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Communication from Croatia concerning the case of DRAGOJEVIC v. Croatia (Application No. 68955/11)

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Communication de la Croatie concernant l'affaire DRAGOJEVIC c. Croatie (requête n° 68955/11) (**anglais uniquement**)



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SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

GOVERNMENT OF THE REPUBLIC OF CROATIA
OFFICE OF THE REPRESENTATIVE OF
THE REPUBLIC OF CROATIA BEFORE
THE EUROPEAN COURT OF HUMAN RIGHTS

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Zagreb, 24 April 2018

ACTION PLAN

DRAGOJEVIĆ GROUP V. CROATIA

Dragojević (68955/11), leading judgment of 15/01/2015, final on 15/04/2015

Bašić (22251/13), judgment of 25/10/2016, final on 25/01/2017

Matanović (2742/12), judgment of 21/02/2017, final on 04/07/2017

Office of the Representative of the Republic of Croatia
before the European Court of Human Rights

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I. CASE DESCRIPTION

1. These cases concern violations of the applicants' right to respect for their private life, home and correspondence on account of their unlawful surveillance which was based on orders of the investigating judge issued contrary to the relevant domestic law (violations of Article 8 of the Convention).
2. The case of *Matanović* also concerns a violation of the applicant's right to a fair trial on account of the fact that the domestic authorities failed to disclose to him evidence obtained through his unlawful surveillance (a violation of Article 6§1).
3. The impugned criminal proceedings in this group were conducted between 2007 and 2012. In particular, the applicants were suspected of drug trafficking (*Dragojević* and *Bašić*) or corruption (*Matanović*). At the request of the prosecuting authorities, investigating judges authorised the use of secret surveillance without examining whether any less intrusive measures were available. They merely indicated that "the investigation could not be conducted by other means". Thus, the domestic courts did not take into account the requirements established through the Court's case-law on this point.
4. In *Matanović* the applicant was also denied access to evidence which had been obtained through secret surveillance in the context of the same case, which concerned individuals who were not eventually accused in the proceedings.
5. The applicants were subsequently convicted. Their conviction relied extensively on the secret surveillance recordings.
6. The Court found that:
 - the investigating judge ordered surveillance contrary to the 1997 Code of Criminal Procedure due to lack of reasoning;
 - domestic courts dismissed the applicants' complaints that surveillance orders had not been reasoned by limiting their assessment to the extent relevant for the admissibility of evidence thus obtained, without going into the substance of the Convention

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requirements concerning the allegations of arbitrary interference with the applicant's rights under Article 8;

- the domestic courts dismissed the applicant's requests for examination of recordings concerning other individuals, considering these recordings irrelevant for the case (*Matanović* only);
- the 1997 Code of Criminal Procedure provided no procedure allowing the competent court to assess if the recordings were relevant to the applicant's case. In particular whether they contained such particulars which might have reduced his sentence or put into doubt the scope of his alleged criminal activity (*Matanović* only).

II. INDIVIDUAL MEASURES

7. In response to the Courts' judgments the authorities have taken measures aimed at bringing the violations to an end eliminating the negative consequences sustained.

(i) The applicants' current situation

8. At the outset, the Government highlights that the applicants were released from prison (the applicant in *Bašić* in 2012, in *Matanović* in 2015 and in *Dragojević* in 2017).

(ii) Reopening of the impugned criminal proceedings

9. The Government furthermore recalls the Court's findings that the applicants had not been deprived of the fair trial in respective domestic proceedings (§§ 131-135 in *Dragojević*, §§ 41-51 in *Bašić*). As for the applicant *Matanović*, the Court noted that finding of a violation of the applicant's right to a fair trial did not imply that the applicant had been wrongly convicted (§ 203 in *Matanović*).
10. In response to the Courts' judgments, the applicants requested reopening of the impugned criminal proceedings, pursuant to Section 502 of the Code of Criminal Procedure.
11. On 28 April 2015, Mr Dragojević requested reopening of proceedings before the Dubrovnik County Court. His request was dismissed as unfounded by a final decision of

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the Supreme Court of 22 October 2015. The Supreme Court highlighted the Court's findings that use of evidence obtained by secret surveillance in the criminal proceedings against the applicant had not resulted in the violation of his right to a fair trial. Furthermore, the applicants' conviction had not been based solely on the evidence in question. The applicant subsequently lodged a constitutional complaint against the said decisions complaining that his rights under Article 6 § 1 and Article 8 of the Convention were violated in the proceedings concerning reopening. On 1 June 2016 the Constitutional Court dismissed his constitutional complaint.

12. On 22 February 2017 Mr Bašić requested reopening before the Slavonski Brod County Court. On 2 May 2017 the Slavonski Brod County Court dismissed his request as unfounded. On 18 January 2018 the Supreme Court upheld the Slavonski Brod County Court's decision, highlighting the Court's findings that the use of evidence obtained by secret surveillance in the criminal proceedings against the applicant had not resulted in the violation of his right to a fair trial. The Supreme Court concluded that the violation at issue did not affect the outcome of the impugned proceedings.
13. On 1 August 2017 Mr Matanović requested reopening of the criminal proceedings before the Zagreb County Court. In its decision, the Zagreb County Court noted that some of the recordings which had never been disclosed to the applicant have been destroyed in accordance with applicable legislation. The recordings which had not been destroyed were admitted as evidence in different criminal proceedings against another individual who was subsequently convicted. The Zagreb County Court concluded that the violations found by the Court might have influenced the applicant's conviction for the charge of abuse of power and on 6 October 2017 partially granted the applicant's request ordering reopening of the criminal proceedings in respect of that charge. The proceedings following the applicant's appeal are pending before the Supreme Court.

(iii) The applicants' redress

14. The Government recalls that the applicants sought non-pecuniary damage in proceedings before the Court. Mr *Matanović* also requested pecuniary damage on account of loss of earnings. The Court dismissed his request finding no causal link between the violation

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found and the pecuniary damage alleged. The Court furthermore awarded the applicants just satisfaction in respect of non-pecuniary damage.

III. GENERAL MEASURES

15. The Government highlights that the authorities have taken measures aimed at preventing similar violations. These measures are set out below:

A. Measures aimed at ensuring that secret surveillance orders are properly reasoned

16. The key measures adopted to ensure that secret surveillance orders are properly reasoned are the change of case-law of domestic courts and raising awareness on Convention requirements in this regard.

(i) *Change of case-law*

17. Recalling that the Court was satisfied that the procedures for secret surveillance measures had been envisaged in domestic law (§§ 87, 90-91 in *Dragojević*), the Government deems the violations at hand resulted from misapplication of relevant domestic legislation.
18. On this note, the Government highlights that the domestic courts have aligned their case-law with the Court's findings and now assess the use of secret surveillance from the aspect of defendants' right to private life and correspondence.
19. In particular, in response to the Courts' judgments the Supreme Court operated the change of its case-law as follows (decisions available at www.vsrh.hr):
- on 7 February 2017 (case no. I Kž-Us 7/17-4) the Supreme Court found that the investigative judge had issued several surveillance orders which had not been adequately reasoned, whereas the trial court failed to examine whether such use of secret surveillance measures had violated the defendants' human rights. The Supreme Court thus quashed the trial court's decision and instructed the trial court to carefully examine

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surveillance orders in order to establish whether the lawfulness requirement had been met for each individual surveillance order;

- on 4 May 2017 (case no. I KŽ-US 26/2017-5) the Supreme Court found that the investigative judge had ordered secret surveillance of the defendants' telephone calls only by quoting the relevant provision of the Code of Criminal Procedure, whereas the appeal court failed to examine whether the secret surveillance was ordered in accordance with domestic statutory requirements. Relying on the Court's findings in *Dragojević* and *Matanović*, the Supreme Court instructed the trial court to firstly examine whether the secret surveillance order had been properly reasoned and then to assess whether the use of secret surveillance was necessary and justified under Article 8 of the Convention.

20. The lower instance criminal courts are adhering to the Supreme Court's case-law and Convention requirements on this point. For instance, on 28 February 2017 (case no. 5 KŽ 607/16-3) the Zagreb County Court found that the trial court had failed to examine whether the police conducted surveillance of the defendant's telephone conversations in accordance with relevant domestic legislation which expressly envisages that the head of the Criminal Investigations Department in the Ministry of the Interior shall issue a written order for each individual case. Relying on the Court's findings in *Dragojević*, the Zagreb County Court quashed the trial court's decision and instructed it to obtain information whether the written surveillance order had actually been issued. This decision is available at www.vsrh.hr.

(ii) Awareness raising measures

21. In response to these judgments, in 2015 and 2017, the Judicial Academy organized workshops to raise awareness of criminal-law judges on the Court's findings. The workshop carried out in 2015 addressed the obligations of investigation judges when ordering secret surveillance measures in view of *Dragojević*. The workshop carried out in 2017 focused on the Convention requirements with respect to secret surveillance orders in the light of *Bašić* and *Matanović*.

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B. Measures aimed at ensuring disclosure of evidence obtained by secret surveillance orders

22. The Government recalls that the violation of the applicant's right to a fair trial in *Matanović* resulted from deficient legislation applicable at the relevant time, not providing defence with an adequate procedure for the disclosure of evidence obtained by secret surveillance measures (§ 187 in *Matanović*).
23. The Government highlights that following the facts of *Matanović*, the relevant legislation was amended. To this end, in 2008 a new Code of Criminal Procedure was enacted ("2008 CCP). It entered into force on 1 September 2011, and was amended several times since.
24. The CCP currently in force stipulates the procedure for disclosure of evidence obtained by secret surveillance. In particular, Section 338 provides that the recordings obtained by secret surveillance are kept by the state attorney's offices. Upon a defendant's request for examination of the recordings, the state attorney's offices shall allow the defendant immediate reproduction of the recording or access to the documentation. This allows the defendant access to all recordings used by the state attorney to select the evidence in a criminal case, and the possibility to request that the recordings or documents (or their parts) be reproduced or read during the trial hearing. Thus, the standards set by the Court with regard to disclosure of evidence obtained by secret surveillance measures have been transmitted into the domestic procedural legislation.
25. Above legislative measures were further detailed in the State Attorneys' Manual in 2015. The said Manual provides state attorneys with detailed instructions regarding defendants' right to access recordings obtained by secret surveillance measures. The Manual is available on the intranet page of the State Attorney's Office and is accessible to state attorneys.

C. Publication and dissemination measures

26. The Government has ensured widespread publication and dissemination of the Court's findings.

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27. At the outset, the Government ensured that the judgments were translated into Croatian. The translations were published on the web page of the Office of the Representative of the Republic of Croatia before the European Court (“the Office of the Representative”) and the Constitutional Court. They were therefore made available to legal professionals and members of the judiciary as well as to the general public.
28. With a view to facilitating their dissemination, the Office of the Representative compiled analyses of the *Dragojević* group judgments. The analyses and the translations of the judgments were then disseminated to all members of the Expert Council for the Execution of Judgments and Decisions of the European Court of Human Rights (its members include, *inter alia*, representatives of the Supreme Court, the Constitutional Court, the State Attorney General’s Office, the Ministry of Justice and the Judicial Academy).
29. The analysis and the translation of the judgment have been further transmitted to the respective courts which had conducted the impugned criminal proceedings against the applicants.
30. In order to ensure that future judgments/decisions in similar cases are rendered in compliance with the Court’s case-law, the Supreme Court furthermore ensured that the analysis and the translations of the judgments were transmitted to all domestic municipal and county courts.
31. The Office of the Representative compiled an *Overview* of the Court’s judgments which are related to actions of domestic judiciary in criminal law field with a view to raising awareness among domestic judges of the Court’s findings concerning misapplication of the domestic law in general, including the field of secret surveillance. This *Overview* includes all judgments of the *Dragojević* group. The Overview was presented to the Supreme Court as the highest domestic judicial authority.
32. The Office of the Representative furthermore published a short summary of the *Dragojević* judgment in the quarterly *Review of the jurisprudence of the European Court of Human*

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Rights. The *Review* was disseminated to all relevant domestic authorities. It is available on the website of the Office of the Representative¹ and the Croatian Bar Association².

33. The Government has therefore ensured that all that all competent authorities, including those who acted in breach of the Convention, have been made aware of the European Court's findings.

IV. JUST SATISFACTION

34. Just satisfaction awarded to the applicants was paid within the deadline imparted by the Court. In particular, the just satisfaction awarded to the applicant in *Dragojević* was disbursed on 11 June 2015, in *Bašić* on 20 April 2017 and in *Matanović* on 21 September 2017.

V. CONCLUSION

35. The Government shall inform the Committee of Ministers on further developments regarding the individual measures in the cases of *Bašić* and *Matanović*.
36. The Government deems that the general measures taken are capable of preventing similar violations in the future. The Government is aware of other cases against Croatia in which the applicants raised similar violations of Article 8 of the Convention (*Parazajder*, 50049/12, judgment of 1/3/2018 and 3 cases pending before the Court: *Keskin*, 41536/14, *Bosak*, 40429/14 and *Pejkić*, 49922/16). However, the impugned facts in these cases occurred prior to the change of the Supreme Court's case-law (notably between 2007 and 2015) and therefore do not contest the effectiveness of the general measures taken.

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Representative

¹<https://uredzastupnika.gov.hr/vijesti/objavljen-pregled-prakse-europskog-suda-za-ljudska-prava-sijecanj-ozujak-2015/259>.

² http://www.hok-cba.hr/sites/default/files/pregled_prakse_1.15.pdf.