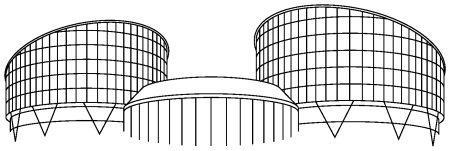

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GRBA v. CROATIA

(Application no. 47074/12)

JUDGMENT

STRASBOURG

23 November 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Grba v. Croatia,

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

Linos-Alexandre Sicilianos, *President,*
Aleš Pejchal,
Krzysztof Wojtyczek,
Ksenija Turković,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 31 October 2017,

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

PROCEDURE

1. The case originated in an application (no. 47074/12) 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 national of Bosnia and Herzegovina, Mr Zoran Grba ("the applicant"), on 5 July 2012.

2. The applicant was represented by Mr S. Radobuljac and Ms Lidija Horvat, lawyers practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, entrapment by "agents provocateurs", unlawful secret surveillance, and the use of evidence thereby obtained in the criminal proceedings against him, contrary to Articles 6 § 1 and 8 of the Convention.

4. On 16 February 2015 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The Government of Bosnia and Herzegovina did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1965 and lives in Sarajevo, Bosnia and Herzegovina. At the time of the introduction of his application, the applicant served a prison sentence in Croatia.

A. Background to the case

7. During June and July 2008 the Istria Police Department (*Policijska uprava istarska*; hereafter: "the police") received several complaints concerning the use of counterfeit euro banknotes in Istria.

8. The video surveillance recordings made in one of the shops where the counterfeit currency was used revealed that a certain C.M. had paid using several counterfeit 100 euro notes.

9. According to a police report dated 21 July 2008, further unspecified investigative police work identified the applicant as the person who had supplied a total of 3,000 counterfeit euros to C.M. The report also claimed that the applicant was expected to return from Bosnia and Herzegovina to Croatia for the purpose of uttering a further 20,000 counterfeit euros and, if that proved to be successful, he would bring a further 200,000 counterfeit euros with a view to uttering them in Istria.

B. Special investigative measures

10. Acting on the evidence presented in the police report (see paragraph 9 above), on 21 July 2008 the Pula County State Attorney's Office (*Županijsko državno odvjetništvo u Puli*) asked an investigating judge from the Pula County Court (*Županijski sud u Puli*) to authorise the use of special investigative measures in respect of the applicant, namely tapping his telephone, covertly monitoring him using undercover agents, and conducting a simulated purchase operation.

11. The investigating judge granted the request and on the same day issued an order for the use of special investigative measures. The relevant part of the statement of grounds reads:

> "The request of the [Pula County State Attorney's Office] is well-founded.
>
> As the materials and information available to the police suggest that there is probably cause to believe that Zoran Grba, a national of Bosnia and Herzegovina, engages in the offence of currency counterfeiting under Article 274 §§ 1 and 2 of the Criminal Code, and given that, in the view of the investigating judge, the investigation cannot be efficiently carried out by other means, or would be extremely difficult, the well-founded request of the [Pula County State Attorney's Office] should be granted and the requested measures are hereby ordered with regard to Zoran Grba as indicated

in the operative part of this order. These measures will be implemented by the police between 21 July and 21 November 2008."

12. On 6 August 2008 the Pula County State Attorney's Office informed the investigating judge that the applicant also used another telephone number, and requested an authorisation for the tapping thereof.

13. On the same day the investigating judge granted the request, finding that there were no new facts or circumstances suggesting that the use of the special investigative measures in respect of the applicant should be discontinued.

14. Meanwhile, on the same day, the applicant met an undercover police agent who purchased one counterfeit 100 euro note from him.

15. In the ensuing period several further meetings and contacts between the applicant and the undercover agent took place. On 12 August 2008 the undercover agent purchased 149 counterfeit 100 euro notes from the applicant, and on 17 October 2008 the applicant sold him a further sixty-four counterfeit 100 euro notes.

16. On 17 November 2008 the police informed the Pula County State Attorney's Office of the actions taken through applying special investigative measures. The police stated that the applicant's arrest had initially been planned for 17 November 2008, when he was supposed to come to Croatia for the purpose of selling further counterfeit euro banknotes to an undercover agent but he had postponed that meeting. The police therefore requested an extension of the use of special investigative measures in order to identify and arrest all those involved in the uttering of the counterfeit banknotes and to collect evidence concerning the offence at issue.

17. On 18 November 2008 the Pula County State Attorney's Office made a fresh request for the use of special investigative measures in respect of the applicant.

18. The investigating judge granted the request and on the same day issued an order extending the use of special investigative measures for a further month. The judge found that the grounds set out in his order of 21 July 2008 remained valid (see paragraph 11 above) and that the information provided by the police suggested that it was necessary to extend the use of special investigative measures in respect of the applicant for a further month.

19. On 19 November 2008 the Pula County State Attorney's Office asked for corrections to be made to the order in relation to an incorrect phone number in its request of 18 November 2008 and also in respect of the omission of another phone number used by the applicant. The investigating judge granted this request on 21 November 2008.

20. On 22 November 2008 the applicant, accompanied by his brother D.S., met the undercover agent in Solin. On that occasion he sold him 600 counterfeit 100 euro notes for 21,000 euros (EUR). Following the illicit transaction, the applicant and D.S. were arrested by the police.

21. After the arrest the applicant and his car were searched. The police found and seized EUR 21,000 in cash.

C. Investigation

22. On 23 November 2008 the police lodged a criminal complaint with the Pazin Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Pazinu*) against the applicant on charges of currency counterfeiting. No criminal complaint was lodged against D.S.

23. On the same day the applicant was brought before an investigating judge of the Pula County Court for questioning, during which he remained silent. The investigating judge ordered his remand in custody.

24. The investigating judge also heard D.S. as a witness but he invoked his testimonial privilege as the applicant's brother and gave no evidence.

25. Following a request for the opening of a judicial investigation in respect of the applicant, on 26 November 2008 the investigating judge questioned the applicant, but the applicant again remained silent. On the same day, the investigating judge opened an investigation in respect of the applicant in connection with suspected currency counterfeiting relating to the four occasions on which he had sold the counterfeit banknotes to the undercover agents.

26. In the course of the investigation, the investigating judge obtained an expert report stating that the 600 banknotes of 100 euro which the applicant had sold to the undercover agents were counterfeit. The judge also decided that the undercover police agents would be questioned under the pseudonyms E.K. and A.B. via video link and with distorted images and sound.

27. On 23 January 2009 the investigating judge questioned the undercover agent E.K. The applicant's lawyer was present during the questioning.

28. In his statement E.K. said that his first contact with the applicant had occurred sometime in late July 2008, when they had spoken on the phone. According to E.K., he had not told the applicant the reason for calling him, but at the time the applicant had been in Sarajevo so they had been unable to meet. E.K. also explained that following this initial contact, he had met the applicant in a restaurant in Duga Resa at the beginning of August 2008. On that occasion they had started talking about business. The applicant had asked him what he was interested in and E.K. had replied that he had heard that the applicant was offering some good "papers". The applicant had replied that it was true and asked E.K. what he was really interested in and E.K. had repeated that he had heard that the applicant was offering good "papers". However, E.K. was no longer able to recall the further details of this conversation with the applicant. E.K. explained that during this first meeting the applicant had sold him a 100 euro note for 300 Croatian kunas

(HRK) (approximately EUR 40), which E.K. had accepted. According to E.K., the applicant had also said that if E.K. wished, they could arrange a further purchase of a larger quantity of such banknotes.

29. E.K. stated that eight to ten days following his first meeting with the applicant, they had met again in a car park near Zagreb. On that occasion the applicant had offered E.K. the opportunity to buy a further 15,000 counterfeit euros. E.K. had accepted the offer and had paid EUR 6,000 for the counterfeit euros. E.K. testified that a further meeting with the applicant had taken place in Odra after a phone call from the applicant. On that occasion the applicant had asked E.K. whether he knew anybody who would be interested in the purchase of larger quantities of counterfeit currency and E.K. had replied that he had a friend – in actual fact another undercover agent, A.B. – who would be interested. According to E.K., the next meeting with the applicant had taken place some time in mid-October 2008 in a restaurant in Lupoglav. E.K. explained that on that occasion he had been accompanied by the second undercover agent, A.B. On that occasion E.K. had bought 6,500 counterfeit euros (it later turned out that the amount was in fact 6,400 euros) from the applicant for EUR 2,500. Following this exchange they had been in contact by phone but they had not met.

30. The investigating judge also questioned the undercover agent A.B. in the presence of the applicant's lawyer.

31. During his questioning A.B. described the circumstances in which he had first met the applicant in the restaurant in Lupoglav in October 2008 (see paragraph 29 above). According to A.B., the applicant had asked him whether or not he wanted to buy counterfeit currency. A.B. had then expressed interest in doing so and the applicant had stated that he could supply 50,000 counterfeit euros, which he would be prepared to bring to Split. They had then agreed to stay in touch and exchanged phone numbers. A.B. also stated that the applicant had called him in early November 2008 and asked him whether he wanted to buy the counterfeit euros. Afterwards they had had several telephone conversations until the applicant had finally called A.B. and offered him 60,000 counterfeit euros for the price of EUR 21,000. A.B. had accepted that and they had met in a shopping centre in Solin. The illicit exchange had then taken place and the applicant had afterwards been arrested.

32. After completion of the investigation, the investigating judge forwarded the case file to the Pazin Municipal State Attorney's Office for further examination and a decision.

D. Proceedings on indictment

33. On 17 February 2009 the Pazin Municipal State Attorney's Office indicted the applicant in the Pazin Municipal Court (*Općinski sud u Pazinu*)

on charges of currency counterfeiting in connection with the four occasions on which he had sold counterfeit euros to the undercover police agents (see paragraphs 14-15 and 20 above).

34. A three-judge panel of the Pazin Municipal Court confirmed the indictment on 10 March 2009 and sent the case for trial.

35. At a hearing on 27 March 2009 the applicant, represented by a lawyer, pleaded not guilty with regard to the first three instances of the alleged uttering of counterfeit notes (see paragraphs 14-15 above), whereas he considered himself "responsible" for the transaction on 22 November 2008 because he had "given in to the inducement" by the police.

36. At the same hearing the Pazin Municipal Court questioned the undercover police agents E.K. and A.B. The undercover agent E.K. stated that he could no longer say who had initiated a meeting specifically for the purchase of the counterfeit currency and he was unable to answer the question whether the applicant should have been arrested as soon as he had sold the first counterfeit 100 euro note to him. E.K. was also unable to say whether he would have been authorised to arrest the applicant. The undercover agent A.B. reiterated the statement he had given to the investigating judge.

37. Following the questioning of the witnesses, the trial bench examined the secret surveillance recordings and asked the police to inform them whether the euros paid for the counterfeit notes at the first three meetings (see paragraphs 14-15 above) had been traced and confiscated.

38. On 6 April 2009 the police replied that they had neither traced the money which had been paid for the purchase of the counterfeits nor confiscated it from the applicant on the first three occasions.

39. A further hearing was held on 16 April 2009, at which the trial bench commissioned a psychiatric expert report concerning the applicant's mental condition at the moment of the commission of the offences.

40. In the course of his examination by a psychiatrist the applicant explained that he had had serious financial difficulties and that he had needed money urgently. He also stated that he had never before broken the law and had never committed an offence. In summer 2008 an undercover police agent had started contacting him, asking him whether he could supply counterfeit euros. The applicant believed that one of the people in Croatia who owed him money must have given his phone number to the police. As the agent had been very persistent in his calls (he had called him at least fifty times), the applicant had agreed to his request. The applicant had not believed that he was doing anything bad by simply delivering counterfeit money. He explained that he would have never agreed to do it had he not been pressurised by the undercover agent.

41. In his report dated 21 April 2009 the expert witness found that the applicant had had full mental capacity at the time of commission of the offences.

42. On 13 May 2009 a further hearing was held before the Pazin Municipal Court at which the expert witness responded to questions concerning his report.

43. At the same hearing the applicant was questioned but decided to remain silent and not to give any evidence. Following the applicant's questioning, the trial bench concluded the trial proceedings and heard the parties' closing arguments. The applicant contended that he had been incited by the police to commit the offences at issue. He argued that it had been the undercover agents who had contacted him first and that their evidence concerning the circumstances of their various contacts had been both incomplete and contradictory. He pointed out that there no audio recordings of his meetings with the undercover agents and it was unclear why had they not arrested him before 22 November 2008 if he had committed an offence on the first three occasions, as suggested in the indictment.

44. On 13 May 2009 the Pazin Municipal Court found the applicant guilty as charged and sentenced him to five years and six months' imprisonment. It also confiscated HRK 300 (approximately EUR 40) and EUR 8,500 from the applicant and ordered his expulsion from Croatia. The Pazin Municipal Court held that the four occasions on which the applicant had sold counterfeit currency to the undercover agents should be classified as a repeated offence of uttering counterfeit currency under Article 274 § 1 of the Criminal Code. When sentencing the applicant, the Pazin Municipal Court explained that the applicant's persistence in uttering counterfeit currency on four occasions, as well the quantity of counterfeit banknotes uttered (81,400 counterfeit euros in total), constituted particularly aggravating factors. With regard to the applicant's plea of entrapment, the Pazin Municipal Court merely noted that it had no reason to doubt the statements provided by the undercover agents.

45. The applicant challenged the first-instance judgment before the Pula County Court arguing, in particular, that the circumstances of his entrapment had not been properly examined.

46. On 20 October 2009 the Pula County Court quashed the first-instance judgment and remitted the case for re-examination. It found that the first-instance judgment had been based solely on the undercover agents' statements about their conversations with the applicant, which was contrary to Article 180 of the Code of Criminal Procedure.

47. In the resumed proceedings the Pazin Municipal Court excluded from the case file as unlawful evidence all the undercover agents' statements about their conversations with the applicant.

48. At a hearing on 18 January 2010 the Pazin Municipal Court again questioned the undercover agents E.K. and A.B.

49. In his statement E.K. explained that he could not judge whether he had contacted the applicant more frequently than the applicant had contacted him. He was also unable to recall the details of his conversation

with the applicant when they had first talked over the phone. E.K. also explained that a simulated purchase operation was sometimes carried out just once and sometimes on several occasions. In the case at issue, he had been instructed by his superiors to conduct several such simulated purchases. Moreover, it was for his superior and not him to determine the ultimate aim of the simulated purchase operation. In any case, the aim of such a police operation was to eradicate currency counterfeiting. E.K. was unable to recall who had initiated the meeting in Lupoglav in mid-October 2008 when he had introduced the applicant to the second undercover agent A.B. Nor could he say who had initiated the other meetings. With regard to his first meeting with the applicant, he could not say whether the applicant had had only one 100 euro counterfeit note in his possession or more than one. E.K. answered that it was "[the applicant's] own business".

50. In his statement A.B. explained that his meeting in Solin had taken place at the applicant's initiative and that it was the applicant who had contacted him more frequently than vice versa. A.B. further stated that it was his superior who had the authority to decide whether the simulated purchase would be organised just once or on several occasions.

51. Following the questioning of the undercover agents, the defence asked that C.M. – who was initially identified as the person to whom the applicant had allegedly first supplied the counterfeit euros (see paragraphs 7-9 above) – be questioned at the trial. The trial bench of the Pazin Municipal Court dismissed the request by the defence as irrelevant and adjourned the hearing in order to examine the recordings of the applicant's secret surveillance.

52. On 30 March and 27 April 2010 the Pazin Municipal Court examined the recordings of the applicant's communications and meetings with the undercover agents. It found that there had been eight unsuccessful attempts on the part of the undercover agents to contact the applicant.

53. At a hearing on 27 April 2010 the Pazin Municipal Court heard the parties' closing arguments. The applicant argued in particular that the police had abused their powers in not arresting him after the first illicit transfer of counterfeit euros and had instead incited him to commit further offences by arranging purchases of larger quantities of counterfeit euros. He also contended that there had never been a reasonable suspicion of his having committed an offence which could have justified the investigating judge's decision to authorise the use of undercover investigative measures.

54. On the same day the Pazin Municipal Court found the applicant guilty as charged and sentenced him to five years and six months' imprisonment. It also confiscated HRK 300 (approximately EUR 40) and EUR 8,500 from the applicant and ordered his expulsion from Croatia. When sentencing the applicant, the Pazin Municipal Court reiterated its previous findings (see paragraph 44 above).

55. With regard to the applicant's plea of entrapment, the Pazin Municipal Court observed:

> "In the case at issue, examination of the audio recordings of the phone taps confirmed the circumstances surrounding the communication between the undercover agents and the accused, in particular the intensity of the telephone communications. Taking note of the recorded statements of the undercover agents during their communications [with the applicant], it was established that the purpose of the communications was [organising] a meeting with the accused in order to effectuate a simulated purchase.
>
> This court considers that it cannot be said that the undercover agents acted improperly in the sense that by their actions they allowed the accused to develop his criminal activity [or] in any manner incited him to commit an offence.
>
> Neither the questioning of the undercover agents nor any other [evidence adduced] suggests that the undercover agents incited the accused to commit an offence in the sense that they offered him some reward or brought him presents or such like.
>
> It is true [as was established during the proceedings] that, for instance, between 12 and 16 October 2008 the undercover agent tried to contact the accused eight times on his mobile phone, but this court considers that this was not prohibited nor did it incite the accused to commit criminal acts. Those were attempts to contact the accused in the period which was 'covered' by the [investigating judge's order]. It should be also taken into account that in the period at issue there had already been communication between the accused and the undercover agent."

56. The applicant challenged the first-instance judgment by lodging an appeal before the Pula County Court. He argued, in particular, that the orders for the use of special investigative measures had not been adequately reasoned, as required under the Code of Criminal Procedure. He also contended that there had been no reason to continue with the use of simulated purchases and the undercover agents' activities after the first illicit transfer of counterfeit euros in August 2008. All further events had constituted entrapment intended to extend the scope of his criminal activity, which eventually resulted in a more severe sentence. The applicant claimed that such measures could have been justified by the necessity to arrest further individuals involved in the offence, but no activity in that respect had been undertaken in his case.

57. On 24 September 2010 the Pula County Court dismissed the applicant's appeal and upheld the first-instance judgment. It held that the investigating judge's orders for the use of special investigative measures had been properly reasoned as required under the Code of Criminal Procedure. With regard to the plea of entrapment, the Pula County Court observed:

> "... [The investigating judge] ordered that the [special investigative] measures be implemented between 21 July and 21 November 2008, namely over a period of four months. The investigating judge's order ... of 18 November 2008 shows that the use of [special investigative] measures was extended for a month from 21 November to 21 December 2008. It is apparent from the order that, in response to an application by the State Attorney's Office, the investigating judge extended the use of [special

> investigative] measures for appropriate reasons. It [also] follows from the circumstances of the case that there was probably cause to believe that the accused had uttered counterfeit euros, which suggested the commission of a serious criminal offence (currency counterfeiting). Taking into account the nature of such an offence and the fact that the use of special investigative measures was producing certain results, there were relevant reasons for extending the use of [special investigative] measures under Article 180 of the Code of Criminal Procedure. It cannot therefore be said that the conduct of the undercover agents broadened the extent of the criminal activity of the accused.
>
> It should be noted that it cannot be claimed that the use of special investigative measures under Article 180 § 1(4) and (5) of the Code of Criminal Procedure can be considered as an incitement to commit a criminal offence. The undercover agent E.K. contacted the accused only after the use of special investigative measures had been ordered and there is therefore no unlawfulness in his conduct. Furthermore, the fact that E.K. first contacted the accused without telling him the reason for the contact, as was established by the first-instance court from the statement of E.K., and the fact that the first meeting took place almost a month later (on 6 August 2008) – when the undercover agent in Duga Resa bought one 100 euro counterfeit note from the accused for the amount of HRK 300 – cannot be considered as an incitement but was a tactical action aimed at gaining the confidence of the accused and further uttering of counterfeit euros. The fact that the undercover agent succeeded in his task is self-evident, since the accused continued to sell him larger quantities of counterfeit euros for real euros until he was arrested."

58. On 6 November 2010 the applicant filed a request for extraordinary review of a final judgment before the Supreme Court (*Vrhovni sud Republike Hrvatske*), challenging the findings of the Pula County Court. He contended that the Pula County Court had failed to provide adequate reasoning for its findings concerning the incitement. Specifically, it had not thoroughly examined the circumstances of the applicant's first contact with the undercover agent when the first instance of incitement had occurred. Furthermore, the Pula County Court had not taken into account the fact that the majority of the contacts with the applicant had been initiated by the undercover agents, and it had not analysed the substance of their discussions, even though they had been duly recorded, as a result of the applicant's phone having been tapped. In this connection the applicant pointed out relevant parts of the transcript of the phone taps, in particular the part where the undercover agent stated: "Come on, you must definitely come. Don't you know, ok, we are serious people ..."; or where the applicant stated "I will not bring [it] and that's it", after which the undercover agent started inciting him to a criminal act. The applicant also contended that the investigating judge's orders for the use of special investigative measures had not been properly reasoned, as required under the Code of Criminal Procedure.

59. On 5 April 2011 the Supreme Court dismissed the applicant's request for extraordinary review of a final judgment, endorsing the reasoning of the lower courts concerning the applicant's plea of incitement. It found that there was nothing in the conduct of the undercover agents

suggesting incitement. It also considered that there had been sufficient basis for the use of secret surveillance and that the orders of the investigating judge had been issued in accordance with the relevant provisions of the Code of Criminal Procedure.

60. On 24 June 2011 the applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*) reiterating the arguments he had presented before the lower courts. He pointed out in particular that the use of special investigative measures had been authorised contrary to the relevant domestic law as the investigating judge's orders had not been properly reasoned. In his view, this had infringed his right to respect for his private life and the confidentiality of his correspondence guaranteed under Articles 35 and 36 of the Constitution. The applicant also contended that he had been incited to commit an offence by the undercover agents and that the lower courts had not properly examined his plea of entrapment.

61. On 8 December 2011 the Constitutional Court declared the applicant's constitutional complaint inadmissible on the grounds that the decision of the Supreme Court concerned neither a determination of his rights and obligations nor a criminal charge against him.

62. The decision of the Constitutional Court was served on the applicant's representative on 5 January 2012.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

1. Constitution

63. 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:

Article 29

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

Article 35

"Everyone has the right to respect for and the 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."

64. The jurisdiction of the Constitutional Court is regulated under section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu*, Official Gazette no. 99/1999, with further references), which provides as follows:

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, concerning his or her rights and obligations, or about a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: a constitutional right) ...

2. If another legal remedy exists in respect of the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after that remedy has been exhausted."

65. At its September 2012 meeting the Constitutional Court, stressing the need of its compliance with the Court's case-law in *Maresti v. Croatia* (no. 55759/07, §§ 23-28, 25 June 2009), *Dolenec v. Croatia* (no. 25282/06, §§ 191-201, 26 November 2009) and *Šebalj v. Croatia* (no. 4429/09, §§ 242-245, 28 June 2011), decided that it should assume jurisdiction and provide protection under section 62 of the Constitutional Court Act concerning the constitutional complaints lodged after a full or partial dismissal of a request for extraordinary review of a final judgment by the Supreme Court (see, for instance, U-III-3773/2008, 5 February 2013, para. 8).

2. Criminal Code

66. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/1997, 129/2000, 51/2001, 105/2004, 71/2006, 110/2007 and 152/2008) reads:

Currency counterfeiting
Article 274

"(1) Whoever counterfeits currency with an aim to utter it as genuine, or whoever modifies currency with an aim to utter it, or whoever utters such counterfeit currency, shall be punished by imprisonment for between one and ten years.

(2) The same punishment as referred to in paragraph (1) shall be applicable to those who procure counterfeit currency with the aim of uttering it as genuine.

(3) Whoever utters counterfeit currency which he or she has received as genuine, in the knowledge that it was counterfeited or modified, shall be punished by a fine or imprisonment up to one year.

(4) The counterfeit currency shall be forfeited."

3. Code of Criminal Procedure

67. 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 are set out in the case of *Dragojević v. Croatia* (no. 68955/11, §§ 55-56, 15 January 2015).

68. The relevant provisions of the Code of Criminal Procedure concerning the plea of entrapment in general are summarised in the case of *Matanović v. Croatia* (no. 2742/12, §§ 84-86, 4 April 2017).

69. Under Article 181(2) of the Code of Criminal Procedure the use of special investigative measures was allowed with regard to the offence of currency counterfeiting under Article 274 of the Criminal Code.

70. On 18 December 2008 a new Code of Criminal Procedure was enacted (Official Gazette, nos. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013 and 152/2014), which in the relevant part provides:

Article 502

"...

(2) The relevant provisions concerning the reopening of criminal proceedings shall be applicable in the case of a request for revision of any final court decision in connection with a final judgment of the European Court of Human Rights in which a violation of the rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms has been found.

(3) A request for the reopening of proceedings in connection with a final judgment of the European Court of Human Rights may be lodged within a thirty-day time-limit starting from the date on which the judgment of the European Court of Human Rights becomes final."

Article 574

"...

(2) If prior to the entry into force of this Code a decision has been adopted against which a legal remedy is allowed pursuant to the provisions of the legislation relevant to the proceedings [in which the decision was adopted] ..., the provisions of that legislation shall be applicable [to the proceedings in respect of the remedy], unless otherwise provided under this Code.

(3) Articles 497-508 of this Code shall be applicable accordingly to requests for the reopening of criminal proceedings made under the Code of Criminal Procedure (Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 62/2003, and 115/2006)."

B. Relevant practice

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

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

2. Relevant practice concerning the plea of entrapment

72. The relevant practice concerning the plea of entrapment in general is set out in the case of *Matanović v. Croatia* (cited above, §§ 94-96).

73. The Supreme Court's case-law on entrapment in general was further explained in a case concerning repetition of the practice of simulated purchase (Kž 37/02-7, 23 November 2005). The relevant part of the judgment reads:

> "The first-instance court correctly found that the undercover agent, due to a certain aspect of his assignment, had needed to gain the confidence of the accused G.S. and for that he had needed some time. This is apparent from the fact that from the time when the special investigative measures were first used until their termination, the number of communications and meetings between the accused G.S. and the undercover agent intensified.
>
> The simulated purchase model requires that the undercover agent first declare himself or herself as a buyer of a particular type and quantity of drugs and it also requires an agreement on the price. This can never be understood as an incitement to commit an offence ...
>
> An incitement, within the meaning of Article 180 § 5 of the Code of Criminal Procedure, would have occurred only if the undercover agent – before the accused 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 make a decision to commit an offence (or bolstered such an initial decision [which the accused] had made), which is not the case in the present case ..."

III. RELEVANT INTERNATIONAL AND COMPARATIVE MATERIAL

74. 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, and *Matanović*, cited above, § 98.

75. 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). See also *Matanović*, cited above, § 99.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 8 OF THE CONVENTION

76. The applicant complained of entrapment by agents provocateurs, unlawful secret surveillance and the use of evidence thereby obtained in the criminal proceedings against him. He relied on Articles 6 § 1 and 8 of the Convention, which, in so far as relevant, provide as follows:

Article 6

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

Article 8

"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

1. The parties' submissions

77. The Government argued that the final domestic decision in the present case was the Supreme Court's judgment of 5 April 2011 (see paragraph 59 above) and that there had been no reason for the applicant to lodge a constitutional complaint against that judgment before the Constitutional Court. Accordingly, the Government considered that the judgment of the Supreme Court of 5 April 2011, rather than the Constitutional Court's decision of 8 December 2011 (see paragraphs 61-62 above), was the one which was of relevance for the calculation of the six-month time-limit. Moreover, the Government considered that the applicant should have simultaneously lodged a constitutional complaint before the Constitutional Court and a request for extraordinary review of a final judgment before the Supreme Court in order to properly exhaust the domestic remedies.

78. The applicant maintained that he had properly exhausted the domestic remedies. He pointed out that the Constitutional Court's practice of declaring inadmissible constitutional complaints against decisions of the Supreme Court relating to requests for extraordinary review of a final

judgement had subsequently been abandoned on the grounds that it was contrary to the relevant principles set out in the Court's case-law.

2. The Court's assessment

79. The Court notes that in a number of earlier cases against Croatia it has already examined the same legal issue as that raised by the Government in the case at hand (see the case-law cited at paragraph 65 above). It rejected the Government's argument stressing that, in view of the relevant constitutional arrangement under section 62 of the Constitutional Court Act, the fact that an applicant lodged a constitutional complaint against the judgment of the Supreme Court dismissing his request for extraordinary review of a final judgment and awaited the resolution of the case by the Constitutional Court, could not be held against him in the calculation of the six-month time-limit (see, for instance, *Gregačević v. Croatia*, no. 58331/09, §§ 41-42, 10 July 2012). The Court also notes that the Constitutional Court decided to follow this case-law in its interpretation of section 62 of the Constitutional Court Act (see paragraph 65 above).

80. In these circumstances, the Court sees no reason to depart from this case-law in the present case. It notes that the decision of the Constitutional Court was served on the applicant's representative on 5 January 2012 (see paragraph 62 above) and that the applicant lodged his application with the Court on 5 July 2012, namely within the six-month time-limit. Accordingly, the Government's objection should be rejected.

81. The Court notes that the application 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. It must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 8 of the Convention through secret surveillance of the applicant

(a) The parties' arguments

82. Referring to the Court's case-law in the *Dragojević* case (cited above), the applicant submitted that the recourse to the special investigative measures in his case (phone tapping, covert monitoring, use of undercover agents and simulated purchase) had been unlawful because it had been based on orders issued by the investigating judge contrary to the relevant domestic law. In particular, the investigating judge's orders had not contained a proper assessment of the likelihood that an offence had been committed or whether an investigation into that offence could have been

conducted by other, less intrusive, means, as required under the relevant domestic law.

83. The Government accepted that there had been 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 competent State Attorney's Office, which the investigating judge had accepted as such. Moreover, such interference had pursued the legitimate aim of investigating and prosecuting the crime of currency counterfeiting and had been proportionate to the circumstances and the gravity of the offence at issue and the applicant's criminal activity.

(b) The Court's assessment

84. The Court refers to the general principles concerning the use of measures of secret surveillance set out in the *Dragojević* judgment (cited above, §§ 78-84, 86-89; see also *Matanović* case (cited above, § 112). 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).

85. 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 11, 13 and 18 above).

86. 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" (see also Bašić v. Croatia, no. 22251/13, §§ 33-34, 25 October 2016, and Matanović, cited above, § 114).

87. The Court finds that the same considerations from its above-cited cases are applicable in the case at hand. It sees no reason to depart from that case-law in the present case.

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

2. Alleged violation of Article 6 § 1 of the Convention

(a) Alleged violation of Article 6 § 1 concerning the applicant's plea of entrapment

(i) The parties' arguments

89. The applicant argued that when authorising the work of the undercover agents and the use of simulated purchases, the investigating judge had failed to conduct a thorough examination of all the circumstances of the case and had failed to indicate the reasons warranting the use of such special investigative measures. Furthermore, his request for the questioning of C.M. at the trial had been dismissed even though that could have elucidated the circumstances in which he had been contacted by the undercover agents. The applicant also contended that he had been incited by the undercover agents to commit the offences at issue. There was in particular no explanation why he had not been arrested following the first illicit transaction. In the applicant's view, although it could have been justified to continue with the simulated purchases after the first illicit transaction if it had been necessary to arrest further individuals involved in the offences (the "buy and walk operation" technique), in his case no activity to that effect had been undertaken by the police. He therefore considered that the sole purpose of conducting several simulated purchases had been to incite him to commit further more serious offences of currency counterfeiting. In the applicant's view, the investigating judge had failed to supervise the work of the undercover agents effectively and to prevent the abuse of police powers. The applicant also contended that he had not been able to challenge effectively the evidence obtained through the use of the special investigative measures during the trial, given that the undercover agents had been questioned whilst under special measures of protection and the applicant's request to examine further evidence had been dismissed.

90. The Government argued that the undercover agents had merely participated in the applicant's criminal activity and had in no way instigated it or incited the applicant to commit further offences. In the Government's

view, it was clear that the applicant had already decided to commit the offence of currency counterfeiting before the undercover agents had contacted him. This was apparent from the information obtained by the police concerning the uttering of counterfeit currency by C.M. and his connection with the applicant. Moreover, the use of undercover agents had been justified by the need to identify other individuals involved in the currency counterfeiting operation. That had been a legitimate investigative technique under the Court's case-law. The Government also submitted that the undercover agents had merely declared themselves to be potential buyers of counterfeit euros, which had been justified and necessary given the nature of their work and the circumstances surrounding the criminal offence at issue. In the Government's view, the introduction of a second undercover agent in the police operation had been necessary in order to investigate the extent of the applicant's already known criminal activity. The Government also stated that a number of procedural safeguards had been put in place as regards the use of evidence obtained by the undercover agents. In particular, the use of special investigative measures had been authorised by a valid order issued by the investigating judge, the applicant and his lawyer had both had the opportunity to question the undercover agents and full access to the case file, and they had been also able to put forward all the relevant arguments, which had been duly examined by the domestic courts.

(ii) The Court's assessment

(α) General principles

- *The test of entrapment*

91. The general principles concerning the issue of entrapment and the Court's methodology for examining the complaints of entrapment are extensively elaborated in the *Matanović* case (cited above, §§ 121-135, with further references).

- *The cases concerning multiple illicit transactions*

92. Although the Court has not yet expressly addressed the question of whether and in what circumstances recourse to an operation technique involving the arrangement of multiple illicit transactions with a suspect by the State authorities may run counter to the Article 6 requirements of protection from entrapment and the abuse of powers by the State in the investigation of crime, there are several examples in its case-law which are instructive in this respect.

93. In *Milinienė v. Lithuania* (no. 74355/01, § 38, 24 June 2008) the Court was confronted with a situation in which a private individual, backed by the police, offered to the applicant – who had worked as a judge –

several considerable financial inducements in return for a favourable resolution of his case. The Court found that, even though the police had influenced the course of events, there was nothing in their actions suggesting abuse. It also considered that the decisive factor for the commission of the offence at issue had been the conduct of the private individual and the applicant and not that of the police.

94. In the case of *Malininas v. Lithuania* (no. 10071/04, § 37, 1 July 2008), the Court examined a situation where the applicant had offered to supply drugs to an undercover agent who had approached him to ask where he could acquire such illegal drugs, after which the transaction had progressed and the applicant had been offered a significant sum of money to supply a large quantity of narcotics. The Court found that this "obviously represented an inducement to produce the goods" and expanded the police's role beyond that of undercover agents to that of *agents provocateurs*, contrary to the protection from entrapment under Article 6.

95. In the case of *Lalas v. Lithuania* (no. 13109/04, § 45, 1 March 2011), the Court was faced with a situation where the applicant's criminal activity had been uncovered during the execution of a so-called criminal conduct simulation model that was initially ordered in respect of another person. Relying on the *Malininas* case-law, the Court found that the significant amount of money offered by the undercover agent to the applicant's accomplice had also represented – in respect of the applicant – an inducement to produce narcotics which amounted to an entrapment contrary to Article 6.

96. In *Furcht v. Germany* (no. 54648/09, §§ 58-59, 23 October 2014) the Court examined a situation in which the applicant had at first declined an undercover agent's proposal of participating in a drug deal but was then re-contacted by the undercover agent and persuaded to continue arranging the sale of drugs by a third party to the undercover agents. The Court considered that by engaging in such conduct "the investigating authorities clearly abandoned a passive attitude and caused the applicant to commit the offences". The Court therefore concluded that the undercover measure in question went beyond the mere passive investigation of pre-existing criminal activity and amounted to police incitement, contrary to Article 6.

97. By contrast, in the case of *Scholer v. Germany* (no. 14212/10, §§ 89-90, 18 December 2014), concerning a multiple drug deal, the Court did not find a violation of Article 6 § 1 of the Convention with regard to the applicant's complaint that the police investigators had inflated the quantity of drugs ordered and thus incited him to deal in larger amounts of drugs. The Court observed that the police informant had indeed asked the applicant prior to the third drug transaction whether he could supply him with larger amounts of drugs. However, the exact quantity of drugs ordered had been fixed only after the applicant had explained that he could supply the informant with as many drugs as the latter wanted. The Court therefore held

that the applicant had not been subjected to undue pressure by the informant, who was acting on the police's instructions, to commit the drug offences of which he was subsequently found guilty. In these circumstances, the Court concluded that the police had investigated the applicant's activities in an essentially passive manner and had not incited him to commit drug offences he would not have committed had an "ordinary" customer approached him instead of the police.

98. In *Ciprian Vlăduț and Ioan Florin Pop v. Romania* (nos. 43490/07 and 44304/07, §§ 86-87, 16 July 2015), a case concerning several illicit drug transactions, the Court observed that the undercover police agent had planned the first deal and had made all the arrangements for the next deal, leaving the applicant with nothing more to do than follow his lead. Although the Court found that the applicant had demonstrated the ability to obtain more drugs at short notice, it considered that the significant role played by the undercover agent in arranging the next deal ran counter to the requirement of passivity on the State agent's part. The Court also noted that the undercover agent had been the main buyer of the first batch of drugs and, although the crime had already been committed, he had insisted that the applicant bring in more drugs to sell exclusively to him, even threatening to take his business elsewhere in the event of the applicant's failure to meet his demand. In the Court's view, the combination of insistence on the part of the police and the lack of any prior information concerning the applicant's alleged implication in drug trafficking were sufficient to conclude that there had been entrapment in the case at issue.

99. It follows from the above that recourse to an operation technique involving the arrangement of multiple illicit transactions with a suspect by the State authorities is a recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise. The Court's case-law shows that in practice such an operation technique may be aimed at gaining trust with an individual with the aim of establishing the scope of his or her criminal activity (see, for instance, *Scholer*, cited above) or working up to a larger source of criminal enterprise, namely to disclose a larger crime circle (see, for instance, *Furcht*, cited above).

100. However, in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement (see *Matanović*, *cited* above, §§ 123-124, with further references). Accordingly, when the State authorities use an operational technique involving the arrangement of multiple illicit transactions with a suspect, the infiltration and participation of an undercover agent in each illicit transaction must not expand the police's role beyond that of undercover agents to that of *agents*

provocateurs. In each transaction, the police's conduct must be consistent with the proper use of governmental power (see *Milinienė*, cited above, § 38; *Lalas*, cited above, § 45; *Scholer*, cited above, §§ 88-89; and *Ciprian Vlăduț and Ioan Florin Pop*, cited above, §§ 86-87).

101. Furthermore, it also follows from the above that in cases concerning recourse to an operational technique involving the arrangement by State authorities of multiple illicit transactions with a suspect, any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime (compare *Malininas*, cited above, § 37, and *Furcht*, cited above, §§ 58-59).

102. In either of the above situations (improper conduct of undercover agents in one or more multiple illicit transactions or involvement in activities enlarging the scope or scale of the crime) the State authorities might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Should it be established that this was the case, the relevant inferences in accordance with the Convention must be drawn either with regard to the particular illicit transaction affected by improper conduct of State authorities or with regard to the arrangement of multiple illicit transactions as a whole (see, *mutatis mutandis*, *Bannikova v. Russia*, no. 18757/06, §§ 53-57, 4 November 2010).

103. The Court also considers that, although normally the issues concerning appropriate sentencing fall outside the scope of the Convention (see, for instance, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 55, 24 January 2017; see also *Cani v. Albania*, no. 11006/06, § 55, 6 March 2012), as a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit. Indeed, in either of the above situations (see paragraphs 102-103 above), although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of the State authorities (compare *Furcht*, cited above).

(β) Application of these principles to the present case

- *Substantive test of incitement*

104. It is undisputed between the parties that the applicant was involved in four encounters during which he succeeded in uttering a significant quantity of counterfeit euros by selling them to the undercover police agents (see paragraphs 14-15 and 20 above). The issue arises, however, as to whether those transactions were the result of the undercover agents'

influence in inciting the applicant to commit the offences at issue. The domestic courts did not consider that to be the case. They relied on the fact that the undercover agents' actions had been covered by an investigating judge's order and considered that it could not be said that the undercover agents had allowed the applicant to develop his criminal activity or in any manner incited him to commit an offence. For the domestic courts, the actions of the undercover agents were tactical actions aimed at gaining the confidence in the applicant in further uttering of counterfeit euros (see paragraphs 55 and 57 above).

105. For its part, the Court finds that there is no doubt that the case at issue falls into the category of "entrapment cases". The first question to be examined by the Court is therefore whether the State agents carrying out the undercover activity remained within the limits of "essentially passive" behaviour or exceeded them, acting as *agents provocateurs* (see *Matanović*, cited above, §§ 123-124 and 132).

106. The Court notes at the outset that at the time when the undercover operation in question was mounted, the applicant did not have a criminal record and nothing in the material available to the Court suggests that he had previously been suspected of money counterfeiting (compare *V. v. Finland*, cited above, § 70, and *Teixeira de Castro v. Portugal*, 9 June 1998, § 38, *Reports of Judgments and Decisions* 1998-IV). However, the undercover operation in respect of the applicant was mounted on the basis of the results of investigative work by the police which allegedly revealed that the applicant had supplied a quantity of counterfeit euros to a certain C.M., who had then uttered them in Istria (see paragraph 9 above).

107. The Court further notes that the first contact between the applicant and the undercover agent was made at the latter's initiative. In July 2008 the undercover agent E.K. contacted the applicant by phone and arranged a meeting with him in August 2008. It was at this meeting that the first illicit transfer of counterfeit currency took place (see paragraphs 14 and 28 above).

108. However, having considered the material available to it, the Court does not consider that this first contact and meeting between the applicant and the undercover agent represented an inducement for the applicant to produce counterfeit currency. In this connection, the Court notes that the applicant readily offered the undercover agent a counterfeit 100 euro note (see paragraph 14 above). He thereby demonstrated his capacity to produce counterfeit currency at short notice and there is no indication that the conduct of the police was the decisive factor in the commission of the offence.

109. The Court is satisfied that the first illicit transaction between the applicant and the undercover agent was the result of the applicant's own deliberate conduct (see *Volkov and Adamskiy v. Russia*, nos. 7614/09 and 30863/10, § 44, 26 March 2015). There is nothing suggesting that the

applicant would not have uttered the counterfeit currency on that occasion had an "ordinary" customer approached him instead of the police (compare *Scholer*, cited above, § 88).

110. The Court observes, however, that the applicant was not arrested following the initial transfer of a 100 euro counterfeit note to the undercover agent in August 2010. This appears to be the result of the investigating authorities' decision to arrange further meetings with the applicant rather than arresting him immediately after the first illicit transaction. The applicant was eventually arrested only when, following an agreement with the undercover agents, he produced larger quantities of the counterfeit euros. Throughout the proceedings before the domestic courts, and also in his submission to the Court, the applicant argued that this had been an abuse of police powers aimed at inciting him to extend the scope of the criminal activity, and which eventually resulted in a more severe sentence (see paragraphs 53, 56 and 91 above).

111. In view of the applicant's specific complaint, although the Court found on the basis of the material available to it that the first illicit transaction between the applicant and the undercover agent was not a result of police incitement, the Court must also examine whether the investigating authorities' recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant ran counter to the requirements of Article 6 § 1 of the Convention (see paragraph 102 above). In making that assessment the Court must first examine whether in any of the multiple illicit transactions the State agents' role was expanded beyond that of undercover agents to that of *agents provocateurs* and, secondly, whether by the multiple illicit transactions the State agents improperly extended the scope or scale of the applicant's actual criminal intent and capacity (see paragraphs 103-104 above).

112. The Court notes firstly that there is no conclusive evidence as to who took the initiative in arranging the further meetings between the applicant and the undercover agents. When cross-examined at the trial, the undercover agent E.K. was unable to state whether he had contacted the applicant more frequently than vice versa, or to say who it was that had initiated the meetings specifically for the illicit transactions involving the counterfeit euros (see paragraphs 36 and 49 above). Although undercover agent A.B. asserted at the trial that it was the applicant who had contacted him concerning the transfer of the large quantity of counterfeit euros on 22 November 2008 (see paragraph 50 above), the Court cannot but note that in the period preceding that event, the undercover agents had repeatedly attempted to contact the applicant (see paragraph 52 above). Moreover, there were certain aspects of the communications between the applicant and the undercover agents that suggested prompting of the applicant to engage in the illicit transfer of counterfeit euros (see paragraph 58 above).

113. The Court further notes that the investigating judge failed to scrutinise adequately the police's request to extend the use of the simulated purchase model by requesting documents, recordings and other details that would have supported the general assertion by the police that further undercover work was needed in order to identify and arrest all those involved in the uttering of the counterfeit banknotes and to collect evidence concerning the offence at issue. Instead, the investigating judge merely accepted the police's application for an extension of the use of the simulated purchase model, finding that there were no new circumstances warranting a discontinuation of the use of the special investigative measures initially ordered in July 2008 (see paragraphs 13 and 18 above). The Court is therefore not satisfied that a proper supervision of the further use of simulated purchases was exercised by the investigating judge (see *Matanović*, cited above, § 124).

114. The Court also observes that there was no indication during the period concerned that the applicant was selling counterfeit currency to anybody other than the undercover agents, that no details were specified regarding the manner in which he had obtained the counterfeit currency, that no other suspect was ever identified as being involved in the case, and no international legal assistance was requested from Bosnia and Herzegovina, where the applicant allegedly procured the counterfeit euros. The ambiguity of the extended use of the simulated purchase model can also be observed in the statements of the undercover agents, who were not only unable to explain why the applicant had not been arrested after the first illicit transfer of euros in August 2008 but were likewise unable to explain the reasons for the decision to engage in multiple illicit transactions with the applicant in the first place (see paragraphs 36 and 49-50 above). It is therefore unclear under what form of practical guidance, if any, the undercover agents acted in the applicant's case after the first purchase.

115. It is also indicative in this context that the applicant was not indicted or convicted for uttering counterfeit euros to anybody except the undercover agents. There is, moreover, no indication that any further activities were undertaken by the authorities to secure the evidence that would have been necessary to prosecute an illegal business enterprise engaged in counterfeiting currency, and which might have warranted recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant.

116. In these circumstances, on the basis of the available material, it is impossible for the Court to establish with a sufficient degree of certainty whether or not the applicant was the victim of entrapment contrary to Article 6 with regard to his participation in the multiple illicit transactions with the State agents. It is therefore essential that the Court examine the procedure whereby the plea of entrapment was assessed in this case, to

ensure that the rights of the defence were adequately protected (see *Matanović*, cited above, §§ 134-135).

- *Procedural test of incitement*

117. The Court notes that the applicant raised an arguable plea of entrapment related to the multiple illicit transactions with the State agents (see paragraphs 35, 43 and 53 above). Although he declared that he considered himself "responsible" for the transaction on 22 November 2008 because he had "given in to the inducement" by the police (see paragraph 35 above), the Court considers that this did not exempt the domestic courts from examining his plea of entrapment. This is because a confession to an offence committed as a result of incitement cannot eradicate either the incitement or its effects (see *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 72, ECHR 2008).

118. In this connection, and in view of the applicant's specific complaints, the competent criminal courts should have investigated why the police decided to launch the operation involving the arrangement of multiple illicit transactions with the applicant, what evidentiary material they had in their possession, and the manner in which the police had interacted with the applicant (see, *mutatis mutandis*, *Nosko and Nefedov v. Russia*, nos. 5753/09 and 11789/10, § 65, 30 October 2014). This was particularly important in view of the lack of proper scrutiny by the investigating judge when authorising the undercover operation in question (see paragraph 115 above) and the inconclusive statements of the undercover agents concerning the decision-making process as regards the conduct of the undercover operation involving multiple purchases in the applicant's case (see paragraph 116 above).

119. In particular, although the applicant had the opportunity to question the police agents who participated in the multiple simulation purchases (see paragraphs 27-31 above) – which is an important factor in assessing his plea of incitement – under the Court's case-law it was also necessary for other witnesses who could testify on the issue of incitement to be heard in court and to be cross-examined by the defence, or at least that detailed reasons should be given for any failure to do so (see *Bannikova*, cited above, § 65).

120. Indeed, it would appear from the statements of the undercover agents that it was their superior who was at the centre of the decision-making process in the case (see paragraphs 49-50 above). Given that the applicant maintained throughout the proceedings that the purchase of further quantities of counterfeit euros had been a result of incitement, it was incumbent on the domestic authorities, irrespective of an explicit request by the applicant, to elucidated circumstances of the case (see, for example, *Ramanauskas*, cited above, § 71, and *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, § 121, 24 April 2014) including by way of questioning the undercover agents' superior officer, who could have

dispelled any doubts as to the grounds and reasons for the multiple application of the simulated purchase model. However, the court in the present case did not attempt to respond to the applicant's complaint of entrapment by following this line of inquiry.

121. The domestic courts, when scrutinising the conduct of the undercover agents, mostly limited their inquiry to ascertaining whether the undercover agents were acting on the basis of an order from an investigating judge. The Pazin Municipal Court also considered that there was nothing suggesting that the undercover agents had acted improperly so as to allow the accused to develop his criminal activity or to incite him in any manner to commit an offence. In this connection it only specified that there was nothing to suggest that the undercover agents had incited the accused to commit an offence "in the sense that they had offered him some reward or that they had brought him presents or such like" (see paragraph 55 above). However, the Court notes that such an inquiry into a plea of entrapment is limited and thus inconsistent with the duty for the domestic courts to scrutinise adequately the investigating authorities' recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant (see paragraphs 102-104 above).

122. In this connection the Court also notes that the Pula County Court, acting as the court of appeal, responded to the applicant's complaints of entrapment by relying on the statement given by the undercover agent E.K. (see paragraph 57 above). The Court has already observed that the statement of the undercover agent E.K. was inconclusive (see paragraph 114 above), which makes it difficult for the Court to accept that this was a sufficient basis on which to discharge the domestic courts' obligation to examine thoroughly the applicant's plea of entrapment concerning the multiple illicit transactions.

123. Moreover, the Court notes that the Supreme Court reiterated and endorsed the reasoning of the lower courts when dismissing the applicant's plea of entrapment despite being confronted with extracts from communications between the applicant and the undercover agents specifically suggesting prompting of the applicant to engage in one of the subsequent illicit transfers of counterfeit euros. However, the Supreme Court failed to analyse thoroughly and to provide the relevant reasoning for accepting or refusing the applicant's contention in this respect (see paragraphs 58-59 above).

124. In the light of the above considerations, the Court finds that the domestic courts failed to comply with their obligation to examine effectively the applicant's plea of entrapment in respect of the multiple illicit transactions of counterfeit currency, as required under the procedural test of incitement under Article 6 § 1 of the Convention (see, for instance, *Pătraşcu v. Romania*, no. 7600/09, § 53, 14 February 2017). They failed in their task of verifying that the manner in which the multiple test purchases

had been ordered and conducted excluded the possibility of abuse of power, in particular of entrapment in any of the subsequent illegal purchases, or whether the police agents engaged in the activities which might have improperly enlarged the scope of the applicant's criminal activity (see, *mutatis mutandis*, *Lagutin and Others*, cited above, § 116). At the same time, the domestic courts based the applicant's sentence on the continuing criminal activity related to his multiple illicit transactions with the police agents (see paragraphs 44 and 54 above).

125. Accordingly, the Court finds that the decision-making procedure leading to the applicant's more serious sentencing for multiple uttering of counterfeit currency failed to comply with the requirements of fairness (see paragraph 97 above). This does not imply that he was wrongly convicted for uttering counterfeit currency but rather that the domestic courts failed to establish whether by his participation in the subsequent illicit transactions the scope of his criminal activity was extended as a result of improper conduct on the part of the authorities, which required the drawing of relevant inferences in accordance with the Convention (see paragraphs 102-105 above).

126. The Court therefore finds that there has been a violation of Article 6 § 1 of the Convention.

(b) Alleged violation of Article 6 § 1 concerning the use of evidence obtained by secret surveillance in the criminal proceedings

127. In view of its findings above, the Court considers that while the applicant's complaint concerning the use of evidence obtained by secret surveillance is admissible, there is no need to examine it separately (see, for instance, *Ciprian Vlăduț and Ioan Florin Pop*, cited above, § 94).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. 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

129. The applicant claimed EUR 10,000 in respect of non-pecuniary damage concerning the breach of his right to a fair trial.

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

131. The Court considers that the applicant must have sustained non-pecuniary damage which is not sufficiently compensated by the finding

of a violation. Ruling on an equitable basis, it awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

132. The applicant also claimed EUR 6,910 for the costs and expenses incurred before the domestic courts and before the Court.

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

134. 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 6,800 covering costs under all heads.

C. Default interest

135. 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's plea of entrapment;

4. *Holds* that there is no need to examine the remaining complaint raised by the applicant under Article 6 § 1 of the Convention;

5. *Holds*,
   (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 (HRK) 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 to the applicant, in respect of non-pecuniary damage;

(ii) EUR 6,800 (six thousand eight 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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Linos-Alexandre Sicilianos
Deputy Registrar	President