regarding the request, the judge of the Supreme Court decides within 48 hours from the submission of the request at the latest. The judge of the Supreme Court delivers the order with the anonymous copies to the public prosecutor of the Republic of North Macedonia, who delivers the order to the authorized person in the institution on whose proposal he submitted the request to the judge of the Supreme Court.

Specifications for security and defence communications monitoring devices are electronic, mechanical, or other technical means by which the content of any communication can be learned or recorded and are maintained by the National Security Agency.

Chart 1: Diagram of measures for monitoring communications with members of the law



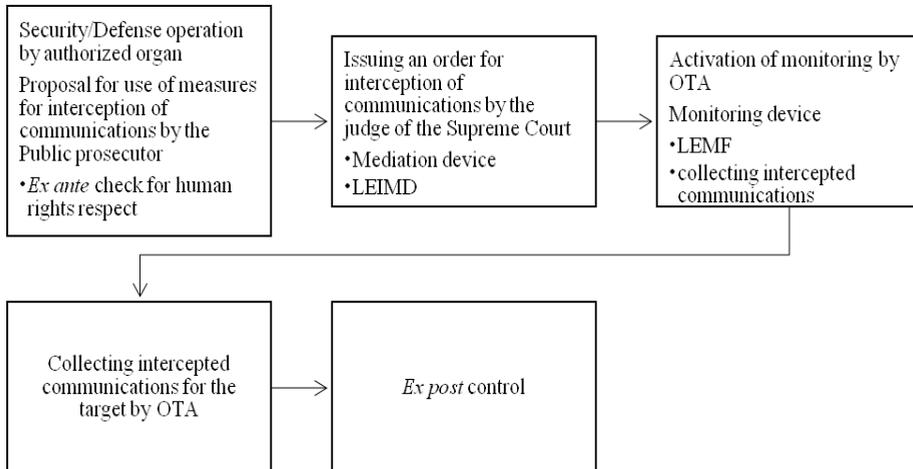
Source: ISDP, Internal Lectures, 2021.

Financial oversight of the implementation of invasive measures – standards and principles

The financial basis for the implementation of the invasive measures comes from the budgets of the relevant security institutions. In this direction, the budget is a document composed of items, which provides in detail the planned income and expenses for a future period of time, usually for a period of one fiscal year. At the end of this process, most parliaments pass laws to pass the implementation of the budget (i.e., officially approve the government accounts at a certain time interval). Hence, the budget is a key instrument for directing and controlling the work of a state body, taking into account the necessity of funding for its functioning. In democratic states, budgets are usually adopted by parliaments as a legislative measure.

Financial oversight focuses on the oversight role that parliament has in the last three phases of the budget cycle — oversight and approval, implementation, and ex post review.

Figure 2: OTA-mediated monitoring of defence and security communications.



Source: <https://ota.mk/mk/zakoni>

The ex-post audit of the finances of the state services is primarily the responsibility of the internal audit mechanisms of each service and the state audit.

When it comes to the application of invasive measures (PIM) for security and defence purposes, it involves sensitive issues, and because of this, most parliamentary oversight of the funding and application of invasive measures takes place behind closed doors.

However, parliaments have a very significant role in this process, reviewing the work of the auditors and exercising their own oversight. For comparative illustration, in some countries, the security-intelligence services are organizationally autonomous, with their own budgets, while in other countries, they work under the administration of the ministries. In such arrangements, the security services do not have their own budgets and are financed from the budget of the ministry to which they belong. Therefore, the term security budget can be ambivalent, as it sometimes refers to the budget of a single service and sometimes to the budget of several services in a single ministry. The term can also refer to the total amount for the entire security community summed up across several ministries. It should also be noted that, in some countries, not all costs related to the application of special investigative measures are included in their budgets.

Specifically, in the Republic of North Macedonia, supervision over communications monitoring measures implemented by the authorized authorities for the implementation of invasive measures (PIM) to fight organized crime and the authorized authorities for the implementation of communications

monitoring measures to protect the interests of security and the defence of the state, as well as the supervision of operators and OTAs are the following institutions:

- The Parliament of the Republic of North Macedonia through its relevant committees:
- ✓ Commission for supervision over the implementation of the special investigative measure for monitoring communications
- ✓ Funding and Budget Commission and
- ✓ Defence and Security Commission
- Civil Oversight Council
- Directorate for Security of Classified Information;
- Directorate for Personal Data Protection and
- Ombudsman

According to the Annual Report on the work of the Operational Technical Agency OTA for 2022 by the Parliamentary Commission for Supervision of the Implementation of Communications Monitoring Measures, there are 471 new activations of the communications monitoring measure in 2021. For the needs of the Ministry of the Interior, there are 292 activations, 12 for the needs of the Public Prosecutor's Office, and there are 342 extensions of the measure for monitoring communications, of which 172 are extensions for the needs of the Ministry of the Interior.

The commission for supervision over the implementation of measures for monitoring communications is organizationally determined by four members, their deputies, and a president. The commission submits an annual report to the Parliament of the Republic of Macedonia for the previous calendar year, no later than the end of February in the current year.

The Commission considers the issues related to:

- Oversight of the implementation of communications monitoring measures,
- Decisions upon the legality of the implementation of measures for monitoring communications by the authorized authorities
- Decisions upon the effectiveness of the implementation of special investigative measures
- drawing up a report on executive supervision
- Establishment of international cooperation on issues related to such supervision and other issues related to the authorized authorities for the implementation of monitoring measures and
- Revision and adoption of the annual financial plan for each year of the OTA.

In addition to the national prescribed mechanisms for supervision and control, the international standards according to which the Republic of North Macedonia respects the recommendations of the Council of Europe, which creates and upgrades its standards for supervision and law enforcement of special investigative measures, as well as supervision over the powers of the agencies

for enforcement of the law, through its bodies are: the Venice Commission, the Parliamentary Assembly of the Council of Europe and the Human Rights Commissariat of the Council of Europe. Specifically, the Venice Commission of the Council of Europe has an important role in ensuring democratic control over the security services and their legality in behaviour.

From the aspect of internal financial control and audit mechanisms, their placement is a prerequisite for the success of external supervision, which cannot be effective without them. These mechanisms imply the operation of accounting departments whose responsibility is to ensure that the authorized institution or competent authority keeps proper and accurate financial records and operates in accordance with all applicable laws. Finance departments have established and maintain financial controls to ensure appropriate use of resources. Adequate internal accounting is essential to the work of external supervisory bodies because, without it, other such bodies will have great difficulty in reconstructing transactions and related activities. In general, the quality of a security institution's accounting is an indicator of whether its financial records are legal and truthful (Wills, 2012).

This includes the regular annual reports, which must include complete financial data as well as information on the operations of the service and record data on the beneficiaries of the funds from the Budget of the funds. Essentially, the reports must provide sufficient information to enable an informed assessment of the implementation of the invasive measures during the fiscal year – especially with regard to the goals, indicators and standards set at the beginning of the year. In the case of most state bodies, the law requires the responsible minister, upon receiving the report, to present it to parliament.

In particular, during the financing and application of invasive PIM measures for the needs of security and defence, in the Republic of North Macedonia, internal control in the General Staff of the Army, in accordance with the organizational structure, J-8 performs internal control of material and financial operations in the Army, Monitoring the regulations of the area of finance and accounting and their application in the Army, makes a preliminary and additional control of the material and financial documentation in the Army, as well as monitors and analyses the implementation of the budget and financial plan of the Army and of the commands and units. In the Ministry of Defence of the RSM, the Finance Department carries out budgeting and budget analysis, determines and adopts the Ministry's financial plans and realizes the financial resources determined by the Ministry's budget and financial plan. The Department of Internal Audit in the Ministry of Defence, on the other hand, has the main responsibilities related to the assessment of the compliance of the Ministry's operations in accordance with the laws, by-laws, and agreements, as well as a thorough assessment of the functioning of the internal control system. While in the Ministry of Internal Affairs, the internal control of financial activities is carried out by the Department for Financial Affairs, which is composed of two sectors: the Department for Budget Coordination and Control,

where the proposal for the ministry's budget is drawn up and monitoring of the implementation of the budget, drafting of a solution for the internal allocation of the budget of the Ministry of the Interior, monitoring the timely payment of expenses in accordance with the procedures for assuming obligations and making payments, cashier operations, etc. and the Accounting Department. census and salaries, in charge of calculation and payment of salaries, accounting recording of all financial transactions, preparation of final account, etc.

Conclusion

With the application of the special investigative measures by the authorized institutions for criminal prosecution, the difficulties in the detection and prosecution of organized and serious crime are significantly overcome or reduced, which also enables the authorized institutions to impose a proactive role in the previous procedure. The introduction of special investigative measures for evidence-gathering techniques is a forced response to the growing threats from serious forms of crime.

Through the approval of special investigative measures, judges and prosecutors act as guarantors of the rule of law and balance the interests of ensuring public safety, on the one hand, and the protection of human rights and freedoms, on the other.

The effectiveness of financial oversight depends on several factors: the commission's resources, investigative powers and access to classified information, the expertise of the commission members, the political will of the commission members to fulfil their obligations, the ability of the commission to influence the budget process (especially when its role is advisory).

Finally, for the institutions authorized to implement measures to monitor communications, in order to preserve the legality and morality of the measures and the appropriate internal and external oversight mechanisms, the imperatives assume the integrity of the institutions and authorized persons, sufficient political will and operational transparency.

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