



Croatian official was not incited to commit corruption, but his defence rights were restricted in the criminal proceedings against him

The case [Matanović v. Croatia](#) (application no. 2742/12) concerned a complaint about entrapment, secret surveillance measures and the non-disclosure and use of the evidence thus obtained. Mr Matanović, the applicant, a vice-president of the Croatian Privatisation Fund, was convicted of corruption in 2009 for accepting and facilitating bribes in exchange for support of investment projects and privatisations. His conviction was essentially based on evidence obtained via telephone tapping following a covert operation involving an informant.

In today's **Chamber** judgment¹ in the case the European Court of Human Rights held, unanimously:

that there had been **no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights as concerned Mr Matanović's complaint of entrapment. The Court found in particular that, on balance, the prosecuting authorities' investigation had essentially remained within the bounds of undercover work, rather than inciting Mr Matanović to commit offences he would not have otherwise committed; but,

that there had been a **violation Article 6 § 1** of the Convention as concerned the non-disclosure of certain evidence in the criminal proceedings against Mr Matanović. In particular, due to a lack of procedural safeguards, Mr Matanović had been prevented from establishing whether recordings in the prosecution's possession, excluded from the case file because they had concerned individuals who were not eventually accused in the proceedings, could have reduced his sentence or put into doubt the scope of his alleged criminal activity; and lastly,

that there had been a **violation of Article 8 (right to respect for private and family life, the home and the correspondence)** because the procedure for ordering and supervising the tapping of Mr Matanović's telephone had not been lawful.

Principal facts

The applicant, Josip Matanović, is a Croatian national who was born in 1949 and is currently serving an 11-year prison sentence in Lepoglava (Croatia) for corruption offences.

The allegations of corruption against Mr Matanović, a vice-president of the Croatian Privatisation Fund, were first made in April 2007 by J.K., the representative of an investment project in the Zadar region. J.K., who had contacted Mr Matanović as an official of the Fund, reported to the State Attorney's Office that Mr Matanović had requested a bribe in order to ensure the realisation of his project. The Attorney's office then asked an investigating judge for authorisation to use secret surveillance measures against Mr Matanović, including tapping of his telephone, covert surveillance and the use of J.K. as an informant. The judge allowed the request under the Code of Criminal Procedure, indicating in his order that the investigation into the offences by other means would either be impossible or extremely difficult.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Following the covert operation, Mr Matanović was arrested and detained, then indicted in February 2008. He was convicted in May 2009 on several counts of taking bribes, facilitating bribe-taking and abusing his power and authority to support certain investment projects and privatisations. The first-instance court relied extensively on the secret surveillance recordings and in particular on those concerning the first meeting arranged after J.K. had agreed to become an informant. At this meeting Mr Matanović had explained to J.K. how much was expected in payment and that it was usual practice to remunerate for lobbying.

Mr Matanović appealed to the Supreme Court, complaining that the secret surveillance measures had not been lawful, that he had been entrapped and that relevant evidence had not been disclosed to the defence. However, the Supreme Court, finding these complaints ill-founded, upheld his conviction of bribe-taking and abuse of power and authority. As concerned the non-disclosure of evidence complaint in particular, the Supreme Court held that the defence had been provided with transcripts of the secret surveillance recordings (whether they had been used to convict Mr Matanović or not); but found that it had no right to have access to other material concerning individuals who were not eventually accused in the proceedings.

The Constitutional Court subsequently endorsed these findings.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life, the home and the correspondence), Mr Matanović alleged that the secret surveillance used against him had been unlawful. He also alleged under Article 6 § 1 (right to a fair trial and right to adequate time and facilities for preparation of defence) that his conviction was unfair as he had been incited to commit a crime by J.K who had acted as an *agent provocateur* and that certain evidence – copies of the secret surveillance recordings – had not been disclosed, despite his and his defence lawyers' multiple requests.

The application was lodged with the European Court of Human Rights on 22 December 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Işıl Karakaş (Turkey), *President*,
Julia Laffranque (Estonia),
Paul Lemmens (Belgium),
Valeriu Griţco (the Republic of Moldova),
Ksenija Turković (Croatia),
Stéphanie Mourou-Vikström (Monaco),
Georges Ravarani (Luxembourg),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 8 (as concerned the secret surveillance measures)

As held in a previous case², the Court stressed that the relevant Croatian law, namely the Code of Criminal Procedure, as interpreted by the national courts, had not been clear as to the authorities' discretion to order surveillance measures. Nor had this law in practice – as applied in Mr Matanović's case – provided sufficient safeguards against possible abuse; the investigating judge had simply referred to the statutory phrase that the investigation could not be conducted by other means,

² [Dragojević v. Croatia](#) (application no. 68955/11) of 15.01.2015.

without indicating why the investigation could not be conducted by other, less intrusive, measures. The procedure for ordering and supervising the tapping of Mr Matanović's telephone had not therefore been lawful, in violation of Article 8.

Article 6 § 1 (as concerned the plea of entrapment)

The Court noted that it was clear from the documents in the case file that Mr Matanović had been involved in corruption. It also found that, on balance, the prosecuting authorities, rather than initiating that criminal activity, had "joined" it. First, there was nothing to suggest that J.K. had been acting for the prosecuting authorities in the initial contact with Mr Matanović; J.K. was a representative for an investment project and in that capacity contacted Mr Matanović as the official of the privatisation fund. Moreover, the prosecuting authorities had only instructed J.K. to act as an informant once J.K. had reported his allegations about Mr Matanović. Indeed, it was clear from the recording of the two men's conversation during their first meeting after J.K. had agreed to become an informant – relied on by the first-instance court – that it was Mr Matanović who had full control of the corruption: it was he who had instructed J.K. on how to proceed with the bribes and he who had explained the reasons why it was justified. The prosecuting authorities' investigation had therefore essentially been passive and remained within the bounds of undercover work, rather than inciting Mr Matanović to commit offences he would not have otherwise committed. Accordingly, there had been no violation of Article 6 § 1 as concerned the plea of entrapment.

Article 6 § 1 (as concerned the non-disclosure and use of evidence obtained via secret surveillance)

Mr Matanović's complaints concerning the unfairness of the proceedings related to his impaired access to three main categories of evidence obtained by the use of secret surveillance measures. The first category of evidence concerned the surveillance recordings which had been submitted into evidence by the prosecution and had been relied upon for Mr Matanović's conviction. The second category of evidence concerned recordings of the secret surveillance of Mr Matanović and the other accused, which had been included in the case file but not relied upon for his conviction. The third category of evidence was made up of the recordings, obtained through secret surveillance in the context of the same case but concerning other individuals who had not eventually been accused in the proceedings. Those recordings had not been relied upon for Mr Matanović's conviction, nor had they been included in the case file or disclosed to the defence.

There was nothing allowing the Court to conclude that Mr Matanović had been prevented from adequately preparing his defence as concerned the surveillance recordings used as evidence for his conviction. Transcripts of the recordings, prepared by an independent and impartial expert, had been made available to the defence as from Mr Matanović's indictment. Although he had not been given copies of the actual recordings, they had been played back at trial and he had been given ample opportunity to compare the transcripts to the played material and have any discrepancies clarified. Moreover, Mr Matanović had never challenged the authenticity of the recordings or contested that the conversations had actually taken place. Therefore, the Court found no unfairness in the proceedings in this respect.

As concerned the recordings included in the case file but not used for Mr Matanović's conviction, the Court noted that he had not made any specific argument as to the possible relevance of this second category of evidence at any point during the domestic proceedings. It could not therefore be concluded that any restriction on his access to these particular recordings had been sufficient to breach the right to a fair trial.

However, the defence was denied access to a third category of evidence which had been obtained through secret surveillance in the context of the same case but which concerned individuals who were not eventually accused in the proceedings. That decision had been made by the prosecuting authorities without providing the defence with the opportunity to participate in the decision-making

process. Indeed, there was no procedure under domestic law to assess the relevance of the evidence obtained by the prosecuting authorities and the necessity of its disclosure. Mr Matanović had therefore been prevented from establishing whether the evidence in the prosecution's possession that had been excluded from the file could have reduced his sentence or put into doubt the scope of his alleged criminal activity. Nor had the domestic courts provided convincing reasons, based on a balancing of the relevant interests, that would justify the restriction on Mr Matanović's defence rights. The Supreme Court had simply dismissed the complaint on the grounds that he had no right of access to such recordings. The Court found that such a position, allowing the prosecuting authorities to assess what might or might not be relevant to the case, without any further procedural safeguards, was contrary to the requirements of Article 6 § 1.

In view of this deficient procedure for the disclosure of evidence and the resulting restrictions on the defence rights, the Court concluded that the proceedings against Mr Matanović, taken as a whole, had been unfair, in violation of Article 6 § 1.

Article 41 (just satisfaction)

The Court held, by four votes to three, that Croatia was to pay Mr Matanović 1,500 euros (EUR) in respect of non-pecuniary damage and EUR 2,500 for costs and expenses.

Separate opinions

Judges Lemmens, Gričco and Ravarani expressed a joint dissenting opinion on Article 41. Judges Lemmens and Karakaş each expressed a concurring opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.