



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MATANOVIĆ v. CROATIA

(Application no. 2742/12)

JUDGMENT

STRASBOURG

04 April 2017

FINAL

04/07/2017

*This judgment has become final under Article 44 § 2 of the Convention. It may
be subject to editorial revision.*

In the case of Matanović v. Croatia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Işıl Karakaş, *President*,
Julia Laffranque,
Paul Lemmens,
Valeriu Griţco,
Ksenija Turković,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 21 February 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2742/12) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Josip Matanović (“the applicant”), on 22 December 2011.

2. The applicant was represented by Ms I. Bojić, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. The applicant complained, in particular, that the domestic authorities’ recourse to special investigative measures, in particular secret surveillance in respect of him, had been in violation of the guarantees of Article 8 of the Convention. He further alleged entrapment by an *agent provocateur* and that the non-disclosure and use of evidence obtained by the use of special investigative measures in the criminal proceedings against him had run counter to Article 6 §§ 1 and 3 (b) of the Convention. The applicant also alleged that the domestic courts’ interpretation of the relevant provisions of the Criminal Code had not been in compliance with the requirements of Article 7 of the Convention.

4. On 29 April 2013 these complaints were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and is currently serving a prison sentence in Lepoglava.

A. Background to the case

6. The applicant was a vice-president of the Croatian Privatisation Fund (*Hrvatski fond za privatizaciju* – hereinafter “the Fund”), a legal entity established by the State and tasked with carrying out the privatisation of publicly owned property.

7. In August and October 2006 M.M., a businessman from Russia, approached the State Attorney’s Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta* – hereinafter: “the State Attorney’s Office”) alleging that he had been trying to make various business investments in Croatia and that he had been introduced to a certain A.P., allegedly an official of the Fund, who had offered his assistance in pursuing the project in the State. In return, A.P. had asked M.M. to deposit 2,250,000 euros (EUR) in various bank accounts.

8. In March 2007 an investigating judge of the Zagreb County Court (*Županijski sud u Zagrebu*) authorised the secret surveillance of a number of individuals, including A.P., in connection with suspicions of bribe-taking and abuse of power and authority. M.M. was granted informant status.

9. In the course of further investigation using secret surveillance, several meetings were recorded in which M.M., assisted by a consultant, J.K., discussed with a lawyer, A.Pi., the measures that needed to be taken in order to carry out a business project in the Zadar region. On that occasion A.Pi. mentioned the applicant as her contact in the Fund. She also stated that everybody should make out well in this business undertaking. J.K. also explained that he knew the applicant from before and that very soon they would have a meeting concerning the investment at issue.

10. On 3 April 2007 J.K. approached the State Attorney’s Office claiming that he was the representative of M.M. and that he had already had a number of contacts with various officials concerning M.M.’s investment in Croatia. In this connection, the day before he had also contacted the applicant, in his capacity as vice-president of the Fund, who had allegedly requested a provision of 5% of the total investment value, which was approximately between EUR 23,000,000 and 25,000,000, to help with the realisation of the project. The applicant had explained to J.K. that that amount would have to be distributed to the bank accounts of three (out of five) vice-presidents of the Fund who would take part in the decision-

making process. J.K. consented to act as an informant under the further guidance of the prosecuting authorities.

B. Special investigative measures

11. On 3 April 2007 the State Attorney's Office asked an investigating judge of the Zagreb County Court to authorise the use of special investigative measures in respect of the applicant, specifically the tapping of his telephone, covert surveillance of him, the use of J.K. as an informant, and conducting a simulated purchase operation.

12. On the same day the application was allowed and the investigating judge ordered the use of special investigative measures in respect of the applicant. The relevant part of the order reads:

“The application is accompanied by the submission of the Ministry of the Interior's Criminal Police Department, and the relevant official notes, statements and other material.

The application is well-founded since the case at issue concerns the offences under Article 181 § 3 of the Code of Criminal Procedure, and the investigation into these offences by other means would either not be possible or would be extremely difficult.

Therefore, all the necessary requirements under Articles 180 and 181 of the Code of Criminal Procedure have been met and the order should be issued with a view to securing the information and evidence necessary for the criminal case.”

13. In the course of the investigation, the investigating judge issued several further orders to the same effect. Various meetings between the applicant and J.K. took place. At a meeting on 11 April 2007 J.K. gave to the applicant EUR 50,000 in connection with his investment project.

14. On 16 June 2007, on the basis of an application by the State Attorney's Office, the investigating judge ordered the termination of the special investigative measures, indicating that their use had produced the results sought.

C. Investigation

15. On 16 June 2007 the applicant was arrested and detained in connection with a suspicion that he had taken bribes and abused his power and authority in several privatisation cases.

16. On 18 June 2007 the State Attorney's Office forwarded to the investigating judge 288 CD recordings of the secret surveillance operation, and on 19 June 2007 it forwarded a further thirty-six CD and twenty DVD recordings.

17. On 19 June 2007 the State Attorney's Office asked an investigating judge of the Zagreb County Court to open an investigation in respect of the applicant and seven other individuals in connection with a suspicion of

bribe-taking and offering bribes related to several investment projects in Croatia, including the one in the Zadar region (see paragraphs 9 and 10 above).

18. In its request for investigation the State Attorney's Office relied on the results of the special investigative measures suggesting that the applicant, in his capacity as vice-president of the Fund, had requested bribes in order to support M.M.'s investment project in the Zadar region. In particular, it was alleged that he had requested bribes amounting to EUR 220,000 and 5% of the total investment, which amounted to EUR 1,700,000. The secret recordings showed that the sealing of this agreement had taken place first on 11 April 2007 when J.K., acting as M.M.'s representative, had paid the applicant EUR 50,000, and then on 24 April 2007 when J.K. had deposited a further EUR 150,000 in a notary public's safe in the applicant's favour. The State Attorney's Office also alleged that the applicant had organised the bribery of the President of the Fund in respect of the investment in the Zadar region, and had agreed to further bribe-taking with J.K. concerning another investment project related to the privatisation of the hotels Ž. and P.

19. When questioned with regard to the charges against him, the applicant decided to remain silent and not to give evidence. On the basis of the available evidence, the investigating judge accepted the request of the State Attorney's Office and opened an investigation.

20. Meanwhile, on 20 June 2007 the State Attorney's Office forwarded 191 CD recordings to the investigating judge. It also forwarded an additional ninety-eight CD recordings to the investigating judge containing secret surveillance of individuals in respect of whom an investigation had not been opened at that time.

21. On 21 June 2007 the investigating judge in charge of the supervision of the special investigative measures forwarded to the investigating judge conducting the investigation 191 CD recordings and the relevant reports concerning the secret surveillance of the suspects and the informants M.M. and J.K.

22. On 26 July 2007 the applicant asked to have access to and to have copies of the secret surveillance CD and DVD recordings.

23. The investigating judge conducting the investigation commissioned a telecommunications expert report including transcripts of the relevant secret surveillance recordings. These were produced by M.Đ., a telecommunications expert. By a letter of 30 November 2007 M.Đ. returned ninety-eight secret surveillance CD recordings in the case at issue that did not contain the communications of the suspects in respect of whom the investigation had been opened.

24. In the course of the investigation the investigating judge authorised numerous search and seizure operations and questioned a number of

witnesses in connection with the offences for which the applicant and the other suspects had been charged.

25. When questioned as a witness by the investigating judge, M.M. explained that J.K. had offered him the services of his company to help with a business investment in Croatia. In particular, J.K. had explained that he knew how to contact the competent State institutions and how these things could be done in a legal way. Soon afterwards they had sent a letter of intent to the Fund concerning M.M.'s investment but they had not received a reply. J.K. had then contacted the applicant, who had been his colleague at university, and arranged a meeting with him at the Fund. M.M. also explained that it was J.K. who had been in contact again with the applicant concerning the investment in the Zadar region.

26. The investigating judge also questioned J.K. but he was unable to give evidence owing to his medical condition and hospitalisation.

27. On the basis of the results of the investigation, the investigating judge twice extended the scope of the investigation to other alleged instances of bribe-taking and abuse of power and authority by the applicant.

28. Following the completion of the investigation, the investigating judge forwarded the case file to the State Attorney's Office for further assessment and a decision.

D. Proceedings on indictment

29. On 12 February 2008 the State Attorney's Office indicted the applicant and nine other individuals and brought them before the Zagreb County Court on charges of bribe-taking, offering bribes and abuse of power and authority. The applicant was indicted in his capacity as a public official on two counts of bribe-taking and bribery of the President of the Fund related to M.M.'s investment project in the Zadar region, two counts of bribe-taking related to the privatisation of the hotels Ž. and P. and the company P.O., and one count of abuse of power and authority related to the privatisation of the company B.

30. The indictment was based on voluminous evidence obtained during the investigation and the recordings of the applicant's telephone communications and secret surveillance of him obtained by the use of special investigative measures. In particular, the State Attorney's Office indicated the particular sequence of the relevant recordings which it intended to submit as evidence at the trial. The State Attorney's Office also asked that the case file concerning the special investigative measures be examined.

31. On 6 March 2008 the applicant lodged an objection against the indictment, arguing that it was confusing and incomplete. He pointed out that his position in the Fund did not fall within the scope of the definition of "public official" under Article 89(3) of the Criminal Code. He further

stressed that J.K., a central figure in the case, had not been questioned during the investigation. The applicant also contended that his defence rights had been breached since the defence had “neither seen nor heard” the audio and video recordings on which the indictment had been based.

32. On 30 April 2008 a three-judge panel of the Zagreb County Court returned the indictment to the State Attorney’s Office on the grounds that one count of the indictment, concerning the applicant’s alleged participation in the bribery of the President of the Fund, had been confusing. It accordingly instructed the State Attorney’s Office to submit an amended indictment consonant with that finding. The State Attorney’s Office complied with the order and submitted an amended indictment on 9 May 2008, following which the Zagreb County Court confirmed it.

33. On 15 October 2008 the president of the trial panel examined the case file of the special investigative operation. On the same day she commissioned a further expert report from the telecommunications expert M.Đ. ordering him to produce transcripts of the relevant recordings relating to two meetings between the applicant and J.K.

34. An order for further transcription of the recordings was made on 24 October 2008. This concerned the recordings of three meetings between the applicant, J.K. and several other individuals, and the sequences of the telephone conversations and text messages concerned.

35. On 7 November 2008 M.Đ. produced transcripts of the recordings indicated in the Zagreb County Court’s order of 15 October 2008 (see paragraph 33 above).

36. On 10 November 2008 the first hearing was held before the Zagreb County Court. At the hearing the trial bench forwarded the expert report of 7 November 2008 (see paragraph 35 above) to the defence. The applicant pleaded not guilty to the charges against him, contending that he had been entrapped by J.K., who was an *agent provocateur*. The defence lawyer of one of the co-accused contended that the defence had not been provided with the surveillance recordings and that those measures had been ordered contrary to the requirements of the relevant domestic law. The trial bench dismissed these arguments as unfounded and scheduled the examination of evidence.

37. On 17 November 2008 M.Đ. produced further transcripts of the secret surveillance recordings related to the Zagreb County Court’s order of 24 October 2008 (see paragraph 34 above).

38. At the hearings on 27 and 28 November 2008 the Zagreb County Court heard evidence from J.K., who explained that he had represented Russian investors in Croatia regarding their interest in the construction of luxury villas on the site of a former brick factory in the Zadar region. He had therefore contacted the Fund and the local authorities in Zadar in order to complete all the relevant administrative matters for the investment. J.K. stated that he had had several meetings with the applicant and that at one

point the applicant had requested a bribe in order to ensure the realisation of the project. J.K. had reported that to the State Attorney's Office and then he had consented to act as an informant. He further explained that he had given EUR 50,000 in cash to the applicant and that, at the applicant's request, he had deposited a further EUR 150,000 in a notary public's safe. It had been also agreed that J.K. would pay EUR 1,500,000 on completion of the project.

39. On 2 December 2008 the Zagreb County Court commissioned another expert report from M.Đ. concerning several particular sequences of the secret surveillance recordings.

40. On 9 December 2008 M.Đ. produced further transcripts of the secret surveillance recordings related to the Zagreb County Court's order of 2 December 2008 (see paragraph 39 above).

41. The expert report was served on the defence at a hearing on 10 December 2008. At the same hearing the trial bench heard evidence from M.M. He explained that the relevant contacts with the applicant had been arranged and directed by J.K., and that he had not personally participated in any illegal transactions in the applicant's favour.

42. At the same hearing the defence counsel reiterated their application for access to the secret surveillance recordings (see paragraphs 31 and 36 above). They argued that according to the available information there were in total 515 CD and 160 DVD recordings which had never been provided to the defence. In these circumstances, the defence counsel contended that they had not had an effective opportunity to prepare for the case. They also asked for access to all the recordings since it was possible that some of them contained exonerating information, which the defence could then submit as evidence.

43. The trial bench dismissed the application by the defence on the grounds that the recordings which were to be examined at the trial as evidence had been duly transcribed by an expert and that the relevant transcripts had been served on the defence. In the trial bench's view, this allowed the defence sufficient time and facilities to prepare for the case as they would be able to raise all objections concerning the recordings after their examination at the trial. Moreover, the trial bench stressed that the sole purpose of the recordings was to examine them during the trial and that Article 155 § 1 of the Code of Criminal Procedure, although providing for the possibility of access to and copying of the case file, did not envisage the copying of CD and DVD material. The trial bench also stressed that the defence could have examined the relevant material in the court-house in the same manner as they had generally examined the case files.

44. On 10 December 2008 the defence counsel sent a joint statement to the Croatian Bar Association (*Hrvatska odvjetnička komora*) complaining that they had been unable to effectively carry out their tasks as defence lawyers since they had been denied access to the secret surveillance

recordings. They also contended that the evidence had been hidden from the defence and that it had been impossible for them to identify whether certain recordings could exonerate their clients or whether there had been suggestions of unlawfulness in some of them.

45. At a hearing on 11 December 2008 the trial bench found that there were in total 212 CD and twenty-seven DVD recordings which had been provided to the court with the indictment of the accused. There were also ninety-eight CD recordings from the same secret surveillance operation but which concerned different persons and not the accused.

46. On 12 December 2008 another hearing was held before the Zagreb County Court at which the defence asked for an adjournment in order to examine the case file concerning the secret surveillance operation. The defence argued that they wanted to examine all the circumstances in which the secret surveillance had been ordered and conducted. The trial bench dismissed the request by the defence on the grounds that the case file concerning the secret surveillance order had been incorporated into the case file concerning the criminal proceedings at issue and could therefore have been consulted by the defence. The trial bench also reiterated its previous arguments concerning the reason for the dismissal of the application by the defence to obtain the copies of the CD and DVD material.

47. On 12 December 2008 the defence counsel sent a letter to the Zagreb County Court asking for access to and the possibility to examine the secret surveillance recordings. They stressed that the CD and DVD material had never been made available to the defence and that there were no technical means available in the court-house which would allow for the examination of the recordings by the defence. They also pointed out that because of the technical impossibility of examining the recordings in the court-house, the practice of the Zagreb County Court in several other cases had been to make copies of the CD and DVD recordings and to send them to the defence. In these circumstances, the defence argued that the Convention rights of the accused to effectively prepare their defence had been breached.

48. On 12 December 2008 the president of the trial panel commissioned another expert report from M.Đ. concerning several further secret surveillance recordings.

49. On 14 December 2008 defence counsel for one of the co-accused sent a letter to the President of the Zagreb County Court indicating that it had been impossible for the defence to obtain access to and to examine the secret surveillance recordings by any means whatsoever.

50. Further hearings before the Zagreb County Court were held on 15 and between 17 and 19 December 2008 at which the secret surveillance recordings were played back. The applicant argued that the recordings were incomplete and confusing and that there were discrepancies between the transcripts and the recordings. He contended that it was impossible for his counsel to work thoroughly since they had not had access to the recordings.

The lead prosecutor also indicated that there were certain discrepancies between the transcripts and the recordings, which she then tried to clarify at the hearing. The trial court ordered the State Attorney's Office to provide the relevant clarifications and it also commissioned a report from the expert M.Đ. in order to provide explanations concerning his particular findings.

51. Meanwhile, on 18 December 2008 M.Đ. produced further transcripts of the secret surveillance recordings related to the Zagreb County Court's order of 12 December 2008 (see paragraph 48 above).

52. On 22 December 2008 the president of the trial panel commissioned another expert report from M.Đ. concerning several other secret surveillance recordings. The expert produced his additional report on 2 January 2009.

53. At the hearings between 12 and 14 January 2009 additional secret surveillance recordings were examined. The applicant argued that he had been entrapped and that the recordings were unlawful evidence.

54. Further hearings before the Zagreb County Court were held between 26 and 29 January; 11-13 and 16-17 February; 4-6 and 9-10 March 2009 at which the trial court heard witnesses and examined further secret surveillance recordings.

55. On 9 March 2009 the applicant asked the Zagreb County Court to again question the informant J.K. and to take further evidence concerning his activities in the Fund.

56. A hearing was held on 12 March 2009 where the trial bench heard further witnesses.

57. At a hearing on 16 March 2009 the State Attorney's Office asked that further secret surveillance recordings be admitted into evidence and examined. The applicant contended that the recordings had been unlawfully obtained as the use of secret surveillance measures had been ordered contrary to the requirements of the relevant domestic law. The trial bench accepted the request of the State Attorney's Office and commissioned an expert report from M.Đ., instructing him to provide transcripts of the recordings.

58. Further hearings were held on 17, 23-26 and 30 March 2009 at which the trial bench heard evidence from several witnesses.

59. On 30 March 2009 M.Đ. produced transcripts of the secret surveillance recordings related to the Zagreb County Court's order of 16 March 2009 (see paragraph 57 above).

60. Further hearings were held on 15-17 and 20 April 2009 at which the trial bench heard further witnesses. The applicant contended that the initial contacts of J.K. and M.M. with the State Attorney's Office showed that they had been prepared to act as *agents provocateurs* and that he had been entrapped into engaging in illegal activities. He therefore asked that the evidence obtained by the use of informants be excluded as unlawfully

obtained. The trial bench dismissed the applicant's arguments on the grounds that nothing suggested that he had been entrapped.

61. At the hearings between 22-24 and 27-28 April 2009 the trial bench questioned the accused. The applicant stated that he had been incited to engage in illegal activities by J.K. but he refused to answer any further questions on the matter.

62. On 29 April 2009 the State Attorney's Office submitted an amended indictment specifying the charges against the accused on the basis of the evidence adduced at the trial. At a hearing on 5 May 2009 the applicant pleaded not guilty to the amended indictment. He reiterated his arguments that he had been entrapped by J.K. and that he had not taken any actions which he had not been entitled to take as vice-president of the Fund.

63. Further hearings were held between 8 and 12 May 2009 at which the trial bench heard the parties' closing arguments.

64. On 15 May 2009 the Zagreb County Court delivered a judgment finding that the applicant, in his capacity as a public official as defined under Article 89(3) of the Criminal Code, had taken bribes (Article 347 § 1 of the Criminal Code), facilitated bribe-taking (Article 348 § 1 of the Criminal Code) and abused his power and authority (Article 337 §§ 1, 3 and 4 of the Criminal Code) in connection with M.M.'s investment project in the Zadar region, the privatisation of the hotels Ž. and P. and the privatisation of the company B. The court sentenced him to eleven years' imprisonment. At the same time, it acquitted the applicant on charges of bribe-taking related to the privatisation of the company P.O. (see paragraph 29 above).

65. The Zagreb County Court explained that all the relevant facts concerning the circumstances of the case had been duly established and that therefore there was no reason for the examination of further evidence requested by the applicant.

66. As regards the application by the defence to obtain the secret surveillance recordings and a complaint of non-disclosure of certain recordings, the Zagreb County Court noted:

"With regard to the recordings which [the State Attorney's Office] asked to be examined at the trial, an expert report was commissioned, that is to say, transcripts were prepared which were served on all the parties, the accused and their lawyers, who were thereby fully informed of the substance of the recordings submitted into evidence. In addition, this panel finds, that, with regard to the recordings which were to be examined at the trial, there was no obstacle to the defence lawyers examining [those recordings] in the court-house before the commencement of the trial.

With regard to the other conversations of the accused, these [recordings] were not submitted into evidence but the defence could have examined their substance by the examination of the written reports filed in the [special investigation case file] after the submission of the indictment.

This panel also considers that the recordings at issue were made solely for their examination at the trial and had they been provided to the parties, the court would not

have had any legal basis at its disposal to prevent and prohibit the parties from reproducing [them] outside of the court[-house] before their examination at trial, and [the court would not have had any legal means] to prevent possible misuse of the recorded material.

This in particular concerns the recordings which were not submitted into evidence; that is to say [the recordings] which concern other individuals and not the accused. Since these recordings were not submitted into evidence, the application by the defence to obtain them is completely unfounded.

Furthermore, this panel has found that ... 212 CD and twenty-seven DVD recordings were given [to the court] whereas the remaining ninety-eight CD recordings concern individuals who had been under secret surveillance ... but were not [subsequently indicted].

...

Moreover, as was noted above, the defence had knowledge of the substance of the material submitted into evidence and they had no right to examine material which does not concern these proceedings; that is to say [material which concerns] individuals who were not indicted in these criminal proceedings ...

This is because section 42(7) of the Office for the Suppression of Corruption and Organised Crime Act provides that if within six months following the termination of a secret surveillance operation criminal proceedings have not been instituted against the [individual under surveillance], all the material collected [during the operation] must be destroyed.

It is clear that, since criminal proceedings were not instituted against these individuals, the recordings at issue are still confidential and should have been destroyed; they could not be and were not evidence in these criminal proceedings ...

If these recordings were put at the disposal of the defence, that would amount to a breach of the above-cited provisions of law, particularly because [the recordings constitute] confidential material concerning individuals who are not under indictment.

Moreover, Article 35 of the Constitution guarantees respect for the private life of every individual, and the court is obliged to act under the Constitution ..., so if it provided the defence with the recordings concerning other individuals ... that would amount to breach of the above-cited provision of the Constitution ...”

67. As to the applicant’s plea of entrapment, the Zagreb County Court noted:

“... This panel finds that [the evidence obtained by the use of informants] is not unlawful evidence because it was obtained on the basis of an investigating judge’s orders. The substance of the adduced evidence and the examined recordings do not show that there was incitement by the informant ... as was further demonstrated.”

68. With regard to the charges against the applicant and the evidence obtained by the use of informants, the Zagreb County Court extensively examined the secret surveillance recordings. It in particular analysed the recordings concerning a meeting on 3 April 2007 where the applicant had indicated to J.K. that a deposit should be made with regard to the investment and where he had also assured J.K. that the project would pass the procedure. During the conversation the applicant had explained to J.K. that

it was usual to remunerate for lobbying and he had further stated the following:

“However, for [the investor], these [things], this information, this access and the [action] which will be taken while the project is [in the pipeline] – for this lobbying ... that is worth ... what I told you the last time. And he can do it, that is fifty thousand euros ... for them that is for a drink, for this company ... That is three or four [glasses of] wine compared to [our other possibilities]. So that’s that and then, then we can make a deposit as you said. After that, if the decision goes through something ... is to be given to me, that is, for him... let’s say one hundred thousand euros more or less when the whole thing goes through. Because on an investment of twenty-two million euros to give one hundred thousand ... for him that would not be even 2% ... I would be overly modest if that would be so, you understand [*sic*].”

69. The applicant challenged the first-instance judgment by lodging an appeal with the Supreme Court (*Vrhovni sud Republike Hrvatske*). He contended that he had been entrapped and unlawfully and unjustifiably placed under secret surveillance. He pointed out in particular that the secret surveillance orders had not been properly reasoned and had been issued under the Code of Criminal Procedure and not the Office for the Suppression of Corruption and Organised Crime Act (hereinafter “the OSCOC Act”). He also complained that the relevant evidence had not been disclosed to the defence, and that the first-instance court had erred in the legal qualification of his position as falling under the term “public official” under Article 89 § 3 of the Criminal Code.

70. On 17 February 2010 the Supreme Court quashed the first-instance judgment in respect of the charges of bribery of the President of the Fund related to M.M.’s investment project in the Zadar region and ordered a retrial. At the same time, it upheld the applicant’s conviction on charges of bribe-taking under Article 347 § 1 of the Criminal Code and abuse of power and authority under Article 337 § 4 of the Criminal Code.

71. As to the applicant’s complaint concerning the unlawfulness of the secret surveillance measures, the Supreme Court noted:

“The first complaint to the effect that the results of the special investigative measures are unlawfully obtained evidence because the investigating judge’s orders were made under the Code of Criminal Procedure and not the [OSCOG Act] is ill-founded.

It is true that the [OSCOG Act] is *lex specialis*, but the appellants failed to observe that section 41(1) of that Act provides that the investigating judge may order, ‘save for the measures under Article 180 of the Code of Criminal Procedure’, two additional measures which are not provided under the Code of Criminal Procedure, namely the use of simulated business services and simulated business contracts. The special investigative measures ... applied in the case at issue are not provided for under the [OSCOG Act] and therefore the [investigating judge’s] orders could have been based only on the Code of Criminal Procedure. Had the investigating judge authorised any of the measures provided for in section 41(1) of the [OSCOG Act], he would have been obliged to rely on that Act.

...

The further arguments that the results of the special investigative measures are unlawfully obtained evidence because the investigating judge, when making the orders, around thirty of them, failed to comply with the requirements set out in the case-law of the Constitutional Court [no. U-III-857/2008] to the effect that the orders must be sufficiently reasoned, are also ill-founded ...

...

This court considers that mere flaws in the reasoning of the secret surveillance orders do not make the results of such measures unlawfully obtained evidence. This is because Article 9 § 2 of the Code of Criminal Procedure provides that unlawfully obtained evidence is evidence which has been obtained in breach of the Code of Criminal Procedure, and is expressly provided for by the [Code of Criminal Procedure].

Article 182 § 6 of the Code of Criminal Procedure provides that evidence obtained by the use of secret surveillance, under Article 180 of the Code of Criminal Procedure, cannot be used as evidence in criminal proceedings only [in a case where] it is unlawful. That is to say, evidence which is obtained without a warrant issued by the investigating judge, or if the [police] acted contrary to Articles 180 and 182 § 2 of the Code of Criminal Procedure, but [this does not concern] the evidence obtained contrary to Article 182 § 1 of the Code of Criminal Procedure, which provides that the order [authorising special investigative measures] should, *inter alia*, refer to the facts which warrant the application of such measures, specifically that there is a reasonable suspicion that an individual has committed a criminal offence and that the investigation could not have been carried out by other means or that [to do so] would have been extremely difficult.

Article 182 § 6 of the Code of Criminal Procedure is compatible with the legal nature of [special investigation] orders. Such orders [made by the investigating judge] are transmitted to the State Attorney, who is authorised to request them, and they are executed by the police. There is no legal avenue [to challenge] such orders since the [State Attorney] has no legal interest in challenging them. The police were therefore, moreover, not allowed to challenge the orders. If the argument of the appellants that secret surveillance orders would be unlawful when they are not sufficiently reasoned were to be accepted, it would call into doubt the [use of] secret surveillance measures, particularly in situations where all other legal conditions had been met but the order was merely not sufficiently reasoned, which would be absolutely unacceptable.”

72. As to the applicant’s plea of entrapment, the Supreme Court held:

“The complaints ... that the informants J.K. and M.M. had incited the accused were raised by all the accused during the first-instance proceedings, and the [first-instance] court correctly found that [this claim] was not clear from the reviewed material. The same complaints are now raised by the accused, Matanović, P. and Pa., and this court considers that their complaints are ill-founded.

The witnesses M.M. and J.K. testified that they had become informants after certain accused asked them for bribes [for carrying out the investment]. [M.]M. consented to act as an informant on 2 March and J.K. on 3 April 2007. After that the activity of gathering evidence commenced.

...

The offence of bribe-taking, which is the subject matter of these proceedings, is committed [just] by making a request for a gift or benefit, and since the witnesses

contacted the State Attorney after they had been asked to make a payment to the accused ... the plea of incitement cannot be accepted.”

73. With respect to the complaint about the non-disclosure of evidence, the Supreme Court noted:

“The argument that the rights of the defence were violated by the non-disclosure of 515 CD and 177 DVD recordings, which were the result of the secret surveillance operation, cannot be accepted ...

...

It is undisputed that at the hearing held on 11 December 2008 the trial court established the exact number of recordings and found that 212 CD and twenty-seven DVD recordings had been submitted with the indictment, while it was found that the [special investigation] case file contained a further ninety-eight CD recordings concerning the secret surveillance of other persons who are not accused in the proceedings at issue. It is also not disputed that the State Attorney asked that eighteen CD and twenty-three DVD recordings be examined as evidence, and that the telecommunications expert made transcripts of these recordings, which were then forwarded to the parties. It is further undisputed that the recordings were reviewed at a hearing, that the accused and their lawyers were present, and that they made their objections concerning the transcripts and not concerning the recordings. It is to be noted that the transcripts are not evidence on which a conviction can be based but are only of auxiliary technical assistance. The only evidence on which a conviction can be based is the recordings, in respect of which no objections were made.

Therefore, the defence had access to all the evidence from the secret surveillance, and the trial court allowed them to comment on the evidence adduced and they exercised that right.

The trial court rightly held that, given that the defence had been informed of the substance of the evidence adduced, they had no right to have the other material which did not concern the accused in the proceedings at issue disclosed. The trial court also rightly pointed to the provision of section 42(7) of the OSCOC Act, which provides that the material obtained by the use of secret surveillance shall be destroyed if, within the six-month time-limit, criminal proceedings have not been instituted against the persons under surveillance ...

Whether the State Attorney, when he was making his selection of the secret surveillance material [to be submitted to the court], excluded certain evidence in favour of the accused ... is of no relevance to the lawfulness of the proceedings at issue. Under the relevant provisions of the Code of Criminal Procedure the State Attorney adduces only relevant evidence concerning the substance of the charges, and therefore he is in a position to make a selection of the evidence.”

74. As regards the applicant’s complaint of the erroneous legal qualification of his position, the Supreme Court noted that the applicant’s position in the Fund had not been one of a “public official” but rather of a “responsible person” under Article 89 §§ 6 and 7 of the Criminal Code. However, in the Supreme Court’s view, this did not render the conviction unlawful. In this connection the Supreme Court explained:

“... [T]he omission at issue had no bearing on the legal qualification of the offence because the criminal offence under Articles 347 § 1 and 337 § 4 of the Criminal Code

can be committed by public officials and responsible persons when they take the actions for which the court found ... Matanović guilty ...”

75. On 20 April 2010 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) reiterating his arguments of entrapment, the unlawfulness of the secret surveillance orders, the lack of access to evidence and the erroneous legal qualification of his conviction. He relied, *inter alia*, on Articles 29 § 1, 31, 35 and 36 of the Constitution and Articles 6 §§ 1 and 3 (b) and 8 of the Convention. The applicant also complained that the statements of various public officials breached of his right to the presumption of innocence.

76. On 30 June 2011 the Constitutional Court, relying on the Court’s case-law in *Peša v. Croatia* (no. 40523/08, 8 April 2010) found a violation of the applicant’s right to the presumption of innocence but dismissed his other complaints, endorsing the findings and reasoning of the Supreme Court.

77. Meanwhile, on 19 September 2011, following a retrial in respect of the charges of bribery of the President of the Fund related to M.M.’s investment project in the Zadar region (see paragraph 70 above), the Zagreb County Court acquitted the applicant, and this judgment was confirmed by the Supreme Court on 18 January 2012.

E. Other relevant facts

78. On 1 June 2012 the applicant, represented by I.F., a lawyer, lodged an application for the reopening of the proceedings before the Zagreb County Court. He relied, in particular, on a document allegedly issued by the Ministry of the Interior (*Ministarstvo unutarnjih poslova Republike Hrvatske*) on 3 March 1993 indicating that J.K. had worked as a police officer in the period between 1974 and 1993. Together with the document in question the applicant submitted a written statement by A.P., a lawyer, indicating that the document had been “accidentally” left in her office by M.M. some time in May 2007. The applicant contended that this shed light on the actions of J.K., who had acted as an *agent provocateur* in his case.

79. On 24 January 2014 the Zagreb County Court dismissed the applicant’s application for the reopening of the proceedings on the grounds that, even if the document submitted by the applicant suggested that J.K. had worked as a police officer, there was no doubt that he had not been a police officer at the moment when he had acted as an informant in the applicant’s case. The Zagreb County Court also considered that there were no new relevant facts warranting the reopening of the proceedings.

80. The applicant appealed against the above decision to the Supreme Court on 13 February 2014; it appears that the proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution

81. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010 and 5/2014) read as follows:

Article 29

“In the determination of his or her rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.”

Article 31

“(1) No one shall be punished for an act which, before it was committed, was not defined as a criminal offence by a statute or international law ...”

Article 35

“Everyone has a right to respect for and legal protection of his private and family life, dignity, reputation and honour.”

Article 36

“Freedom and confidentiality of correspondence and all other forms of communication are guaranteed and inviolable.

Only the law may provide for restrictions necessary for the protection of national security or the conduct of criminal proceedings.”

2. Criminal Code

82. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 129/2000, 51/2001 and 105/2004) read as follows:

The meaning of the terms used in this code

Article 89

“... ”

(3) A public official, when referred to as the perpetrator of a criminal offence, is an official elected or nominated to a representative body, a civil servant or a person performing official duties in bodies of the state administration, local self-government and administration, a unit of local self-government, the judiciary, ... the Ombudsman’s Office ... the Office of the President of the Republic, or a body, an office or an expert agency of the Government of the Republic of Croatia and the Parliament, a judicial official, a judge of the Constitutional Court of the Republic of Croatia, the State

Attorney of the Republic of Croatia and his or her deputies, the ombudsman of the Republic of Croatia and his or her deputies ... or a notary public. ...

(7) A responsible person, as referred to in this Code, is a person who is entrusted with particular tasks from the field of activities of a legal entity, a government body, a body of local self-government and administration or a local self-government body.”

Abuse of power and authority

Article 337

“(1) A public official or responsible person who, in order to acquire for himself or herself or another any non-pecuniary gain, or who, in order to cause damage to another, uses his or her position of power, oversteps his or her authority or fails in his or her duties, shall be punished by a fine or imprisonment of up to three years.

...

(4) If considerable pecuniary gain is acquired as a result of the criminal offence referred to in paragraph 1 of this Article and the perpetrator acted with intent to acquire such gain, or if [the offence] resulted in large-scale damage, he or she shall be punished by a term of imprisonment of one to ten years.”

Accepting a bribe

Article 347

(1) A public official or responsible person who solicits or accepts a gift or some other gain for himself or for another natural person or legal entity, or who accepts a promise to be given a gift or some other gain in order to perform within the scope of his or her authority an official or other act which he or she should not perform, or to omit an official or other act which he or she should perform, shall be punished by a prison term of six months to five years.”

3. Code of Criminal Procedure

(a) The relevant provisions concerning the use of special investigative measures

83. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003), as applicable at the relevant time, concerning the use of special investigative measures in criminal proceedings in general and with regard to secret surveillance in particular are set out in the case of *Dragojević v. Croatia* (no. 68955/11, § 55, 15 January 2015).

84. Article 180 § 1(4) and (5) of the Code of Criminal Procedure provided for the use of undercover agents and informants and simulated purchase as special investigative measures. Paragraph 5 of the same Article further provided that the use of undercover agents and informants and simulated purchase should not lead to incitement to commit an offence. Acting contrary to this provision would render unlawful and lead to the

exclusion of evidence under Articles 9 and 182 § 6 of the Code of Criminal Procedure.

85. Under Article 181 § 2 of the Code of Criminal Procedure the use of special investigative measures was allowed with regard to the offences of abuse of power and authority, bribe-taking and offering bribes.

86. The Code of Criminal Procedure also provided in its Article 182 § 2 that the results of special investigative measures must be destroyed under the supervision of an investigating judge if the prosecutor dropped the charges against a defendant, or if the results were otherwise not relevant for the criminal proceedings.

(b) Other relevant provision

87. Articles 8 and 68 of the Code of Criminal Procedure provided:

Article 8

“(1) The court and other State bodies participating in the criminal proceedings shall examine and establish with equal care the facts against the accused and those in his or her favour ...”

Article 68

“Following the request of the competent prosecutor for the institution of criminal proceedings or after the investigating judge, before the adoption of the decision on the opening of an investigation, has taken certain investigative actions, the defence lawyer has the right to examine the case file and the obtained material which serves for the establishment of facts [in the proceedings].”

88. The relevant part of Article 155 of the Code of Criminal Procedure provided:

“(1) Anyone, in whose justified interest it is, can be allowed to inspect, transcribe or copy the relevant criminal case files.

...

(5) The accused has the right to inspect, transcribe and copy files and objects which serve for the establishment of facts in the proceedings.”

89. On 18 December 2008 a new Code of Criminal Procedure was enacted (Official Gazette, nos. 152/2008, with further amendments). Part of it came into force in July 2009 and it was fully applicable on 1 September 2011. However, it did not apply to criminal proceedings instituted under the 1997 Code of Criminal Procedure (see paragraphs 83-88 above), for which that Code remained applicable.

90. Article 338 of the 2008 Code of Criminal Procedure provides that the original recordings and the relevant documentation concerning the use of special investigative measures shall be kept by the State Attorney's Office. Upon a request of the State Attorney's Office, the investigating judge, with the assistance of an expert, shall examine and identify the part of the original recordings relevant for the case at issue. Upon the request of

a defendant, the investigating judge shall allow him or her to inspect the recordings or the documentation and the defendant then has the right to ask during the trial that certain parts of the recordings or documentation be examined.

4. Office for the Suppression of Corruption and Organised Crime Act

91. The Office for the Suppression of Corruption and Organised Crime Act (the “OSCOC Act”, Official Gazette nos. 88/2001, 12/2002, 33/2005, 48/2005 and 76/2007), as applicable at the relevant time, in its section 41 referred back to the relevant provisions of the Code of Criminal Procedure and provided for two additional special investigative measures: simulation of business services and simulation of business contracts. The OSCOC Act also provided for a somewhat different procedure for the supervision of execution of secret surveillance orders. In particular, the police were required to submit daily reports to the investigating judge concerning the course of the investigation.

92. Section 42(7) of the OSCOC Act provided that if within six months of the termination of the secret surveillance operation criminal proceedings had not been instituted against the individual under surveillance, all the material gathered must be destroyed.

B. Relevant practice

1. Relevant practice concerning the use of special investigative measures in criminal proceedings

93. The relevant practice concerning the use of special investigative measures in criminal proceedings in general and with regard to secret surveillance in particular is set out in the *Dragojević* case (cited above, §§ 57-60).

2. Relevant practice concerning the plea of entrapment

94. In its decision no. I Kž-529/04-3 of 24 June 2004 the Supreme Court explained the scope of the admissibility of evidence obtained by the use of undercover agents in the investigation of crime. The relevant part of the decision reads:

“... The results of the use of [special investigative] measures have evidentiary value only if that is expressly provided under the law, and even then, just like any other evidence, they must be compatible with the rules [on the admissibility of evidence set out in] Article 9 of the Code of Criminal Procedure.”

95. The Supreme Court’s case-law on entrapment, set out, for instance, in the judgment I Kž-429/03-7 of 2 September 2003, was further elaborated upon in a case concerning a repeated application of simulated purchase

operations (see judgment I Kž 37/02-7, 23 November 2005). The relevant part of the judgment reads:

“The first-instance court correctly found that the undercover agent, owing to the specificity of his assignment, had needed to gain the confidence of G.S., the accused, and for that he had needed some time. This is obvious from the fact that from the moment the use of special investigative measures commenced until their termination, the communications and meetings between ... G.S. and the undercover agent intensified.

Simulated purchase requires that an undercover agent first declare himself or herself a buyer of a particular type and quantity of drugs; it also requires an agreement on the price. This can never be understood as an incitement to an offence ...

Incitement, within the meaning of Article 180 § 5 of the Code of Criminal Procedure, would have occurred only if the undercover agent, before ... G.S. had made a decision to procure and sell the drugs together with other co-perpetrators of the offence, had repeatedly encouraged [the accused] to commit an offence (or bolstered such an initial decision [which the accused] had made), which was not the situation in the present case ...”

96. The relevant case-law of the Constitutional Court on pleas of entrapment (U-III-1393/2007, 2 June 2010) reads as follows:

“... [T]he Constitutional Court points out that the legitimate power and duty of the State, particularly in the early stages of the proceedings, is to use different investigative methods related to the nature of the particular criminal offence that is being investigated. This in particular concerns serious criminal offences which are difficult to detect such as the abuse of drugs, money laundering, illicit trafficking in arms or human beings, property crime, corruption, economic crime and other forms of organised crime. One such investigative method is the use of undercover agents under Article 180 § 1 of the Code of Criminal Procedure. The precondition for their use, the competency for their authorisation and supervision, as well as the duration [of their use], and the assessment of the results for the purpose of their use [in the proceedings] is set out in detail in that law ...

[In the case at issue] the evidence clearly shows, as the lower courts correctly established, that the statement of the undercover agent, according to which the appellant would be paid a certain sum of money for the delivered drugs, could not be considered – either objectively or subjectively – as incitement under Article 37 of the Criminal Code because [such an] *invitatio ad offerendum* was only a general, abstract expression of the readiness of the undercover agent to pay a certain sum of money for the delivered drugs, after which the appellant voluntarily continued communicating with him so as to draw personal benefit from the abstract readiness of the “buyer” [to buy the drugs].

The statement of the undercover agent in the case at issue was not therefore a *conditio sine qua non* for the appellant’s criminal activity, that is to say an action which otherwise he would not have undertaken. On the contrary, the first-instance court and the Supreme Court found that, even without [the undercover agent’s statement] he had been predisposed to commit the offence for which he had been convicted (‘... predisposed to commit offence ...’, the ECHR judgment of 9 April 1998 in the case of *Teixeira de Castro v. Portugal*, § 38). ...”

3. *Other relevant practice*

97. On 28 January 2009, in case no. U-III-5423/2008, the Constitutional Court examined a constitutional complaint by one of the applicant's co-accused, R.P., concerning the lack of impartiality of a Supreme Court judge who had previously participated in the proceedings at issue by taking certain actions as a judge of the Zagreb County Court. When finding a violation of the appellant's right to a fair trial in this respect, the Constitutional Court noted the following:

"6.2 ... In addition, [Z.K.] has examined a written application by the appellant's defence lawyer to allow her access to and to copy the [material] gathered by the use of special investigative measures in order for her to be able to prepare the defence. However, contrary to Article 68 of the Code of Criminal Procedure, which guarantees to a defence lawyer the right to have access to and [the possibility] to obtain the evidence immediately at the beginning of the criminal proceedings, he did not allow that application but rather [archived until further notice], that is to say, he adjourned his decision for a future undetermined moment in the proceedings ..."

III. RELEVANT INTERNATIONAL AND COMPARATIVE MATERIAL

98. The relevant international material on special investigative measures is set out in the case of *Ramanauskas v. Lithuania* [GC], no. 74420/01, §§ 35-37, ECHR 2008. See also *Dragojević*, cited above, §§ 62-66.

99. A comparative law study on the use of undercover agents in covert operations in the Council of Europe Member States is outlined in the case of *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, §§ 50-63, 2 October 2012).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. **The parties' submissions**

100. The Government submitted that the applicant had been under secret surveillance between 3 April and 16 June 2007, and that he had learned of this when the indictment had been lodged on 12 February 2008. Accordingly, in the Government's view, the six-month time-limit had started running from that time and there had been no reason for the applicant to wait for the outcome of the criminal proceedings. Furthermore, the Government argued that the applicant had failed to raise his Article 8 complaints in his appeal to the Supreme Court and his constitutional

complaint before the Constitutional Court, and had therefore failed to properly exhaust the domestic remedies. The Government pointed out that the document, purportedly showing that J.K. had worked as a police officer, which the applicant had submitted with his observations to the Court of 31 December 2013, was a forgery. They provided a letter of the Ministry of the Interior of 27 January 2014 indicating that the document in question had never been issued in respect of J.K. The Government therefore considered that the applicant's representative should be excluded from the proceedings under Rule 44D of the Rules of Court because she had provided falsified documents to the Court and had also provided certain confidential documents from other, unrelated, proceedings at the domestic level. Lastly, the Government considered that the applicant's complaints were premature since the application for the reopening of the proceedings was pending before the domestic courts.

101. The applicant pointed out that he had properly raised his Article 8 complaint before the competent domestic authorities, including the Constitutional Court, and had brought his complaints to the Court only after the Constitutional Court had dismissed his constitutional complaint. The applicant therefore considered that he had properly exhausted all domestic remedies and complied with the six-month time-limit. With regard to the Government's request for the exclusion of his representative from the proceedings owing to her reliance on an allegedly forged document, the applicant stressed that the document at issue, purportedly showing that J.K. had worked for the police, had also been submitted before the Zagreb County Court together with his application for the reopening of the proceedings. The Zagreb County Court had not found that the document had been forged. It had relied on it when establishing the relevant facts of the case but had then dismissed the application for the reopening on grounds unrelated to the alleged forgery of documents.

B. The Court's assessment

102. The Court notes at the outset that in the *Dragojević* case it has already examined and dismissed the same objection raised by the Government in the case at hand concerning the applicant's compliance with the six-month time-limit (see *Dragojević*, cited above, § 72). The Court sees no reason to depart from this case-law in the present case. It therefore dismisses the Government's objection.

103. The Court also notes, contrary to what the Government have asserted, that in his appeal before the Supreme Court (see paragraph 70 above) and his constitutional complaint before the Constitutional Court (see paragraph 75 above) the applicant complained that the secret surveillance of him had been contrary to the relevant domestic law (compare *Dragojević*, cited above, §§ 72-73). Moreover, in his

constitutional complaint the applicant explicitly relied on the relevant provisions of the Constitution and Article 8 of the Convention. In these circumstances, the Court finds that the applicant properly exhausted the domestic remedies. The Government's objection should therefore be dismissed.

104. With regard to the Government's submission concerning the alleged abusive conduct of the applicant's representative in submitting forged documents to the Court, the Court refers to its case-law concerning the concept of "abuse", within the meaning of Article 35 § 3 of the Convention, as recently set out in the *Gross* judgment (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014; see also *Petrović v. Serbia* (dec.), no. 56551/11 et al., 18 October 2011).

105. The Court notes that the document in question, purportedly showing that J.K. had previously worked as a police officer, was submitted to the Court by the applicant's representative Ms Bojić as an annex to her submission of 31 December 2013. The same document seems to originate from the office of another lawyer, A.P.; that document had been submitted by the applicant's legal representative at the domestic level, I.F., in support of an application for the reopening of the criminal proceedings before the Zagreb County Court (see paragraph 78 above). Indeed, as the applicant pointed out, the Zagreb County Court did not go into the question of the validity of the document at issue but, taking note of its substance, dismissed the applicant's application for the reopening of the proceedings on different grounds (see paragraph 79 above). The Government, however, subsequently obtained a letter of the Ministry of the Interior, dated 27 January 2014, indicating that the document at issue was a forgery.

106. In these circumstances, the Court notes that the true nature of the document at issue became known only through the Ministry of the Interior's letter of 27 January 2014 and that neither the applicant's lawyer at the domestic level nor the competent domestic courts had previously had any doubt as to the authenticity of the document in question. In these circumstances, the Court cannot establish that the applicant's representative before it, Ms Bojić, knowingly based the applicant's submission on untrue facts. Nor does it find that she made other misleading or inappropriate submissions before it. The Court therefore dismisses the Government's objection of abuse by the applicant's representative.

107. Lastly, with regard to the Government's submission that the applicant's complaints are premature because of the pending application for the reopening of the criminal proceedings, the Court refers to its well-established case-law according to which Article 35 does not normally require resort to extraordinary remedies, such as an application for retrial or other means of reopening judicial proceedings in a case (see, amongst many other authorities, *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009, and the cases cited therein). Accordingly, as such

extraordinary procedures are outside the normal chain of domestic remedies, the Court cannot find that the applicant's complaints are premature because of the pending proceedings for the reopening of the criminal proceedings. The Government's objection should therefore be rejected.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

108. The applicant complained that the domestic authorities' recourse to special investigative measures, in particular secret surveillance, had been in violation of the guarantees of Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private ... life, ... and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

109. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds (see paragraphs 102-103 and 106-107 above). It must therefore be declared admissible.

B. Merits

1. The parties' arguments

110. The applicant submitted, in particular, that the secret surveillance in respect of him had been unlawful because it had been based on the orders of the investigating judge issued contrary to the relevant domestic law and the requirements set out by the Constitutional Court. In particular, those orders of the investigating judge had contained no assessment of whether the investigation into that offence could have been conducted by other, less intrusive, means. There had therefore been no effective judicial control of measures interfering with the fundamental rights of an individual, as required under the relevant domestic law. The applicant further contended that the use of special investigative measures had been authorised under the Code of Criminal Procedure and not the OSCOC Act, which was a *lex specialis* concerning the charges against him.

111. The Government accepted that there had been an interference with the applicant's rights under Article 8 of the Convention. However, they considered that such interference had been lawful and justified. In particular, the secret surveillance orders had been based on Article 180 of the Code of Criminal Procedure and had been issued and supervised by an investigating judge pursuant to reasoned and substantiated requests from the State Attorney's Office. Moreover, such interference had pursued the legitimate aim of investigating and prosecuting corruption and had been proportionate to the circumstances and seriousness of the offence at issue. The Government also considered that there had been no reason to rely on the OSCOC Act when ordering and conducting special investigative measures as the additional covert measures envisaged under that Act had not been used and thus that Act had not been applicable.

2. *The Court's assessment*

112. The Court refers to the general principles concerning the use of measures of secret surveillance set out in the *Dragojević* judgment (see *Dragojević*, cited above, §§ 78-84, 86-89). It further notes, as it found in the *Dragojević* judgment, that by tapping the applicant's telephone and monitoring him there was an interference with his right to respect for both private life and correspondence, guaranteed under Article 8 of the Convention (*ibid.*, § 85).

113. The Court notes in the case at hand that, as in the *Dragojević* case, the investigating judge's orders on the use of secret surveillance measures referred to an application for the use of secret surveillance by the competent State Attorney's Office and indicated the statutory phrase that "the investigation [could] not be conducted by other means or that it would be extremely difficult [to do so]". They did not, however, provide relevant reasoning as to the particular circumstances of the case and in particular why the investigation could not be conducted by other, less intrusive, means (see paragraphs 12 and 13 above).

114. The Court found in the *Dragojević* case (cited above, §§ 90-101) that the lack of reasoning in the investigating judge's order, accompanied by the circumvention by the domestic courts of this lack of reasoning by retrospective justification of the use of secret surveillance, was not in compliance with the relevant domestic law and did not therefore secure in practice adequate safeguards against various possible abuses. The Court stressed in particular that the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone was not shown to have fully complied with the

requirements of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society".

115. The Court finds that the same considerations from the *Dragojević* case are applicable in the case at hand. It sees no reason to depart from that case-law in the present case.

116. This is sufficient for the Court to conclude that there has been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

117. The applicant contended that he had not had a fair trial. He complained of entrapment by an *agent provocateur* and the non-disclosure and use of evidence obtained by special investigative measures in the criminal proceedings against him. He relied on Article 6 §§ 1 and 3 (b) of the Convention, which, in so far as relevant, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence; ..."

A. Admissibility

118. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds (see paragraphs 102-103 and 106-107 above). They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 6 § 1 of the Convention concerning the applicant's plea of entrapment

(a) The parties' arguments

119. The applicant contended that an investigating judge had authorised the use of special investigative measures, including the use of informants, without a thorough assessment of whether the use of such measures was justified and necessary in the circumstances of the case. Moreover, in the applicant's view, there had not been sufficient safeguards against abuse by informants of their position in the domestic system at the relevant time.

The applicant further submitted that he had never engaged in any illegal activities. He had never requested a bribe and it had been J.K. who had entrapped him into the corrupt scheme. The applicant considered that it had been apparent from the recordings of his communication with J.K. that the latter had created the conditions for corruption and had then contacted him in order to incite him to participate in such activities. However, the domestic courts had not properly examined all the circumstances of his initial contacts with J.K. and the prosecution had failed to adequately refute his arguments of entrapment.

120. The Government argued that it had been clearly established by the domestic courts that the applicant had requested bribes for his promotion of M.M.'s investment project. He had indicated several phases through which the bribe should be paid for his services and that he was in full control over all the operational details of the offering and payment of bribes. In the Government's view, it was clear that the applicant had not been entrapped by the informant as it was he who had initiated the discussions concerning the bribe-taking. The Government further explained that the use of an informant as a special investigative measure in respect of the applicant had been authorised only after the relevant information had come to light indicating that the applicant had been engaged in illegal activities in the Fund, which had already been under investigation by the State Attorney's Office. The Government stressed that it was apparent from the recorded conversation between the applicant and the informant J.K. of 3 April 2007 that the applicant had explained the details of the corruption and that J.K. had remained essentially passive and had not incited him to engage in any illegal activity. The same was true for the other meetings between the applicant and J.K. at which the applicant had taken a bribe in the amount of EUR 50,000 in cash and a deposit of EUR 150,000, and had also requested a further percentage of the overall value of the investment project. In the Government's view, it was obvious that the informant J.K. had not instigated but merely participated in the applicant's corruption. The Government also considered all the circumstances concerning the use of informants had been under adequate judicial control, first by the investigating judge and afterwards by the Supreme Court and the Constitutional Court.

(b) The Court's assessment

(i) General principles

121. The general principles concerning the issue of entrapment are set out in the case of *Ramanauskas* (cited above, §§ 49-61).

122. In its extensive case-law on the subject the Court has developed criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in

criminal investigations. Whereas it is not possible to reduce the variety of situations which might occur in this context to a mere checklist of simplified criteria, the Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement. The relevant criteria determining the Court's examination in this context are set out in the case of *Bannikova v. Russia* (no. 18757/06, §§ 37-65, 4 November 2010). These criteria are summarised below.

- *Substantive test of incitement*

123. When examining the applicant's arguable plea of entrapment, the Court will attempt, as a first step, to establish on the basis of the available material whether the offence would have been committed without the authorities' intervention, that is to say whether the investigation was "essentially passive". In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation, in particular, whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed to commit a criminal offence (see *Furcht v. Germany*, no. 54648/09, § 51, 23 October 2014) and the conduct of the authorities carrying it out, specifically whether the authorities exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (*ibid.*, § 52; see also *Morari v. the Republic of Moldova*, no. 65311/09, § 32, 8 March 2016).

124. In this connection the Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It has considered judicial supervision as the most appropriate means in cases involving covert operations (see *Furcht*, cited above, § 53; see also *Bannikova*, cited above, §§ 37-50, with further references). Moreover, the execution of the simulated purchases performed by an undercover officer or informant must be particularly well justified, be subject to a stringent authorisation procedure, and be documented in a way that allows a subsequent independent scrutiny of the actors' conduct (see *Veselov and Others*, cited above, § 102). Indeed, a lack of procedural safeguards in the ordering of an undercover operation generates a risk of arbitrariness and police entrapment (see *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 64, 30 October 2014).

- *Procedural test of incitement*

125. As a second step, the Court will examine the way the domestic courts dealt with the applicant's plea of incitement, which is the procedural part of its examination of the *agent provocateur* complaint (see *Bannikova*, cited above, §§ 51-65, with further references).

126. As the starting point, the Court must be satisfied with the domestic courts' capacity to deal with such a complaint in a manner compatible with the right to a fair hearing. It should therefore verify whether an arguable complaint of incitement constitutes a substantive defence under domestic law, or gives grounds for the exclusion of evidence, or leads to similar consequences. Although the Court will generally leave it to the domestic authorities to decide what procedure must be followed by the judiciary when faced with a plea of incitement, it requires such a procedure to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment.

127. In particular, the questions to be addressed by the judicial authority deciding on an entrapment plea were set out in *Ramanauskas* (cited above, § 71):

“The Court observes that throughout the proceedings the applicant maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination ... of whether or not [the prosecuting authorities] had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. ... The applicant should have had the opportunity to state his case on each of these points.”

128. In this connection, the Court has also found that a guilty plea as regards criminal charges does not dispense the trial court from the duty to examine allegations of incitement (*ibid.*, § 72).

129. Moreover, the principles of adversarial proceedings and equality of arms are indispensable in the determination of an *agent provocateur* claim, as well as the procedural guarantees related to the disclosure of evidence and questioning of the undercover agents and other witnesses who could testify on the issue of incitement (see *Bannikova*, cited above, §§ 58-65).

130. In this connection, the Court also reiterates that it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (*ibid.*, § 48).

- *Methodology of the Court's assessment*

131. It follows from the Court's case-law that a preliminary consideration in its assessment of a complaint of incitement relates to the existence of an arguable complaint that an applicant was subjected to incitement by the State authorities. In this connection, in order to proceed with further assessment, the Court must satisfy itself that the situation under examination falls *prima facie* within the category of “entrapment cases” (see, for cases where this criterion was not met, *Trifontsov v. Russia* (dec.),

no. 12025/02, §§ 32-35, 9 October 2012, and *Lyubchenko v. Ukraine* (dec.), no. 34640/05, §§ 33-34, 31 May 2016).

132. If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement (see paragraphs 123-124 above).

133. Where, under the substantive test of incitement, on the basis of the available information the Court could find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that will normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings against the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention (see, for instance, *Scholer v. Germany*, no. 14212/10, § 90, 18 December 2014, and *Rymanov v. Russia* (dec.), no. 18471/03, 13 December 2016).

134. However, if the Court's findings under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the parties' interpretations of events (see *Bannikova*, cited above, §§ 52 and 67; see also *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, § 46, ECHR 2004-X, and *V. v. Finland*, no. 40412/98, § 80, 24 April 2007) or if the Court finds, on the basis of the substantive test, that an applicant was subjected to incitement, contrary to Article 6 § 1 of the Convention, it will be necessary for the Court to proceed, as a second step, with the procedural test of incitement.

135. The Court applies this test in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention (see *Ramanauskas*, cited above, § 70; *Furcht*, cited above, § 53, and *Ciprian Vlăduț and Ioan Florin Pop v. Romania*, nos. 43490/07 and 44304/07, § 88, 16 July 2015; see also *Bannikova*, cited above, §§ 53-57, concerning the relevant inferences to be drawn from a successful plea of incitement). The proceedings against an applicant would be deprived of the fairness required by Article 6 of the Convention if the actions of the State authorities had the effect of inciting the applicant to commit the offence for which he or she was convicted and the domestic courts did not address appropriately the allegations of incitement (see *Ramanauskas*, cited above, § 73; *Constantin and Stoian v. Romania*, nos. 23782/06 and 46629/06, § 64, 29 September 2009; and *Sepil v. Turkey*, no. 17711/07, § 36, 12 November 2013).

(ii) *Application of these principles to the present case*

136. The Court notes that it is clear from the documents before it that the applicant, acting in his capacity as vice-president of the Fund, was involved in the corruption related to M.M.'s investment project in which he accepted a bribe in the amount of EUR 50,000 and afterwards a deposited bribe in the amount of EUR 150,000, and also negotiated a percentage of the overall value of the investment project. The disagreement between the parties relates to whether that was a result of the informant J.K.'s exerting influence on the applicant and inciting him to take bribes or whether J.K., backed by the prosecuting authorities, merely joined the applicant's corrupt transactions.

137. In view of the above circumstances, the Court finds that the case at issue falls within the category of "entrapment cases". Accordingly, the principal issue to be examined by the Court is whether the actions of the prosecuting authorities remained within the bounds of undercover work rather than inciting the applicant to an illegal activity (see paragraph 123 above). In other words, the Court must examine whether or not the prosecuting authorities confined themselves to "investigating criminal activity in an essentially passive manner" in the present case (see *Ramanauskas*, cited above, §§ 66-67; and *Miliniene v. Lithuania*, no. 74355/01, § 37, 24 June 2008). In answering this question the Court has regard to the following considerations.

138. The Court firstly notes that although there was no clear evidence that the applicant had committed any offences beforehand, in particular corruption-related offences, an investigation carried out by the prosecuting authorities into alleged corruption in the Fund suggested that the applicant might have been involved in illegal activities (see paragraphs 7-9 above). The first concrete allegations of the applicant's corruption were made by J.K., who on 3 April 2007 contacted the State Attorney's Office; the same day he was granted informant status concerning the matter (see paragraphs 10-12 above).

139. The Court notes that J.K. was a private individual who acted as the representative of an investment project in the Zadar region and who in that capacity contacted the applicant as an official of the Fund. In this connection it should be also noted that the applicant's allegations that J.K. had previously worked as a police agent were based on far-fetched and fabricated evidence (see paragraphs 105-106 above). In fact, there is nothing suggesting that at his initial contact with the applicant J.K. was acting as an agent of the State or that he was acting for the prosecuting authorities on their instructions or otherwise under their control. The prosecuting authorities only instructed J.K. to act as an informant after he had reported the applicant's corrupt offers. The Court sees nothing inadequate or arbitrary in that decision (see *Gorgievski v. the former Yugoslav Republic of Macedonia*, no. 18002/02, § 52, 16 July 2009).

140. In this connection the Court also cannot accept the applicant's argument that there were not sufficient safeguards against abuse by informants in the domestic system at the relevant time. The Code of Criminal Procedure provided the relevant procedural and substantive requirements for recourse to informants in the investigation of crime and explicitly prohibited incitement. It also mandated judicial assessment of an arguable plea of entrapment and sanctioned the incitement by the exclusion of evidence so obtained from the proceedings (see paragraph 84 above), which the Court has already accepted as an appropriate remedy with regard to a successful plea of incitement (see *Bannikova*, cited above, § 56).

141. The Court further notes that the first meeting between the applicant and J.K. at which J.K. acted with the support of the prosecuting authorities occurred on 3 April 2007. On that occasion, J.K. had been authorised to engage in the corrupt scheme and he had been given technical equipment to record their conversations (see paragraphs 11 and 12 above).

142. The Court observes, as it follows from the judgment of the Zagreb County Court of 15 May 2009, that the recording of this conversation between the applicant and J.K. demonstrates that the applicant was in full control of the corruption related to the investment project at issue. It was he who explained to J.K. the modalities of the illegal activity, including the payments that should be carried out for the realisation of the project. He also insisted that those payments would not represent a significant financial burden for the investor and he explained the reasons why it was justified to ask for a percentage of the investment (see paragraph 68 above).

143. It is clear that the applicant instructed J.K. on how to proceed with the matter and insisted on the justification of his request for a bribe. Moreover, there is nothing suggesting that this discussion was the result of J.K. having previously incited the applicant to take bribes. Indeed, the applicant did not take any steps to inform the authorities that J.K. had attempted to offer him a bribe before the critical meeting of 3 April 2007 took place (compare *Gorgievski*, cited above, § 53).

144. In these circumstances, the Court does not find anything abusive in the prosecuting authorities' mounting and conduct of the informant operation, particularly given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of corruption on the rule of law in a democratic society. Nor does the Court find that the prosecuting authorities' role was the determining factor. The determining factor was the conduct of the applicant in his contact with J.K. The Court therefore accepts that, on balance, the prosecuting authorities may be said to have "joined" the criminal activity rather than to have initiated it. Their actions thus remained within the bounds of undercover work rather than that of *agents provocateurs* in possible breach of Article 6 § 1 of the Convention (compare *Milinién*, cited above, § 38).

145. In view of the foregoing, the Court finds that the available material allows it to establish, with a sufficient degree of certainty, that the prosecuting authorities investigated the applicant's activities in an essentially passive manner and did not incite him to commit offences he would not have otherwise committed. The undercover measure thus did not amount to incitement, as defined in the Court's case-law relating to Article 6 § 1 of the Convention. The subsequent use, in the criminal proceedings against the applicant, of the evidence obtained by the undercover measure therefore does not raise an issue under Article 6 § 1.

146. This is sufficient for the Court to conclude that there has been no violation of Article 6 § 1 of the Convention concerning the applicant's plea of entrapment.

2. Alleged violation of Article 6 § 1 of the Convention concerning the non-disclosure and use of evidence obtained by special investigative measures

(a) The parties' arguments

147. The applicant contended that he had several times asked for access to and copies of the recordings related to the special investigative measures but his applications had been denied by the domestic courts. Moreover, the other defence lawyers had also made multiple unsuccessful attempts to access the relevant recordings. In the applicant's view, this had been contrary to the Constitutional Court's findings concerning the defence rights flowing from Article 68 of the Code of Criminal Procedure (see paragraph 97 above). The applicant stressed that any justification of the denial of his right to access the recordings by the necessity to protect the rights of others had been vague and unclear. In fact, the domestic authorities had allowed the recordings of his conversation with J.K. to leak into the public and those recordings could still be found today on the Internet. Moreover, the applicant contended that it had been impossible for him to know the substance of the undisclosed recordings, which might have also contained evidence in favour of the defence. In his view, the proceedings as a whole had fallen short of the requirements of a fair trial.

148. The Government argued that following the submission of the indictment against him, the applicant had had access to the case file concerning the use of special investigative measures, which contained the relevant reports on the use of special investigative measures. He had therefore had sufficient time to prepare his defence given that the first hearing had been held nine months later. The Government further argued that all the evidence on which the applicant's conviction had been based had been accessible to the defence. The recordings which had been examined at trial had been transcribed by an expert and the transcripts had been made available to the defence. On the other hand, in the Government's view, there

had been no reason to allow the defence to have access to the secret surveillance recordings of individuals who had not been accused in the proceedings. Moreover, it had not been possible to allow the defence access to or copies of such recordings as that could have endangered the rights of third parties. All this had been examined and adequately explained to the defence by the competent domestic courts. In these circumstances, the Government considered that the criminal proceedings against the applicant, taken as a whole, had been fair.

(b) The Court's assessment

(i) General principles

149. The Court observes that the guarantees set out in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in general in paragraph 1. For this reason, it finds it unnecessary to examine the applicant's allegations separately from the standpoint of paragraph 3 (b), since they amount to a complaint that he did not receive a fair trial. The Court will therefore confine its examination to the question of whether the proceedings in their entirety were fair (see *Leas v. Estonia*, no. 59577/08, § 76, 6 March 2012, with further references; see also *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015, and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 250, 13 September 2016).

150. In particular, in the context of the use of evidence obtained by special investigative measures, regard must be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, amongst many other authorities, *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009; *Beraru v. Romania*, no. 40107/04, § 75, 18 March 2014; *Dragojević*, cited above, § 129; and *Nițulescu v. Romania*, no. 16184/06, § 46, 22 September 2015).

151. Furthermore, the Court reiterates that a fundamental aspect of the right to a fair trial is that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and

comment on the observations filed and the evidence adduced by the other party (see *Brandstetter v. Austria*, 28 August 1991, §§ 66-67, Series A no. 211). In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see *Natunen v. Finland*, no. 21022/04, § 39, 31 March 2009, and *Leas*, cited above, § 77).

152. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, *Reports* 1997-III). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Natunen*, cited above, § 40, and *Leas*, cited above, § 78).

153. Indeed, in many cases where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the relevant interest involved against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (see *Leas*, cited above, with further references).

154. The Court must in particular examine whether the non-disclosure was counterbalanced by adequate procedural guarantees. For instance, in *Jasper v. the United Kingdom* ([GC], no. 27052/95, §§ 53 et seq., 16 February 2000) the Court noted that the defence had been kept informed and had been permitted to make submissions and participate in the decision-making process as far as possible and that it had been the trial judge who had decided on the question of disclosure of evidence, even though the defence had not had access to it. The Court noted that the judge had been aware of both the contents of the withheld evidence and the nature of the applicant's case, and had thus been able to weigh the applicant's interest in disclosure against the public interest in concealment (see, by contrast, *Edwards and Lewis*, cited above, § 46).

155. In making its assessment of the relevant procedural guarantees, the Court must also have regard to the importance of the undisclosed material

and its use in the trial (see *Jasper*, cited above, §§ 54-55). It must in particular satisfy itself that the domestic procedure allowed that the impact of the relevant material on the safety of the conviction be considered in the light of detailed and informed argument from the defence (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 66, ECHR 2000-II).

156. The Court further reiterates that Article 6, more specifically Article 6 § 3 (b), guarantees the accused “adequate time and facilities for the preparation of his defence” and therefore implies that the substantive defence activity on his or her behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings. Furthermore, the facilities which should be enjoyed by everyone charged with a criminal offence include the opportunity to acquaint him- or herself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (see *Leas*, cited above, § 80, with further references).

157. Failure to disclose to the defence material evidence which contains such particulars as could enable the accused to exonerate him- or herself or have his or her sentence reduced would constitute a refusal of the facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 of the Convention (see *C.G.P. v. the Netherlands* (dec.), no. 29835/96, 15 January 1997). The accused may, however, be expected to give specific reasons for his request (see *Bendenoun v. France*, 24 February 1994, § 52, Series A no. 284) and the domestic courts are entitled to examine the validity of these reasons (see *C.G.P.*, cited above; *Natunen*, cited above, § 43, *Janatuinen v. Finland*, no. 28552/05, § 45, 8 December 2009; and *Leas*, cited above, § 81).

158. In any case, however, in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect, a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6 § 1 (see *Natunen*, cited above, §§ 47-49).

159. Lastly, the Court reiterates that the right to a fair trial also implies the right of access to the case file. The Court has already found that unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed, in the Court’s assessment, in favour of the finding that the principle of equality of arms had been breached (see *Beraru*, cited

above, § 70). In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice. The respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (see *Öcalan v. Turkey* [GC], no. 46221/99, § 140, ECHR 2005-IV).

(ii) *Application of these principles to the present case*

160. The Court notes in the case at hand that the applicant's complaints concerning the unfairness of the proceedings relate to his impaired access to three main categories of evidence obtained by the use of secret surveillance measures (see paragraph 11 above). The first category of evidence concerns the surveillance recordings which were submitted into evidence by the prosecution and were relied upon for the applicant's conviction. This in particular concerns eighteen CD and twenty-three DVD recordings. The second category of evidence concerns 194 CD and four DVD recordings of the secret surveillance of the applicant and the other accused, which were included in the case file but not relied upon for the applicant's conviction (the remainder of in total 212 CD and twenty-seven DVD recordings). The third category of evidence is made up of ninety-eight CD recordings, obtained through secret surveillance in the context of the same case but concerning other individuals who were not eventually accused in the proceedings. These recordings were not relied upon for the applicant's conviction nor were they included in the case file or disclosed to the defence (see paragraph 73 above).

161. The Court notes that an issue with regard to access to evidence may arise under Article 6 in so far as the evidence at issue is relevant for the applicant's case, specifically if it had an important bearing on the charges held against the applicant (see *Rowe and Davis*, cited above, § 66; *Korellis v. Cyprus*, no. 54528/00, §§ 33-35, 7 January 2003; and *Mirilashvili*, cited above, § 199). This is the case if the evidence was used and relied upon for the determination of the applicant's guilt or it contained such particulars which could have enabled the applicant to exonerate her- or himself or have his or her sentence reduced with regard to the charges held against him or her (see *Leas*, cited above, § 81, and cases cited therein). It should be also noted that the relevant evidence in this context is not only evidence directly relevant to the facts of the case but also other evidence that might relate to the admissibility, reliability and completeness of the former (see *Mirilashvili*, cited above, § 200).

162. The Court has already found above with regard to the applicant's plea of entrapment that the available material in the case file shows, with a sufficient degree of certainty, that the applicant was not entrapped by an *agent provocateur* (see paragraph 146 above). However, the Court notes

that the applicant was indicted and eventually convicted on several counts of corruption and not only those related to M.M.'s investment project in the Zadar region (see paragraphs 29 and 64 above). Accordingly, without calling into question its finding concerning the applicant's plea of entrapment, the Court considers it necessary to examine whether an issue arises with regard to the applicant's access to evidence, which was relevant for his case within the meaning of the Court's case-law (see paragraph 161 above).

163. With regard to the first category of evidence, namely the eighteen CD and twenty-three DVD recordings which were relied upon for the applicant's conviction, the Court notes that the applicant does not deny that he had access to the transcripts of those recordings but contends that, despite repeated attempts, the defence was denied the possibility of obtaining copies of the recordings.

164. In this connection the Court notes that the transcripts of the recordings which were served on the defence had been commissioned by the investigating judge and the trial court and prepared by an expert (see paragraph 23 above) whose independence and impartiality were never called into question. Moreover, the Court notes that the recordings were played back at the trial and the applicant was given an ample opportunity to compare the transcripts against the played material (compare *Klimentyev v. Russia*, no. 46503/99, § 108, 16 November 2006). Indeed, his objections concerning the discrepancies between the transcripts and the audio recordings were duly attended to and further expert reports were commissioned in order to clarify those discrepancies (see paragraph 50 above). He also availed himself of the opportunity to question the validity of the evidence at issue, and the domestic courts gave thorough answers to his objections (see *Niculescu*, cited above, § 124).

165. In this regard the Court notes that it cannot be said to be a requirement of Article 6 of the Convention for the accused to have access to copies of secret surveillance recordings. This is in principle a question within the discretion of the domestic authorities. What is important for the Court to consider is whether the accused was given an adequate opportunity to prepare the defence, as required under Article 6 of the Convention. Accordingly, an issue would normally arise under Article 6 when the accused could not effectively obtain either the transcripts or a copy of the recordings of the tapped phone calls used as evidence in the proceedings (see *Beraru*, cited above, §§ 71, 73 and 81).

166. It is true that, according to the Supreme Court, under the relevant domestic law transcripts were not evidence in the proceedings but only an instrument of ancillary technical assistance to the parties and that the only evidence in the proceedings on which the relevant facts can be established for a conviction was the secret surveillance recordings (see paragraph 73 above). However, there is nothing suggesting that the production of the

transcript of the recordings by an independent and impartial expert and the playing back of the recordings at the trial could not have been a counterbalance to the impossibility for the defence to obtain the copies of the recordings (see, for instance, *Mirea v. Romania*, no. 19314/07, § 47, 6 October 2015).

167. In this connection the Court considers it also important to note that the applicant never contested that the recorded conversations indeed took place and he never challenged the authenticity of the recordings. Moreover, as already noted above, all doubts of the defence as to the alleged discrepancies between the transcripts and the audio recordings were duly attended to and eliminated by further assessment of the relevant evidence at the trial (see paragraph 164 above).

168. Furthermore, it is important to note that the transcripts on which the prosecutor relied at the trial were made available to the defence at the moment of the lodging of the indictment (see paragraph 30 above). Additional transcripts were ordered by the trial court after taking into account the parties' arguments and they were made available to the defence in due time upon their production (see paragraphs 39, 48 52 and 57 above). There is therefore nothing allowing the Court to conclude that the applicant was prevented from adequately preparing his defence with regard to the evidence adduced.

169. In the light of these considerations, the Court does not find any unfairness in the proceedings in connection with the fact that the applicant was not provided with copies of the secret surveillance recordings which were relied upon for his conviction.

170. With regard to the applicant's complaint of a lack of access to the other two categories of recordings – those which were not relied upon for his conviction and concern either him and his co-accused or those which concern other individuals who were not eventually accused in the proceedings (see paragraph 160 above) – the Court reiterates that an issue of access to such evidence arises only to the extent that it was relevant for the applicant's case, specifically that it contained such particulars which could have enabled the applicant to exonerate himself or have his sentence reduced or might have related to the admissibility, reliability and completeness of the directly relevant evidence (see paragraph 161 above).

171. The relevance of evidence falling within one of these two categories is primarily a matter for the domestic authorities to determine. According to the Court's case-law, the accused may be expected to give specific reasons for his or her request to have such material disclosed and the domestic authorities are entitled to examine the validity of these reasons (see the summary of general principles in paragraph 157 above). Moreover, in making its assessment under Article 6 of the Convention the Court must take into account the special features of the proceedings involved (see *Vacher v. France*, 17 December 1996, § 24, *Reports* 1996-VI).

172. In the case at issue, the second category of the secret surveillance recordings, namely 194 CD and four DVD recordings of the secret surveillance of the applicant and the other accused, was included in the case file, but the applicant complained that his access to those recordings had been impaired. On the other hand, the third category of the recordings, made up of ninety-eight CD recordings, obtained through secret surveillance in the context of the same case, concerned other individuals who were not eventually accused in the proceedings and these were not disclosed to the defence (see paragraph 160 above).

173. In these circumstances, an issue of the applicant's effective access to the case file arises with regard to the second category of evidence, while an issue of disclosure arises with regard to the third category of evidence. The Court will therefore, in the light of the above considerations concerning the relevance of the evidence for the case (see paragraphs 160-162 above), examine the applicant's complaints with regard to the two categories of evidence separately.

174. With regard to the second category of evidence, namely 194 CD and four DVD recordings of the secret surveillance of the applicant and the other accused, the Court notes the following.

175. In respect of this category of evidence, as explained by the Zagreb County Court, the applicant had access to the reports on his conversations with third parties prepared in the course of the use of secret surveillance measures (see paragraph 66 above). The Court notes that it appears from the material before it that these reports were sufficiently detailed so as to allow the applicant to form specific arguments as to the possible relevance of the particular parts of the recordings for his case. This is particularly true in view of the fact that he was best placed to assess their relevance to his case.

176. This accordingly allowed the applicant to ask the trial court to admit into evidence and examine those parts of the recordings in evidence. In view of the fact that the trial court attended to all the applicant's reasoned objections concerning the accuracy of the transcripts and recordings used as evidence in the proceedings (see paragraph 164 above), the Court sees no reason to hold that such an application would have been ignored or arbitrarily denied.

177. However, due to the applicant's failure to make any such specific argument concerning the possible relevance of the evidence at issue at any point during the domestic proceedings (see paragraph 158 above), the Court is not able to conclude that the alleged impossibility for the applicant to access to the recordings belonging to the second category of evidence is of itself sufficient to find a breach of his right to a fair trial. Nevertheless, in its assessment of the overall fairness of the proceedings, the Court will remain mindful of this restriction for the applicant's defence rights.

178. With regard to the third category of evidence, namely the ninety-eight CD recordings concerning other individuals who were not eventually accused in the proceedings, the Court notes that they were obtained through secret surveillance in the context of a larger investigation conducted in the same case. However, as opposed to the second category of evidence, the Zagreb County Court denied access to any information on these recordings to the defence on the grounds that, in view of the fact that they touched upon the private lives of others, no such right of access existed and those recordings should be destroyed under the relevant domestic law (see paragraph 66 above).

179. At the same time, no procedure was put in place which would allow the competent court to assess, upon the applicant's application (see paragraphs 42 and 44 above), their relevance to the case, specifically whether they contained such particulars which could enable the applicant to exonerate himself or to have his sentence reduced or whether they bore relevance to the admissibility, reliability and completeness of the evidence adduced during the proceedings (see paragraph 161 above). It cannot be therefore held against the applicant that he did not make a specific application to access to that particular part of the recordings. Indeed, the applicant's application for access to the recordings was not denied because he had failed to substantiate it or because he had failed to provide acceptable reasons for his application. Instead, his application was dismissed on the grounds that he had no right of access to those recordings as they were considered at the outset not to be relevant for his case and should be destroyed (compare *Natunen*, cited above, § 46).

180. The Court also observes that the Zagreb County Court made an additional argument for the refusal of access to the recordings by relying on the need to protect the privacy of individuals whose telephone conversations had been recorded. In this connection the Court notes that the necessity of achieving a balance between an individual's Article 8 rights and a defendant's defence rights may be a relevant consideration in a particular case (see paragraph 152 above; see also *Y. v. Slovenia*, no. 41107/10, § 115, ECHR 2015 (extracts)). However, in the case at issue the Zagreb County Court made no specific balancing exercise between an individual's Article 8 rights and the applicant's application for disclosure of evidence which would have allowed the applicant to present his counterarguments to any such considerations.

181. It should be also noted that the Supreme Court, when dismissing the applicant's appeal against the decision of the Zagreb County Court refusing to disclose evidence to the defence, made no reference to the need to protect the privacy of others. Instead, as already noted above, it dismissed the applicant's application for access to the recordings at issue on the grounds that he had no right of access to those recordings. The Supreme Court thereby held that it was of no relevance whether the State Attorney,

when making his selection of the secret surveillance material to be submitted to the court, excluded certain evidence in favour of the accused since the State Attorney had been in a position to make a selection of the evidence to be used in the proceeding (see paragraph 73 above).

182. The Court notes, however, that such a position of the Supreme Court is at variance with the Court's case-law according to which in systems where the prosecuting authorities are obliged by law to take into consideration both the facts for and against the suspect – which is the case in Croatian law (see paragraph 87 above) – a procedure whereby the prosecuting authorities themselves attempt to assess what may or may not be relevant to the case, without any further procedural safeguards for the rights of the defence, cannot comply with the requirements of Article 6 § 1 (see paragraph 158 above).

183. In view of the above considerations, the Court finds that the present case is different from other cases where the Court was satisfied that the defence had been kept informed and had been permitted to make submissions and participate in the decision-making process as far as possible and noted that the need for disclosure had been at all times under the assessment of the competent court, providing a further, important, safeguard (see paragraph 154 above). In the case at issue, the decision regarding the undisclosed evidence was made by the prosecuting authorities without providing the defence with the opportunity to participate in the decision-making process (compare *Natunen*, cited above, § 48). It would appear that the contested measure stemmed from the position of the Supreme Court which was, as already observed above, at variance with the relevant Convention standards (see paragraph 181 above).

184. Accordingly, the Court finds that the applicant's opportunity to acquaint himself, for the purposes of preparing his defence, with the evidence obtained by secret surveillance, was seriously impaired by the absence of an appropriate procedure by which the relevance of evidence obtained by the prosecuting authorities and the necessity of its disclosure could be properly assessed. It also finds that the domestic courts failed to provide convincing reasons based on a balancing of the relevant interests that would justify the restriction on the applicant's defence rights.

185. In this connection the Court notes that the relevant domestic law was in the meantime amended, providing for a procedure in which the relevant arguments concerning the disclosure of evidence in the possession of the prosecution could be assessed and disclosure could be ordered by the competent investigating judge. However, these amendments were not applicable in the applicant's case (see paragraphs 89 and 90 above; and compare *Natunen*, cited above, § 49).

186. It is therefore evident that, in view of the deficient procedure for the disclosure of the evidence under consideration, the applicant was not in a position to form a specific argument as to the relevance of the evidence in

question and to have the competent court examine his application in the light of his right to effectively prepare his defence. Although, as already found above, the available material in the case file shows, with a sufficient degree of certainty, that the applicant was not incited to commit the offences at issue (see paragraph 146 above), the fact remains that he was prevented from having a procedure whereby it could be established whether the evidence in the possession of the prosecution that had been excluded from the file might have reduced his sentence or put into doubt the scope of his alleged criminal activity.

187. In view of the above considerations concerning the restrictions on the applicant's defence rights and the deficient procedure for the disclosure of evidence (see paragraphs 177 and 186 above), the Court finds that the proceedings against the applicant, taken as a whole, fell short of the requirements of a fair trial.

188. There has therefore been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

189. The applicant further complained that the domestic courts' interpretation of the relevant provisions of the Criminal Code had run counter to the requirements of Article 7 of the Convention, which, in so far as relevant, reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

190. The applicant contended that it had been obvious from the very beginning of the proceedings that he had not had the status of a "public official" under Article 89 § 3 of the Criminal Code. However, in its indictment, the State Attorney's Office had insisted on his status as a public official and the Zagreb County Court had proceeded with the case under that assumption. The applicant further considered that he had not had an effective opportunity to examine the charges against him concerning his status as a "responsible person" under Article 89 § 7 of the Criminal Code. He also argued that the actions he had been charged with performing had not been actions he had not been entitled to perform, as argued by the prosecution and as accepted by the domestic courts.

191. The Government stressed that although it was true that the applicant had been sentenced as a public official by the first-instance court, the Supreme Court had rectified this error finding that the applicant had in fact acted as a responsible person in a legal entity, which had also been covered under the legal description of the offences at issue. The Government also pointed out that the Supreme Court had examined and

explained in great detail all the actions for which it had found the applicant guilty, which had been fully in compliance with the relevant provisions of the Criminal Code.

192. The Court notes at the outset that the applicant was convicted at first instance of the offences of bribe-taking (Article 347 § 1 of the Criminal Code), offering bribes (Article 348 § 1 of the Criminal Code) and abuse of power and authority (Article 337 §§ 1, 3 and 4 of the Criminal Code). In particular, the Zagreb County Court found that he had committed these offences acting in his capacity as a public official, as defined under Article 89 § 3 of the Criminal Code, while carrying out activities related to M.M.'s investment project in the Zadar region, the privatisation of the hotels Ž. and P. and the privatisation of the company B. (see paragraph 64 above).

193. Following the applicant's appeal, where he alleged the erroneous legal qualification of his position, the Supreme Court found that the applicant's position in the Fund had not been that of a "public official" but that of a "responsible person" under Article 89 §§ 6 and 7 of the Criminal Code. The Supreme Court therefore reclassified the applicant's conviction to that effect and, on the facts of the case, found him guilty of the charges of bribe-taking under Article 347 § 1 of the Criminal Code and abuse of power and authority under Article 337 § 4 of the Criminal Code (see paragraph 70 above). The Supreme Court held that the error of the first-instance court concerning the applicant's position had not rendered his conviction unlawful as the positions of both a public official and a responsible person had been covered under the relevant provisions of the Criminal Code (see paragraph 74 above).

194. The Court notes that there is no dispute between the parties that Article 347 § 1 of the Criminal Code and Article 337 § 4 of the Criminal Code, under which the applicant was convicted, equally proscribe actions taken by a public official and a responsible person in carrying out corruption. Moreover, the two provisions of the Criminal Code provide for the same sanctions irrespective of whether the corrupt acts were carried out by an individual acting in his or her capacity as a public official or responsible person, as defined under Article 89 of the Criminal Code (see paragraph 82 above). The Court notes that the accessibility of these provisions does not raise any problems in the instant case and the applicant did not complain that they lacked clarity or that their application had been unforeseeable to him.

195. The Court further notes that the applicant's position in carrying out the impugned corruption was a matter of dispute between the defence and the prosecution from the very outset of the proceedings (see paragraph 31 above) and that this dispute was finally settled by the judgment of the Supreme Court. The Court also notes that the applicant had every opportunity to raise all his arguments concerning the legal qualification of his position and the circumstances of the impugned corruption, and that

those arguments were duly examined by the Supreme Court when finding him guilty under Articles 347 § 1 and 337 § 4 of the Criminal Code (see paragraphs 70 and 74 above).

196. In these circumstances, the Court sees no reason to doubt the findings of the Supreme Court concerning the applicant's conviction under the relevant provisions of the Criminal Code. Nor does it find that the erroneous legal qualification of the applicant's conviction at first instance, rectified by the Supreme Court's judgment following the applicant's appeal, in itself ran counter to the requirements of Article 7 of the Convention.

197. The Court therefore finds that the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

198. Lastly, the applicant complained of the lack of impartiality of the trial court and the refusal of the trial court to hear evidence from certain witnesses for the defence. He also contended that the Constitutional Court's finding of a violation of his right to the presumption of innocence, accompanied by a possibility to obtain damages in civil proceedings, had not sufficed to satisfy the requirement of an effective domestic remedy. He relied on Article 6 §§ 1 and 2 and Article 13 of the Convention.

199. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded, and must be rejected pursuant to Article 35 § 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

200. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

201. The applicant claimed EUR 126,400 in respect of pecuniary damage, related to the loss of earnings due to his imprisonment, and EUR 90,000 in respect of non-pecuniary damage.

202. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

203. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. With regard to the claim for non-pecuniary damage, the Court notes that the finding of a breach of the applicant's right to a fair trial in the present case does not imply that the applicant was wrongly convicted (compare *Dvorski v. Croatia* [GC], no. 25703/11, § 117, ECHR 2015) but rather, as stressed above, that he was not given an effective opportunity of access to the relevant evidence with a view to determining whether such evidence might have reduced his sentence or put into doubt the scope of his alleged criminal activity. Accordingly, accepting that the applicant might have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation, and making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

204. The applicant also claimed 70,937.50 Croatian kunas (HRK; approximately EUR 9,400) for the costs and expenses incurred before the Court.

205. The Government considered the applicant's claim excessive and unfounded.

206. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 covering costs under all heads.

C. Default interest

207. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints concerning the alleged unlawful use of special investigative measures, entrapment by an *agent provocateur* and the non-disclosure and use of evidence obtained by special investigative measures in the criminal proceedings against the applicant admissible, and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention;
3. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention with regard to the applicant's complaint of entrapment;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention with regard to the non-disclosure of evidence in the criminal proceedings against the applicant;
5. *Holds*, by four votes to three,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Işıl Karakaş
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Karakaş;
- (b) concurring opinion of Judge Lemmens;
- (c) joint dissenting opinion on Article 41 of Judges Lemmens, Gričco and Ravarani.

A.I.K.
S.H.N.

CONCURRING OPINION OF JUDGE KARAKAŞ

1. I do not share the Court's assessment concerning the second category of evidence, namely 194 CD and 4 DVD recordings of the secret surveillance of the applicant and the other accused (see paragraphs 175-77).

2. According to the Court, in respect of this category of evidence the applicant had access to the reports on his conversations with third parties prepared in the course of the use of secret surveillance measures. The Court notes that "it appears from the material before it that these reports were sufficiently detailed so as to allow the applicant to form specific arguments as to the possible relevance of the particular parts of the recordings for his case" (see paragraph 175).

3. At this point I should observe that the information provided in these reports was in the hands of the prosecuting authorities and their reliability and completeness were never verified by the trial court or any other independent body, as had been the case with the recordings used as evidence in the proceedings in respect of which an independent and impartial expert had prepared the relevant transcripts (see paragraph 164).

4. Moreover, at no point was the applicant given an effective opportunity to examine the secret surveillance recordings themselves. The findings by the Zagreb County Court that the applicant could have examined the relevant recordings in the court-house conflict with the fact that the applicant's repeated applications to secure him that opportunity were never attended to. Defence counsel asked the Zagreb County Court for access to and the possibility to examine the secret surveillance recordings. They stressed that the CD and DVD material had never been made available to the defence and that there were no technical means available in the court-house which would allow for the examination of the recordings by the defence. They also pointed out that, because of the technical impossibility of examining the recordings in the court-house, the practice of the Zagreb County Court in several other cases had been to make copies of the CD and DVD recordings and to send them to the defence (see paragraph 47).

5. It was impossible for the defence to obtain access to and examine the secret surveillance recordings by any means whatsoever. The arguments of the defence lawyers that the Zagreb County Court was unable to facilitate access to the recordings were arguably never refuted. Moreover, the applicant's argument regarding the existence of discrepancies between the transcripts and the recordings was also accepted by the lead prosecutor (see paragraph 50).

6. “The right to an adversarial trial means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused” (see *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004-X).

7. Therefore I am unable to accept that access to the recordings in the facilities of the Zagreb County Court was a viable possibility for the defence to assess the contents of the relevant recordings. In these circumstances, their ability to prepare their defence concerning the secret surveillance measures falling within the second category of evidence was seriously impaired.

8. According to the majority, due to the applicant’s failure to make any specific argument concerning the possible relevance of the evidence at issue, “the Court is not able to conclude that the alleged impossibility for the applicant to gain access to the recordings belonging to the second category of evidence is of itself sufficient to find a breach of his right to a fair trial” (see paragraph 177). This assessment is highly problematic. The defence cannot gain access to the content of the CDs and DVDs belonging to the second category which may contain evidence capable of affecting the determination of the applicant’s culpability. Without having access to all relevant evidentiary material, how can the applicant form a specific argument about the relevance of material which remained unavailable to him throughout the entire proceedings? The limitations on access to the relevant evidence prevented the defence from forming specific arguments as to the relevance of the evidence in question and from having an opportunity to prepare the defence effectively.

9. Moreover, it is difficult to see how the majority’s assessment squares with the principle according to which unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The Court has already found in its case-law that the failure to afford such access has weighed in favour of the finding that the principle of equality of arms had been breached. This is because importance is attached to appearances as well as to increased sensitivity to the fair administration of justice. Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (see paragraph 159 of the judgment, with further

references). None of this, in my view, is properly appreciated in the majority's assessment of the applicant's right of access to the second category of evidence.

10. Even though the majority remain mindful of this restriction for the applicant's defence rights (see paragraph 177 *in fine*), I think that the lack of effective access to the second category of evidence was of such importance that it significantly prejudiced the applicant's right to a fair trial.

CONCURRING OPINION OF JUDGE LEMMENS

1. I am happy to agree with the judgment in so far as it concerns the main issues, namely the complaints about alleged violations of Article 6 § 1 of the Convention.

With respect to the complaint relating to Article 8 of the Convention, I voted with my colleagues in finding a violation of that provision. However, I am unable to subscribe to the reasoning of the majority. In the present opinion I would like briefly to explain why some parts of that reasoning seem questionable to me.

Finally, I respectfully, but firmly, disagree with the majority's decision to award the applicant just satisfaction. On this point I refer to the joint dissenting opinion by Judges Gričco and Ravarani and myself.

2. The majority's reasoning relating to the Article 8 complaint is limited to the examination of the question whether the measures of secret surveillance were "in accordance with the law". In our case the legality issue boils down to the question whether the orders of the investigating judge authorising these measures complied with domestic law.

I note with the majority that the various orders did "not ... provide relevant reasoning as to the particular circumstances of the case and in particular why the investigation could not be conducted by other, less intrusive, means" (paragraph 113 of the judgment).

The relevant provisions of domestic law are not quoted in the judgment. Reference is made to a description of the provisions of the old Code of Criminal Procedure and the relevant practice of the domestic courts in *Dragojević v. Croatia* (no. 68955/11, respectively §§ 55 and 57-60, 15 January 2015, referred to respectively in paragraphs 83 and 93 of the judgment). Two provisions in particular are relevant. Article 180 (1) provided that the investigating judge could order special investigating measures, including telephone tapping and covert monitoring of persons and objects, "if an investigation by other means would either not be possible or would be extremely difficult". Article 182 (1) provided that the said measures had to be authorised by "a written reasoned order" and that the order had to "stipulate ... the circumstances justifying the need for the measures". According to the case-law of the Constitutional Court and the Supreme Court, it followed from the combination of both Articles that a secret surveillance order had to contain reasons explaining why, in the circumstances of the case, an investigation by other means would not be possible or would be extremely difficult.

In the present case, as indicated above, such specific reasoning was lacking. This was also acknowledged by the Supreme Court, which noted in its judgment of 17 February 2010 that there were "flaws in the reasoning of the secret surveillance orders" (see the quotation in paragraph 71 of the judgment).

This is sufficient, in my opinion, to conclude that the secret surveillance measures were not in accordance with domestic law. On that formal basis¹, I concurred with the finding of a violation of Article 8.

3. The majority, however, do not stop there.

They criticise “the circumvention by the domestic courts of this lack of reasoning by retrospective justification of the use of secret surveillance” (see paragraph 114 of the judgment)². I find this criticism unfair.

I find it difficult to state that the Supreme Court tried to “circumvent” the lack of reasoning by a “retrospective” justification. It simply decided that, notwithstanding the unlawfulness of the orders authorising the secret surveillance measures, the evidence obtained as a result of these measures could be used in the criminal proceedings against the applicant, as it was not “unlawfully obtained evidence” within the meaning of Article 9 § 2 of the old Code of Criminal Procedure (see again the quotation in paragraph 71 of the judgment)³. I do not find such a decision questionable per se. Our Court does not exclude, as a matter of principle and in the abstract, the possibility that unlawfully obtained evidence may be admissible evidence in subsequent criminal proceedings (see *Schenk v. Switzerland*, 12 July 1988, § 46, Series A no. 140). It has on occasion found that the admission in evidence of information obtained without a legal basis in domestic law, and therefore not “in accordance with the law” within the meaning of Article 8 § 2 of the Convention, did not, in the circumstances of the case, conflict with the requirements of fairness guaranteed by Article 6 § 1 (see, for example, *Khan v. the United Kingdom*, no. 35394/97, §§ 34-40, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 76-81, ECHR 2001-IX; *Vukota-Bojić v. Switzerland*, no. 61838/10, §§ 91-100,

¹ In the domestic proceedings the applicant raised the issue of the lack of proper reasoning in the orders of the investigating judge only in his appeals to the Supreme Court and the Constitutional Court (see respectively paragraphs 69 and 75 of the judgment), not in the proceedings before the Zagreb County Court. This seems to suggest that during the trial the applicant was not particularly bothered by the flaws in the orders’ reasoning.

² The same language has been used in *Dragojević* (cited above, § 97) and in *Bašić v. Croatia* (no. 22251/13, § 34, 25 October 2016). While I did not sit in the first case, I sat in the second. I regret that that language did not already strike me at the time.

³ Under Article 9 § 2 of the old Code of Criminal Procedure, “unlawfully obtained evidence is evidence obtained by means of a breach of the fundamental rights of the defence, the right to dignity, reputation, honour and respect for private and family life guaranteed under the Constitution, domestic law or international law, or evidence obtained in breach of the rules of criminal procedure in so far as set out in this Code, as well as any other evidence obtained unlawfully” (see the quotation in *Dragojević*, cited above, § 55). According to the Supreme Court, evidence obtained on the basis of an insufficiently reasoned order is not explicitly excluded from being used as evidence in the criminal proceedings and does not therefore constitute “unlawfully obtained evidence” in the above sense (see the judgment of 3 February 2009, quoted in *Dragojević*, cited above, § 58, and the judgment of 17 February 2010 in the applicant’s case, quoted in paragraph 71 of the present judgment). This is a matter of interpretation of domestic law, which is one for the domestic authorities.

18 October 2016; and *Bašić v. Croatia*, no. 22251/13, §§ 41-50, 25 October 2016).

4. The majority further find that “the relevant domestic law, as interpreted and applied by the competent courts, did not provide reasonable clarity regarding the scope and manner of exercise of the discretion conferred on the public authorities, and in particular did not secure in practice adequate safeguards against various possible abuses” (see paragraph 114 of the judgment)⁴. This finding needs to be nuanced, in my opinion.

On the one hand, I do not see what was wrong with the clarity of the law itself. As the Court noted approvingly in *Dragojević*, domestic law required secret surveillance measures to be authorised by a judge and carried out “on the basis of a detailed judicial order properly stipulating the necessity and proportionality of any such measure” (*Dragojević*, cited above, § 92). What went wrong in the present case (and in *Dragojević*, for that matter) is that the investigating judge did not show that he thoroughly scrutinised the request of the State Attorney’s Office, as required by law. This is a shortcoming relating to the application of the law, not to the law itself.

On the other hand, it may be true that domestic law did not provide adequate and sufficient safeguards against insufficiently reasoned orders, by not allowing for an effective possibility of challenging the lawfulness of the secret surveillance measures, regardless of their use in the criminal proceedings (see *Dragojević*, cited above, §§ 96-100). But this conclusion cannot follow, in my opinion, from the mere fact that the orders of the investigating judge were not sufficiently reasoned and that, despite this flaw, the evidence obtained as a result of the measures thus authorised was used in the criminal proceedings.

⁴ This language is again taken from *Dragojević* (cited above, § 101). Interestingly, it has not been repeated in *Bašić* (cited above).

JOINT PARTLY DISSENTING OPINION OF JUDGES LEMMENS, GRIŢCO AND RAVARANI

1. To our regret, we are unable to vote for an award to the applicant in respect of non-pecuniary damage. The reasons, explaining our point of view on this specific question, are the following.

2. An award of just satisfaction, including for non-pecuniary or “moral” damage, is neither a right nor an automatic consequence of finding a violation of the Convention. Pursuant to Article 41, the Court may award monetary compensation to the injured party if it considers this to be “necessary”. In other words, it is a matter entirely within the Court’s discretion (see, among many examples, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 76, ECHR 1999-II). In the exercise of this discretionary power “the Court will have regard to all the circumstances of the case, including the nature of the violations found, as well as any special circumstances pertaining to the context of the case” (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 250 and 252, ECHR 2009).

3. The Court has also drawn attention to the fact that, for instance, its awards for non-pecuniary damage “...serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned” (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 224, ECHR 2009).

4. Thus, taking account of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred (*ibid.*), the Court’s general practice is to award damages in cases where violations of human rights have been found.

5. However, following the same criteria, the Court has frequently concluded that the finding of a violation would constitute sufficient satisfaction, without making a monetary award in this respect.

6. Bearing in mind the nature of the violations found in the case at hand, we would like to draw attention to some examples from an entire line of jurisprudence where the Court, under Articles 6 and 8 of the Convention, has stated that the finding of a violation in itself constitutes sufficient just satisfaction as to the alleged damage, without any further financial compensation: *Foucher v. France*, 18 March 1997, Reports of Judgments and Decisions 1997-II (denial of access to criminal file), *Dowsett v. the United Kingdom*, no. 39482/98, ECHR 2003-VII (non-disclosure of material by prosecution that would have been vital to defence), *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, ECHR 2004-X

(prosecution's failure to disclose material evidence to defence of entrapment on public interest), *Chorniy v. Ukraine*, no. 35227/06, 16 May 2013 (inability to appeal effectively against judgments due to failure to provide copies of them), *Kruslin v. France*, 24 April 1990, Series A no. 176-A (failure of national law to clarify scope and manner of authority's powers of tapping and interception), *Dumitru Popescu v. Romania* (no. 2), no. 71525/01, 26 April 2007 (interception of telephone calls by State agents and a lack of adequate safeguards to prevent abuse), and *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V (conviction on the basis of evidence obtained by a covert listening device installed by the police for which no statutory regulatory system existed).

7. Turning to the factual circumstances of the instant case it is to be noted that the applicant, acting in his capacity as vice-president of the Croatian Privatisation Fund, was involved in corruption related to a significant investment project in which he accepted a bribe in the amount of EUR 50,000, arranged to receive a further bribe in the amount of EUR 150,000, and also negotiated a percentage of the overall value of the investment project, estimated at between EUR 23,000,000 and EUR 25,000,000 (see paragraphs 10, 13, 18 and 136 of the judgment).

8. As can be seen from the case-file, the national authorities investigated the applicant's illegal activities in an essentially passive manner and did not incite him to commit offences he would not otherwise have committed (see paragraphs 144-45 of the judgment).

9. Moreover, it was the applicant who played an active role in giving instructions and explaining the modalities of the illegal activity, including the payments that were to be made in exchange for his support for the realisation of the impugned investment project (see paragraphs 10, 68 and 142-43 of the judgment). In the same context we also consider it important to note, as the judgment has already done, that the applicant never contested that the recorded conversations had indeed taken place and never challenged the authenticity of the recordings (see paragraph 167 of the judgment).

10. Against that background, we prefer to adopt the approach of the Court in the cases mentioned in paragraph 6 of the present opinion. Consequently, having regard to the specific circumstances pertaining to the corruption context of this case, we do not consider it appropriate to make an award for non-pecuniary damage. In our view, the Court's finding of violations of the applicant's rights protected by Articles 6 and 8 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage that he may have suffered.