

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b) and Article 59(1), (2) and (3) and Article 60 and Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Plenary and composed of the following judges:

Mr. Mato Tadić, Vice-President,

Mr. Zlatko M. Knežević, Vice-President,

Ms. Margarita Tsatsa-Nikolovska, Vice-President,

Mr. Tudor Pantiru,

Ms. Valerija Galić,

Mr. Miodrag Simović,

Mr. Giovanni Grasso

Having deliberated on the request filed by **Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request**, in the case no. **U 5/16**, at its session held on 1 June 2017 adopted the following

PARTIAL DECISION ON ADMISSIBILITY AND MERITS

The request filed by **Ms. Borjana Krišto**, the Second Deputy Chair of the House of Representatives at the time of filing the request, is partly granted.

It is hereby established that the provisions of Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 118 (3) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the

provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are not in conformity with the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 61(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, not later than six months from the date of communicating the present decision, to harmonize the provisions of:

Article 84 (2), (3) and (4) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the

provisions of Article I(2) of the Constitution of Bosnia and Herzegovina,

Article 117 (d) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3) (f) of the Constitution of Bosnia and Herzegovina,

Article 118 (3) and Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

Article 225 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the provisions of Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina,

and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) with the

provisions of Article I(2) of the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly of Bosnia and Herzegovina is hereby ordered, in accordance with Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina to inform the Constitutional Court, within six months from the date of communicating this decision, on the measures taken to enforce the present decision.

The request filed by Ms. **Borjana Krišto**, Second Deputy Chair of the House of Representatives at the time of filing the request, for the review of constitutionality of the provisions of Article 84 (5), Article 119 (1) and Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) is hereby dismissed as ill-founded.

It is hereby established that the provisions of 84 (5) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Articles I(2) and II(3) (e) of the Constitution of Bosnia and Herzegovina.

It is hereby established that the provisions of Article 119 (1) of the Criminal Procedure Code of Bosnia and Herzegovina

(*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of Article I(2) and II(3) (f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is hereby established that the provisions of Article 216 (2) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) are in conformity with the provisions of II(3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 27 June 2016, Ms. Borjana Krišto, Second Deputy Chair of the House of Representatives at the time of filing the request (“the applicant”) filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for the review of constitutionality of the provisions of Article 84 (2), (3), (4) and (5), Article 109 (1) and (2), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (*Official Gazette of BiH*, nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13; “the Code”) with the provisions of Article I(2), II(3) (b), (e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 23(2) of the Rules of the Constitutional Court, the Parliamentary Assembly of Bosnia and Herzegovina, the House of Representatives and the House of Peoples respectively were requested on 1 July 2016 to submit their respective replies to the request.
3. The House of Representatives and the House of Peoples submitted their replies to the request on 1 August and 28 July 2016 respectively.
4. In accordance with Article 90(1) (b) of the Rules of the Constitutional Court, at the session held on 30 and 31 March 2017 the Constitutional Court adopted a decision disqualifying the President of the Constitutional Court Mr. Mirsad Ćeman and the Judge Ms. Seada Palavrić from working and deciding on the respective request, as they had taken part, as members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in the enactment of the Law, which provisions were challenged.
5. Pursuant to Article 60 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court reached a conclusion to adopt a partial decision and to postpone the

adoption of the decision regarding the part relating to the establishment of the conformity of Article 109 (1) and (2) of the Code with the provisions of Article II(3) (b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.

III. Request

a) Allegations stated in the request

1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

6. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.
7. In reasoning these allegations, the applicant has stated that the mentioned provisions are unspecified and imprecise, because they do not prescribe the limits, or the manner in which the Chief Prosecutor treats a witness who is being granted immunity, *i.e.* the Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses, so that the victim and the damaged person lose the right to satisfaction in a criminal procedure. The legislator failed to set a clear and precise limit considering the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights.
8. Besides, a “prosecutor’s pardon” entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution, which leads to the violation of the principle of the equality of citizens before the law and the principle of legality, thus it becomes questionable as to what happens with the property gain effected through the criminal offense. Prosecutor’s pardon entirely excludes the court and its role in a criminal procedure, and the witness becomes an evidentiary instrument in the hands of the prosecution.

2. Physical Examination and Other Procedures, Article 109 (1) and (2) of the Code

9. The applicant indicated that the provisions of Article 109 (1) and (2) of the Code are in contravention of Article II(3)(b) and (f) of the Constitution of Bosnia and Herzegovina and Articles 3 and 8 of the European Convention.
10. In reasoning these allegations, the applicant indicated that the mentioned provisions prescribe the taking of blood samples and other medical procedures, essentially speak about medical treatments and criteria according to which, against the will and without the consent of the accused and other persons, they may be subjected to such medical treatments, which may raise the issue of inhuman and degrading treatment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention. The applicant pointed to the case-law of the European Court of Human Rights according to which the right to private life was narrowly connected to the term of personal integrity, and any interference with the physical integrity must be prescribed by law and must be proportionate to the legitimate purpose for which it is exercised and for which the consent of the given person is required. Within the meaning of the case-law of the European Court of Human Rights (the applicant specified the judgments of the European Court of Human Rights) any performance of coercive medical procedure with the aim of collecting evidence must be convincingly justified by the facts of the present case, whereby it is necessary to be mindful of the gravity of the criminal offense concerned, and it must also be shown that the alternative methods of extracting evidence were considered. Besides, the procedure must not be followed by any risk of permanent damage to the suspect's health. The provisions of Article 109 (1) and (2), from the aspect of Article 3 of the European Convention, do not specify the degree to which coercive medical procedure was necessary for obtaining evidence, the risk to the suspect's health, the manner in which the procedure was performed and the physical pain and mental suffering the procedure inflicted, the degree of physician's (medical) supervision made available and the effects on the suspect's health.

3. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 point d) of the Code

11. The applicant indicated that the provisions of Article 117 point d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.
12. In reasoning these allegations, the applicant indicated that the prescribing in this manner made it possible for the exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and covert arbitrariness are introduced into the criminal legislation. Irrespective of the legitimate goal, the said provision opens up a possibility to undertake investigative actions for almost all criminal offenses enumerated in the Criminal Code.

4. Competence to Order the Measures and the Duration of the Measures, Article 118 paragraph (3) of the Code

13. The applicant indicated that the provisions of Article 118 paragraph (3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina.
14. In reasoning these allegations, the applicant indicated that, according to these provisions, investigative actions may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, with measures referred to in points a) and c) of Article 116 of the Code lasting up to six months in total at the longest. Such a long period of the duration of measures can in no way be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The portion of the provision reading “particularly important reasons” violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. Besides, that part of the provision is at the same time a presumption and a standard, on which a preliminary proceeding judge relies when applying this provision. Namely, it is an undisputed fact that a prolonged duration of special investigative actions will be necessary when it comes to criminal offenses of terrorism, severe forms of corruption, *i.e.* organized crime, trafficking in

persons, in narcotic drugs and in arms. However, the disputed provision did not make a necessary distinction between such offenses and those that do not have such elements, and to which the extension of time limits should not apply. Due to the aforementioned, the disputed provision causes legal unforeseeability and legal uncertainty. The applicant indicated that the restrictions on citizens' constitutional rights to privacy are within the judicial discretion of a Prosecutor and a preliminary proceeding judge, based on unspecified presumptions for the extension of the enforcement of special investigative actions.

5. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119 paragraph (1) of the Code

15. The applicant indicated that the provisions of Article 119 paragraph (1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.
16. In reasoning these allegations, the applicant indicated that the regulation of special investigative actions is not in conformity with the Constitution of Bosnia and Herzegovina for the reason that there is no mechanism securing a judicial control. Namely, the Court decides on the commencement of the undertaking of special investigative actions, however the mentioned provision prescribes that upon the completion of actions a police body prepares a report for the Prosecutor's Office, and a Prosecutor does so for a preliminary proceeding judge and only then a preliminary proceeding judge obtains a complete information on the results of the special investigative actions. A preliminary proceeding judge, after determining the commencement of the application is unable to oversee whether there still exists a need for the conduct of such actions, since the Code does not impose on a preliminary proceeding judge an obligation to demand daily or periodical reports from the police, neither does it impose an obligation on the police to submit such reports of its own initiative to a preliminary proceeding judge, or to a Prosecutor for that matter. The applicant indicated that the European Court of Human Rights holds that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. In the case of *Rotaru v. Romania* the European Court of Human Rights indicated that although intelligence services may exist legitimately in a democratic society, the powers of secret

oversight of citizens may be tolerated solely to an extent that is strictly necessary for the protection of democratic institutions. Within the meaning of Article 8 of the European Convention, oversight procedures must follow the values of a democratic society, particularly the rule of law, which implies that the interference of executive authorities with the rights of individuals must be subjected to effective oversight, which should be carried out by a court. The disputed provision did not envisage such a possibility, instead it prescribed the submission of the relevant data, which makes it possible to reach a conclusion on whether the reasons for which actions were ordered had ceased and whether actions must be stopped. It is certain that the obligations of the police stipulating that “upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures, as well as a report, must be submitted by police authorities to the Prosecutor” are not sufficient for the realization of that goal. A preliminary proceeding judge must have a legal power at all times throughout the conduct of special investigative actions and request from a Prosecutor to submit a report on the justification of their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification of further continuation of actions, request from the police to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one’s own.

6. Order for Conducting an Investigation, Article 216 paragraph (2) of the Code

17. The applicant indicated that the provisions of Article 216 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.
18. In reasoning these allegations, the applicant indicated that the order to conduct an investigation is the first act placing a certain person under a criminal procedure, which, in its essence, constitutes a sort of restriction on fundamental rights and freedoms, as it does not secure the right to appeal or other legal protection against the initiation of criminal prosecution. The order to conduct an investigation contains the data on a perpetrator of the criminal offense if known, the description of the act pointing out the legal elements which make it a crime, the legal name of the criminal offense, *etc.* The legislator is, therefore, obliged to prescribe an obligation that a person must be informed immediately *ex officio* that

he/she is a suspect and to constitute at the same time an effective legal instrument of protection against unlawful prosecution. The right to an appeal may be exceptionally ruled out in cases stipulated by law, if other legal protection is ensured. The right to a legal remedy is a universal constitutional and legal right of a human and a citizen. The order to conduct an investigation does not contain the instruction on the legal remedy, and citizens do not have the secured right to appeal against. Not a single law provides for other legal protection against the mentioned order to conduct an investigation. A Prosecutor has issued an order to conduct an investigation, and the person against whom the investigation is conducted has no knowledge whatsoever about it and has not been informed of his/her rights. That could be justified for the most serious criminal offenses, if found in a particular case that there is a risk to life or body or property of greater extent, which the legislator should specify precisely in the law.

7. Completion of Investigation, Article 225 paragraph (2) of the Code

19. The applicant indicated that the provisions of Article 225 paragraph (2) of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in connection with Article 13 of the European Convention.
20. In reasoning these allegations, the applicant indicated that the mentioned provisions regulate the situation where the investigation is not completed within six months, that the Collegium of the Prosecutor's Office shall undertake necessary measures, without prescribing the final time limit. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure and other irregularities in the course of investigation, so a possibility is left for investigation to be conducted for several years. The case-law of the European Court of Human Rights shows that non-effectiveness of investigative procedures, if established that it existed, always leads to a violation of the rights referred to in the Convention. Criminal prosecution must be independent and impartial and investigation must be effective (comprehensive, thorough, quick, diligent, attentive and meaningful).

8. Issuance of the Indictment, Article 226 paragraph (1) of the Code

21. The applicant indicated that the provisions of Article 226 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention.
22. In reasoning these allegations, the applicant indicated that the mentioned provision is incomprehensive from the aspect of a trial within a reasonable time, which stipulates that “If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense”. Upon the completion of an investigation a Prosecutor has at his/her disposal the information, on which basis he/she could either suspend a procedure or issue an indictment. The legislator is obliged to prescribe a time limit for the issuance of an indictment, as well as the extension thereof when it comes to the complex or particularly complex cases. In addition, the mentioned provisions do not envisage a legal instrument against the delay of the proceedings and other irregularities in the investigation procedure, which is contrary to the principle of the rule of law, legal certainty and legal consistency.

b) Reply to the request

23. The House of Representatives, Constitutional-Legal Committee, indicated that it considered the respective request, and that it adopted a conclusion with six votes in favor, one against and one abstention as follows: “The Constitutional-Legal Committee of the House of Representatives of the Parliamentary Assembly of BiH considered the request of the Constitutional Court of BiH[...] and adopted a conclusion that the Parliamentary Assembly of BiH adopted the Criminal Procedure Code of Bosnia and Herzegovina”.
24. The House of Peoples, Constitutional-Legal Committee, indicated that it considered the respective request, and that the Constitutional Court, in accordance with its competence, should decide on the consistency between the Code with the Constitution of Bosnia and Herzegovina.

IV. Relevant Law

25. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13), as relevant, reads:

Article 84

Right of the Witness to Refuse to Respond

(1) *The witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself.*

(2) *The witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses.*

(3) *Immunity shall be granted by the decision of the Chief Prosecutor of BiH.*

(4) *The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony.*

(5) *A lawyer as the advisor may be assigned by the Court's decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.*

Article 116 paras 1 and 2

Types of Special Investigative Actions and Conditions of Their Application

(1) *If evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in*

committing or is participating in the commission of an offense referred to in Article 117 of this Code.

(2) Measures referred to in Paragraph 1 of this Article are as follows:

- a) surveillance and technical recording of telecommunications;*
- b) access to the computer systems and computerized data processing;*
- c) surveillance and technical recording of premises;*
- d) covert following and technical recording of individuals, means of transport and objects related to them;*
- e) undercover investigators and informants;*
- f) simulated and controlled purchase of certain objects and simulated bribery;*
- g) supervised transport and delivery of objects of criminal offense.*

Article 117

Criminal Offenses as to Which Special Investigative Measures May Be Ordered

Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses:

- a) criminal offenses against the integrity of Bosnia and Herzegovina;*
- b) criminal offenses against humanity and values protected under international law;*
- c) criminal offenses of terrorism;*
- d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced.*

Article 118 paras 1, 3, 5 and 6

Competence to Order the Measures and the Duration of the Measures

(1) Measures referred to in Article 116(2) of this Code shall be ordered by the preliminary proceedings judge in an order upon the properly reasoned

motion of the Prosecutor containing: the data on the person against which the measure is to be applied, the grounds for suspicion referred to in Article 116(1) and (3) of this Code, the reasons for its undertaking and other important circumstances necessitating the application of the measures, the reference to the type of required measure and the method of its implementation and the extent and duration of the measure. The order shall contain the same data as those featured in the Prosecutor's motion as well as ascertainment of the duration of the ordered measure.

(3) Measures referred to in Subparagraphs a) through d) and g) Article 116(2) of this Code may last up to one (1) month, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to in Subparagraphs a), b) and c) last up to six (6) months in total, while the measures referred to in Subparagraphs d) and g) last up to three (3) months in total. The motion as to the measure referred to in Article 116(2)(f) may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.

(5) By way of a written order the preliminary proceedings judge must suspend forthwith the execution of the undertaken measures if the reasons for previously ordering the measures have ceased to exist.

(6) The orders referred to in Paragraph 1 of this Article shall be executed by the police authorities. The companies performing the transmission of information shall be bound to enable the Prosecutor and police authorities to enforce the measures referred to in Article 116(2)(a) of this Code.

Article 119 paras 1 and 3

Materials Received through the Measures and Notification of the Measures Undertaken

(1) *Upon the completion of the application of the measures referred to in Article 116 of this Code, all information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order.*

(3) *The preliminary proceedings judge shall forthwith and following the undertaking of the measures referred to under Article 116 of this Code inform the person against whom the measures were undertaken. That person may request from the Court a review of legality of the order and of the method by which the order was enforced.*

Article 216 paras 1 and 2

Order for Conducting an Investigation

(1) *The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist.*

(2) *The order to conduct the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken.*

Article 225 paras 1 and 2

Completion of Investigation

(1) *The Prosecutor shall order a completion of investigation after he concludes that the status is sufficiently clarified to allow for the bringing of charges. Completion of the investigation shall be noted in the file.*

(2) *If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's*

Office shall undertake necessary measures in order to complete the investigation.

Article 226 paragraph 1

Issuance of the indictment

(1) If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.

V. Admissibility

26. In examining the admissibility of the request the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

27. Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

28. The remainder of the respective request was filed by the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly. Bearing in mind the aforementioned, within the meaning of the provision of Article VI(3)(a) of the Constitution of Bosnia and

Herzegovina and Article 19 of the Rules of the Constitutional Court, the Constitutional Court has established that the remainder of the respective request is admissible, because it was filed by an authorized entity, and that there is not a single formal reason under Article 19 of the Rules of the Constitutional Court rendering the request inadmissible.

VI. Merits

29. The applicant claims that the provisions of Article 84 (2), (3), (4) and (5), Article 117(d), Article 118 (3), Article 119 (1), Article 216 (2), Article 225 (2) and Article 226 (1) of the Code are not in conformity with the provisions of Article I(2), II(3) (e) and (f) of the Constitution of Bosnia and Herzegovina and the provisions of Articles 6, 8 and 13 of the European Convention.

VI. 1. Right of the Witness to Refuse to Respond, Article 84 (2), (3), (4) and (5) of the Code

30. The applicant indicated that the provisions of Article 84 (2), (3), (4) and (5) of the Code are contrary to Article II(3)(e) in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The applicant claims that the mentioned provisions are not in conformity with the Constitution of Bosnia and Herzegovina, because they are unspecified and imprecise, since they do not have a clear limit considering the nature and gravity of criminal offenses, which may justify the failure to undertake criminal prosecution on account of protecting the public interest in a democratic society, which is based on the rule of law and the respect for human rights. The Chief Prosecutor may decide not to undertake criminal prosecution for even the most serious criminal offenses.

31. The Constitutional Court finds, first and foremost, that the provisions of Article 84 paragraph 1 of the Code prescribe that “the witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself”. In that respect the Constitutional Court recalls that the European Court of Human Rights in the case of *Saunders v. The United Kingdom* (see, the European Court of Human Rights, judgment of 17 December 1996) noted that “although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. The right not to incriminate oneself, in particular, presupposes that

the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention”. The Constitutional Court finds that the mentioned provision “incorporated” into the Code the mechanism of privileges against self-incrimination as one of the fundamental rights, which makes a part of the principle of a fair procedure and is narrowly linked to the presumption of innocence.

32. The Constitutional Court finds that the challenged provisions of Article 84 of the Code prescribe that *the witnesses exercising the right referred to in to Paragraph 1 of this Article shall answer the same questions provided that immunity is granted to such witnesses. Immunity shall be granted by the decision of the Chief Prosecutor of BiH. The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony. A lawyer as the advisor may be assigned by the Court’s decision to the witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.*
33. Thus, the challenged provisions, as a form of protection against self-incrimination, the legislator prescribed that a witness may answer those questions provided that he/she has been granted immunity against criminal prosecution, the competence for granting immunity, failure to undertake criminal prosecution against a witness being granted immunity, and an obligation to appoint a counsel under certain conditions to a witness who has been granted immunity. The Constitutional Court observes, first and foremost, that the present case is about a witness, *i.e.* a person for whom no evidence exist that he/she had committed a criminal offense, *i.e.* who will incriminate oneself by answering the questions as a witness in a procedure against another person, and those will be the first evidence against him/her. In terms of the mentioned provisions the prosecutor may abandon criminal prosecution of such a witness for the purpose of obtaining his/her answers in a procedure against another person. Such answers become evidence for the prosecution against that other person. It follows that this is an agreement between a prosecutor and a witness. The Chief Prosecutor shall decide on the granting of immunity.

34. The Constitutional Court recalls that the entry into force of the Code (2003) in Bosnia and Herzegovina brought about essential changes to the rules of a criminal procedure. First and foremost, a criminal procedure was regulated as a sort of a criminal litigation with strong emphasis on the adversariness of each stage of a criminal procedure, where a prosecutor is one of the parties to the proceedings, with the powers and obligation to prosecute the perpetrators of criminal offenses. The Code gives the competence and responsibility to a prosecutor for the entire procedure of uncovering and resolving criminal offenses, by entrusting an investigative procedure in its entirety to a prosecutor. Thus, within the meaning of the Code, a prosecutor has the obligation to undertake criminal prosecution if there is evidence that a criminal offence was committed, unless prescribed differently by this code. The principle of legality follows from the aforementioned, suggesting that everyone for whom evidence exist that he/she had committed a criminal offense should be prosecuted and punished in accordance with law. On the other hand, the Constitutional Court recalls that one of the ways used by contemporary states and the international community for a more successful fight against the perpetrators of severe criminal offenses is the creation of legal mechanisms that allow for a prosecutor to depart, under certain conditions, from the principle of legality of criminal prosecution, and they are special cases, when a greater public interest requires so. The Constitutional Court finds that the mechanism of granting immunity is “incorporated” in the Code with a view to opposing serious threats to the security of citizens, which appear in the form of terrorist organizations and affiliated criminal associations, *i.e.* with a view to bringing the perpetrators of such offenses to justice, as well as the organizers thereof in particular. It is indisputable that the aforesaid constitutes a justified exception to the principle of legality.
35. According to the applicant’s allegations the mentioned provisions do not meet the requirements of being specified and precise, because they do not have a clear boundary vis-à-vis the nature and seriousness of criminal offenses that might justify the failure to undertake criminal prosecution on account of the protection of the public interest in a democratic society.
36. The Constitutional Court recalls the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina, according to which Bosnia and Herzegovina has been determined as “a democratic state, which shall operate under the rule of law and with free and democratic

elections“. The mentioned provision gives rise to the principle of the rule of law, which represents the system of political authority based on the respect for the Constitution, laws and other regulations, by citizens and the holders of public offices alike. All laws, other regulations, as well as conduct on the part of public office holders must be based on law, or on a regulation based on law. Further, the concept of the rule of law is not limited solely to the formal respect for the principle of constitutionality and legality, but it requires that the constitution and laws have certain content, appropriate for a democratic system, so that they may serve the protection of human rights and freedoms in relations between citizens and public authority bodies, as part of a democratic political system. Besides, the European Convention particularly proclaims the rule of law, and its special significance is reflected in the area of procedural law.

37. The Constitutional Court further recalls that the Code determines rules ensuring that no innocent person is convicted in a legally conducted procedure before a competent court, and that a perpetrator of a criminal offense is sentenced or another measure ordered against him/her under conditions envisaged by Criminal Code. Within the meaning of the Constitution of Bosnia and Herzegovina the regulation of criminal legislation lies within the exclusive competence of a legislator. From a constitutional and legal point of view, it is a sole obligation of a legislator to consider, while regulating certain mechanisms of that procedure, the requirements set before it by the Constitution of Bosnia and Herzegovina, particularly those arising from the principle of the rule of law. More precisely, the regulation thereof must be, at all times such, so as to ensure the accomplishment of legitimate goals of a criminal procedure, and a procedural equality of the parties. It is the task of the Constitutional Court to ensure that such requirements are complied with.
38. The Constitutional Court recalls that the requirements of the legal certainty and the rule of law imply that a legal norm is accessible to persons it applies to and is foreseeable for them, that is to say that it is sufficiently precise so that they can actually and specifically know their rights and obligations, up to a degree that is reasonable in given circumstances, so that they can conduct themselves in keeping with such legal norms. When such a requirement is not complied with, undetermined and imprecise legal norms leave room for arbitrary decision-making by competent bodies.

39. The Constitutional Court recalls primarily that different forms of immunity were developed in the international criminal law practice, so that a prosecutor may, depending on the circumstances of the specific case, opt for one of the two basic types of procedural immunity: the total (blanket) immunity granting a witness the full protection from criminal prosecution for any previously committed criminal offenses, to be uncovered during his/her testimony and the limited (use) immunity, guaranteeing a witness that his/her testimony, or other evidence stemming from his/her testimony, will not be used against him/her. However, if a prosecutor collects other evidence, separately and independently from a witness's testimony, a prosecutor may, based on such evidence, prosecute/accuse a witness for a specific criminal offense. Therefore, granting immunity during a criminal procedure aims at ensuring internationally recognized standards of a fair procedure, and they are the right to remain silent, *i.e.* a privilege against self-incrimination. By linking the aforementioned to the provision prescribing that "The witness who has been granted immunity and who has testified shall not be prosecuted except in case of false testimony", the Constitutional Court primarily holds that the challenged provisions are not precise regarding the scope of immunity that may be granted to a certain witness. Namely, based on the cited provision it does not follow whether a decision on immunity relates to the actions the witness mentioned in his/her testimony, or it relates to the actions from the overall criminal event in connection with which the witness deposits a testimony, that is to say whether it relates to the actions that might be uncovered during his/her testimony. Thus, it follows from the cited provision that a legislator failed to make a clear distinction between the right of a witness to remain silent and not to respond to certain questions if a truthful answer would expose him/her to criminal prosecution in relation to the obligation of a witness to answer the questions asked, which is particularly relevant from the aspect of equality of parties to the proceedings. Besides, there is no prescribed mechanism that will ensure for a witness who has been granted immunity, and who has not testified, to be prosecuted for a criminal offense concerning which he/she has been granted immunity. Such a witness may be prosecuted solely if he/she deposited a false testimony. When interpreting the portion of the provision "The witness who has been granted immunity and who has testified shall not be prosecuted..." it could be deduced that criminal prosecution of such a witness is permissible when he/she did not testify. However, the aforementioned indicates that this is an imprecise

provision, *i.e.* that the legislator failed to prescribe precisely when, under what circumstances and in what manner such prosecution might be undertaken, for instance what to do in a situation where a witness has not refused to testify, but has changed the testimony. It follows from the aforementioned that witnesses who would offer testimonies in exchange for abandonment of criminal prosecution do not know specifically and actually to which extent and under which conditions they may realize that, that is to say they do not know when and whether they will be prosecuted. In that respect, the Constitutional Court finds that the legislator did not satisfy the standards of precision and clarity. In view of the aforementioned, the challenged provisions themselves leave room for arbitrary decision-making by a prosecutor, *i.e.* the Chief Prosecutor when granting the immunity.

40. The Constitutional Court further recalls that legal certainty does not mean that decision-makers shall not be entrusted with discretionary powers or a certain freedom to act, provided that there are legal means and legal procedures to prevent the abuse thereof. Laws must always set the framework of discretionary powers and regulate the manner of the implementation thereof with sufficient clarity, which ensures to an individual an adequate protection against arbitrariness. Arbitrary exercise of powers enables unfair or unreasonable decisions contrary to the principle of the rule of law. The Constitutional Court observes that the protection of the rights of the damaged person in a criminal procedure is ensured under the Law (notifying the damaged person of the following: that during a criminal procedure he/she may file a property claim, on the failure to conduct an investigation, on the suspension of the investigation as well as on the reasons for the suspension of the investigation, on the withdrawal of the indictment, on the adoption of a decision acquitting the accused of charges or dismissing the charges or suspending a criminal procedure by a decision, on the results of negotiating the guilt with the accused). Further, the Constitutional Court recalls that the principle of legality is a guarantee to citizens that the prosecutor would institute a criminal procedure whenever statutory conditions have been met (if there is evidence that a criminal offense was committed) and that he/she would treat everyone equally. The person damaged by a criminal offense will then be able to exercise such rights as guaranteed under the Law. On the other hand, the Constitutional Court reiterates that a legislator “incorporated” in the Law the possibility not to undertake criminal prosecution with a view to countering serious threats to the security of citizens appearing in the form of terrorist organizations or other

organized and associated criminal associations, that is to say with a view for perpetrators of such offenses, particularly the organizers thereof, to be brought to justice. In that case, the person damaged by a criminal offence in the perpetration of which a person who was granted the immunity from criminal prosecution for such crime had taken part in the perpetration, will not be able to exercise such rights as guaranteed under the Law, which he/she would possibly be able to exercise in a criminal procedure if no immunity was granted. The Constitutional Court previously noted that a grant of immunity constitutes indisputably a justified exception from the principle of legality. However, the Constitutional Court finds that it follows from the mentioned provisions that the legislator failed to set any statutory conditions or limitations regarding the granting of immunity to a witness, thus it follows that the immunity may be granted to a witness for whom the information exist that he had just participated in the perpetration of criminal offenses as part of a criminal or terrorist organization, with a view to proving criminal offenses, for example the forgery of an official identification card. Thus, the legislator failed to set a limitation for the immunity to be granted to a witness concerning whom there is information to have just participated in the perpetration of these offences, that is to say the challenged provisions do not contain any determinant or indication of the criminal offences being investigated, in order for a prosecutor to suspend the criminal prosecution of a witness with a view to proving those offences. Therefore, the Constitutional Court holds that due to the existence of different interests *i.e.* the endangerment of the rights of an individual to equality before the law and the rights of the persons damaged by a grave criminal offense committed by a person being granted immunity, prescribing the immunity without any limitations rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor, or Chief Prosecutor for that matter. The manner in which the legislator will regulate the mechanism of granting immunity is not within the jurisdiction of the Constitutional Court, however the legislator must prescribe the offences for which immunity may be granted to the witness and the criminal offences to be investigated, in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences. For the sake of comparison, the Constitutional Court observes that the legislator foresaw in the Law a possibility to enter into a Guilty Plea Agreement. That gave a possibility to the prosecutor to negotiate with a suspect or accused on the conditions of confessing to the criminal offense he/she was charged

with, in exchange for a certain sanction, which, by its type and severity, may be below the minimum punishment of imprisonment determined by law for that criminal offense. However, the Constitutional Court observes that the legislator in that case engaged in a detailed regulation of that mechanism, by prescribing exactly the conditions under which a guilty plea agreement may be accepted, and concerning the verification of meeting those conditions the legislator prescribed a judicial control during decision-making on accepting the agreement. Bearing in mind that a prosecutor, or a Chief Prosecutor in the legal system of Bosnia and Herzegovina has a role of a party to the proceedings, which fact does not offer sufficient guarantees regarding his/her independence and impartiality, in addition to prescribing conditions, or limitations (concerning which offences a witness may be granted immunity, and which offences are to be investigated in order for a prosecutor to suspend criminal prosecution of a witness with a view to proving those offences), the legislator is obliged to prescribe judicial control of the fulfillment of these conditions; it is also necessary that the legislator rules out the absolutely discretionary nature of the power conferred by the legislator on a prosecutor or Chief Prosecutor for that matter.

41. Therefore, the Constitutional Court holds that because of imprecision and vagueness of the challenged provisions, these provisions are contrary to the principle of the rule of law. In particular, it is necessary to determine: a) for which crimes the immunity could be granted; b) in which proceedings this kind of immunity could be used. Furthermore, it is necessary to underline that the respect of the conditions foreseen should be verified by an independent and impartial tribunal.
42. The Constitutional Court concludes that the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.
43. In view of the mentioned conclusion, the Constitutional Court will not consider whether the provisions of Article 84 paras 2, 3 and 4 of the Code are contrary to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention.
44. The applicant indicated that the provisions of Article 84 (5) of the Code are contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(3)(d) of the European Convention. The Constitutional Court finds that the mentioned provisions read as follows “A lawyer as the advisor shall be assigned by the Court’s decision to the

witness during the hearing if it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner“. The Constitutional Court observes that the applicant failed to provide a single allegation reasoning why she held that these challenged provisions are contrary to the mentioned articles of the Constitution of Bosnia and Herzegovina and the European Convention.

45. In view of the aforementioned the Constitutional Court finds these allegations stated in the request ill-founded, *i.e.* it concludes that the provisions of Article 84(5) of the Code are in conformity with Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina.

VI. 2. Criminal Offenses as to Which Special Investigative Measures May Be Ordered, Article 117 (d) of the Code

46. The applicant indicated that the provisions of Article 117 (d) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina in conjunction with Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated that the mentioned provisions made it possible to turn an exception into a rule, that is to say that elements of disproportion, excessiveness and covert arbitrariness were introduced into the criminal law legislation. Irrespective of the legitimate goal, the mentioned provision opens up a possibility to undertake special investigative actions for almost all criminal offenses enumerated in the Criminal Code.
47. The Constitutional Court recalls that it is indisputable that by ordering or applying special investigative measures the state interferes with the exercise of the rights of an individual referred to in Article 8 of the European Convention. Such interference is justified within the meaning of Article 8(2) only if “in accordance with the law”, and pursuing one or more legitimate goals adduced in paragraph 2, and is “necessary in a democratic society” in order to achieve that goal or goals (see, *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). Furthermore, “in accordance with the law” pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to the person concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, e.g., *Kruslin v. France*, 24 April 1990, paragraph 27,

Series A no. 176-A). The Constitutional Court also indicates that according to the case-law of the European Court of Human Rights (see also *Kruslin v. France*) wiretapping and other forms of surveillance of telephone conversations constitute serious interference with private life and correspondence and, therefore, must be based on “law” that is particularly precise. The most fundamental thing is to have clear and detailed rules, first and foremost the law must define the categories of persons who can be subject to measures of wiretapping on the basis of a court order and the nature of criminal offenses rendering reasons for such an order. Further, the Constitutional Court recalls that the interference will be considered necessary in a democratic society for a legitimate goal if it responds to an urgent social need and, particularly, if proportionate to a legitimate goal sought to be achieved (see *Coster v. The United Kingdom* no. 24876/94, paragraph 104, 18 January 2001).

48. The Constitutional Court recalls that the provisions of the Code prescribe that if evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he/she has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense referred to in Article 117 of this Code: a) against the integrity of Bosnia and Herzegovina; b) against humanity and values protected under international law; c) terrorism; and d) for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. It follows that the Code specified the categories of persons against whom special investigative measures may be imposed and the nature of criminal offenses.
49. Furthermore, the Constitutional Court finds that the challenged provision of Article 117 (d) of the Code prescribes as follows: “Measures referred to in Article 116(2) of this Code may be ordered for following criminal offenses: criminal offenses for which, pursuant to the law, a prison sentence of three years or more may be pronounced.” The applicant claims that the mentioned provision made it possible for an exception to be turned into a rule, that is to say that elements of disproportion, excessiveness and coveted arbitrariness are introduced into a criminal legislation.
50. First and foremost, the Constitutional Court recalls that the criminal legislation in Bosnia and Herzegovina is made up of the Criminal Code of BH, Criminal Code of the Federation of

BiH, Criminal Code of the Republika Srpska and Criminal Code of the Brčko District. The Constitutional Court further recalls that the reason for enacting the Criminal Code at the state level was the need to introduce the criminal law standards of the international law into the criminal legislation of BiH and thus to secure legal certainty and the protection of human rights throughout BiH, and the advancement of the fight against crime. When inspecting the Criminal Code of BiH, the Constitutional Court observes that for a great majority of criminal offenses (*i.e.* a qualified form) the legislator prescribed a possibility to impose an imprisonment in duration of three years, so that it follows that special investigative measures may be imposed for all those offenses. Furthermore, as part of those criminal offenses the Constitutional Court finds that the Criminal Code of BiH, among other things, prescribed the following as criminal offenses: Attack on the Constitutional Order, Endangering Territorial Integrity, Genocide, Inciting National, Racial and Religious Hatred, Discord or Hostility, Money Laundering, Organized Crime. It follows from the aforementioned that these are extremely important objects of criminal law protection, *i.e.* that these are serious criminal offenses manifested through violence and attack on the fundamental values of a human and the society as a whole. However, as part of those criminal offenses the Criminal Code of BiH, among other things, prescribed as criminal offenses the following: Violating the Free Decision-Making of Voters, Misuse of International Emblems, Counterfeiting of Instruments of Value, False Information about Criminal Offence, Illegal Use of Radio Broadcasting Rights. It follows from the aforementioned that the Criminal Code of BiH also provided criminal offenses that have no elements of serious criminal offenses. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures would be employed exclusively if there was no other way to achieve the goal, so that the legislator undoubtedly had in mind the restriction on the rights of an individual referred to in Article 8 of the European Convention. However, the Constitutional Court reiterates that the Criminal Code of BiH stipulates that special investigative measures may be ordered for a great majority of criminal offenses (basic or qualified form), including serious criminal offenses and criminal offenses not carrying such elements. The Constitutional Court finds that the legitimate goal of the application of special investigative measures is to counter the severest forms of crime. By prescribing that special investigative measures may be ordered for a great majority of criminal offenses prescribed by the Criminal Code, including offenses

not carrying elements of serious criminal offenses, the legislator failed to ensure that the interference with the right referred to in Article 8 would be to such an extent that is necessary for the preservation of democratic institutions, *i.e.* it failed to secure the proportion between the severity of the interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure. It is not within the competence of the Constitutional Court how the legislator will regulate this issue, whether it will raise the general limit of the punishment for which special investigative measures may be determined in combination with certain criminal offenses, or groups of criminal offenses, which, due to their specificity, irrespective of the prescribed punishment, require to be covered by a legal provision of criminal offenses for which special investigative measures may be ordered. However, when determining criminal offenses for which special investigative measures may be ordered, the legislator must restrict itself solely to that which is necessary in a democratic society, *i.e.* make possible the proportion between the right to privacy and the legitimate goal sought to be achieved through the application of that special investigative measure.

51. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

VI. 3. Competence to Order the Measures and the Duration of the Investigative Measures, Article 118(3) of the Code

52. The applicant indicated that the provisions of Article 118(3) of the Code are contrary to Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina. The applicant indicated in the reasons for the said allegations that under these provisions investigative measure may last up to one month at the longest, and may, for particularly important reasons, and upon the reasoned motion of the Prosecutor, be prolonged for a term of another month, provided that the measures referred to in Article 116 (a) and (c) of the Code may last no longer than six months in total. Such a lengthy period may not be considered a proportionate time limit in relation to the nature and need to restrict constitutional rights. The part of the provision reading “particularly important reasons” violates the principle of the rule of law and of the right to a fair trial, because the law is not clear and transparent and leaves a possibility for arbitrary interpretation and

procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features and to which the extension of time limits need not apply.

53. The Constitutional Court reiterates that it is indisputable that by applying special investigative measures the state interferes with the exercise of the rights of an individual referred to in Article 8 of the European Convention. The Constitutional Court recalls the decision of the European Court of Human Rights in the case of *Dragojević v. Croatia* (Application no. 68955/11, judgment of 15 January 2015, paras 79-82) wherein the European Court of Human Rights indicated, such interference is justified within the meaning of Article 8(2) only if “in accordance with the law”, and it pursues one or more legitimate goals adduced in paragraph 2, and is “necessary in a democratic society” in order to achieve that goal or goals (see, in a series of judgments *Kvasnica v. Slovakia*, no. 72094/01, paragraph 77, 9 June 2009). The term “in accordance with the law” pursuant to Article 8(2) requires in principle, firstly, for the disputable measure to have a certain foundation in the domestic regulation; it also applies to the quality of the respective regulation, which should be in accordance with the rule of law and available to a person concerned who must, additionally, be able to anticipate the circumstances for oneself, and that the measure must be in accordance with the rule of law (see, e.g., *Kruslin v. France*, 24 April 1990, paragraph 27, Series A no. 176-A). Particularly in the context of secret measures of surveillance, such as the interception of communications, the requirement of legal “foreseeability” cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Therefore, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see, for instance, *Malone*, cited above, § 67; *Huvig v. France*, judgment of 24 April 1990, Series A no.176-B, § 29; *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, § 46, Reports on Judgments and Decisions 1998-V; *Weber and Saravia v. Germany* (Decision), no. 54934/00, § 93, ECHR 2006 XI; and *Bykov v. Russia* [GC], no. 4378/02, § 76, 10 March 2009). In that respect the Court also reiterated the need for safeguards (see, *Kvasnica*, cited above, § 79). Specifically, since the implementation in

practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Bykov*, cited above, § 78, and *Blaj*, cited above, § 128).

54. Also, in its case-law the European Court of Human Rights developed the following minimum safeguards that should be set out in the statute in order to avoid abuses of power: the nature of the offences which may give rise to such an order; the categories of people liable to have their telephones tapped by judicial order; a limit on the duration of telephone tapping, the procedure for questioning, use and storage of the data obtained; the precautions to be taken when communicating data to other parties and the circumstances in which recordings may or must be erased or the tapes destroyed (see, European Court of Human Rights, *Huvig*, cited above, § 34; *Valenzuela Contreras*, cited above, § 46; and *Prado Bugallo v. Spain*, no. 58496/00, § 30, 18 February 2003).
55. Thus, according to the standards of the European Court of Human Rights, the domestic law must be sufficiently clear and particularly precise in order to point to an individual the circumstances in which and conditions under which the public authorities may order special investigative measures. Since these are secret measures not subject to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference.
56. The Constitutional Court finds that the provision of Article 118(3) of the Code reads: *Investigative measures referred to in Article 116(2) Subparagraphs a) through d) and g) of this Code may last up to one month at the longest, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to*

in Subparagraphs a), b) and c) last up to six months in total, while the measures referred to in Subparagraphs d) and g) last up to three months in total. The motion as to the measure referred to in Article 116(2)(f) of this Code may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application. Based on the mentioned provisions it follows that the total period during which special investigative measures may last is six months, or three months respectively. During this period the duration of these measures was restricted to one month and each new extension requires the statement of reasons by a prosecutor. Thus, the legislator opted for graduality in the establishment and extension thereof. The Constitutional Court finds that any extension of special investigative measures must be approved by a preliminary proceeding judge, who has a possibility not to approve the extension of investigative measures, if the prosecutor's motion contains no reason to continue with the enforcement thereof, *i.e.* that the extension is necessary to serve the purpose for which they were approved. The Constitutional Court finds that the legislator prescribed by the Code that special investigative measures are applied exclusively if there is no other way to achieve the same goal, and that there must be the grounds for suspicion that a person alone has committed or has along with other persons taken part in committing or is participating in the commission of a criminal offense. The legislator prescribed precisely in the provision of Article 118(3) the duration, or the longest duration of special investigative measures (up to one month, the total of three or six months respectively). Furthermore, the Constitutional Court observes that the legislator opted for graduality in the extension of special investigative measures (for additional term of one month). Also, the legislator prescribed that the extension of special investigative measures may be approved for particularly important reasons.

57. The applicant's allegations are based on the claim that the legislator, in the part of the provision reading "particularly important reasons" left a possibility for arbitrary interpretation and procedures on the part of a body before which a procedure is conducted. In addition, the challenged provision did not make a necessary distinction between those bodies and the ones which do not have such features in relation to the offenses to which the extension of time limits need not apply. Therefore, the Constitutional Court ought to examine in the present case whether the challenged provisions, regarding the extension of special investigative measures, sufficiently clearly allege the scope and manner of exercising discretion

conferred upon the public authorities, and whether the period of the extension of special investigative measures was proportionate to the nature of criminal offenses concerning which special investigative measures may be extended.

58. By linking the previously presented case-law of the European Court of Human Rights to the relevant provisions of the Code, the Constitutional Court finds that by prescribing for special investigative measures to last no longer than one month the legislator indisputably took into account the restrictions of the rights of an individual under Article 8 of the European Convention, *i.e.* that the duration of special investigative measures must be brought down to the shortest possible time. However, the challenged provisions prescribe that special investigative measures may be extended two more times, or five more times in duration of one month each for particularly important reasons. In that respect, the Constitutional Court primarily observes that the legislator, as a requirement for the extension of special investigative measures, used a syntagm “particularly important reasons”, which constitutes an undetermined term not used in any other provision of the Code. Namely, it does not follow from the cited provision what particularly important reasons refer to, *i.e.* whether they refer to impossibility to obtain evidence due to the failure of special investigative measures to generate expected results, or they refer to the very nature and circumstances of the perpetration of a criminal offense, and whether and to what extent the results of the information collected up to that moment, through the employment of special investigative measures, must be known to the preliminary proceedings judge. Thus, it follows that the preliminary proceedings judge does not have precise benchmarks in the law according to which he/she could consider the motion of the prosecutor for the extension of special investigative measures and, accordingly, dismiss the motion, or grant it and order the extension thereof. Therefore, whether the reasons of the prosecutor proposing the extension of special investigative measures will be sufficient in terms of “particularly important reasons” depends exclusively on the margin of appreciation of the preliminary proceedings judge. In that respect, the Constitutional Court reiterates that under the standards of the European Court of Human Rights, since these are secret measures not subject to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive – or to a judge – to be expressed in terms of an unfettered power. Consequently, the law must indicate sufficiently clearly the scope of any

such discretion conferred on the competent authorities and the manner of its exercise to give the individual adequate protection against arbitrary interference. In this part the Constitutional Court recalls that inappropriate implementation of certain statutory solutions is not a matter of constitutionality, if such solutions are in themselves in accordance with the constitution. In such situations, in the event of abuse in the implementation of legal provisions there are other appropriate safeguard mechanisms. However, the present case is not about such a situation, but a situation where the challenged provisions are themselves, in the implementation, contrary to the Constitution of Bosnia and Herzegovina, as the challenged provisions did not sufficiently clearly prescribe the scope of discretion conferred upon the preliminary proceedings judge, since his/her discretion is manifested in the form of unlimited powers when interpreting those undetermined legal notions *i.e.* a presumption "for particularly important reasons" so that they do not guarantee to an individual an adequate protection against arbitrary interference. Therefore, the Constitutional Court finds that the legislator, by prescribing that, for particularly important reasons, which is an undetermined presumption, special investigative measures may be extended, did not appreciate that the law must sufficiently clearly prescribe the scope of discretion conferred upon the competent bodies.

59. Also, the Constitutional Court reiterates that according to the case-law of the European Court of Human Rights, the minimum guarantees that should be prescribed in the law in order to avoid the abuse of the conferred powers are, *inter alia*, the nature of the offenses concerning which a measure of eavesdropping may be ordered and the limitation time-wise of the duration of the eavesdropping measure. The Constitutional Court observes that the legislator prescribed in the provisions of Article 116 of the Code that special investigative measures may be ordered for the following criminal offenses: a) against the integrity of Bosnia and Herzegovina, b) against humanity and values protected under international law, c) terrorism, and d) criminal offenses for which, pursuant to the law, a prison sentence of three (3) years or more may be pronounced. Although it did prescribe the types of criminal offenses for which it is possible to order special investigative measures, the Constitutional Court observes that the legislator prescribed in the same manner and within the same time limits the extension of special investigative measures irrespective of criminal offenses concerned. In that respect, the Constitutional Court reiterates that the interference with human rights and fundamental

freedoms, in the present case the right to private life, is justified if in conformity with law and pursuing one or more legitimate goals referred to in Article 8(2) of the European Convention, and is “necessary in a democratic society” in order to achieve a specific goal. The Constitutional Court also recalls that the legitimate goal of special investigative measures constitutes the opposition to the gravest forms of crime. In that sense, it is indisputable that lengthier duration of special investigative measures is necessary if concerning the proving of criminal offenses of terrorism, corruption, organized crime, trafficking in humans and arms since the perpetration of these offenses may last over a prolonged period of time. However, considering the legitimate goal of implementing special investigative measures, the Constitutional Court holds that, although ordering special investigative measures in duration of one month may be justified for all criminal offenses for which a prison sentence of three years or more may be pronounced, it is unclear why the nature and seriousness of criminal offenses for which, for instance, a maximum prison sentence of up to three years or up to five years is prescribed, objectively justifies the possibility of ordering such measures in the longest duration as equally as criminal offenses with a prescribed prison sentence of up to twenty years or a long-term prison sentence. Therefore, the Constitutional Court finds that the legislator, when prescribing the length of special investigative measures failed to take into account the proportion between the restriction on human rights and the seriousness of criminal offenses, that is to say it failed to harmonize the issue of duration of special investigative measures with the nature of certain criminal offenses, which the extension should not apply to objectively.

60. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses, which the extensions of special investigative measures should not apply to, and that the presumption “for particularly important reasons” was determined imprecisely and may not serve as a benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code, in the part relating to the extension of special investigative measures, are not in conformity with Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina.

VI.4. Materials Received through the Measures and Notification of the Measures Undertaken, Article 119(1) of the Code

61. The applicant indicated that the provisions of Article 119(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as there is no mechanism securing a judicial control. The applicant stated that a preliminary proceeding judge must have a legal power at all times during the conduct of special investigative actions and request that a prosecutor submits a report on the justification for their further continuation, or when he/she finds so necessary, for the purpose of evaluating the justification for further continuation of measures, request from the police to submit daily reports and documentation to the extent and measure he/she is authorized to determine on one's own.
62. In connection with those allegations, the Constitutional Court recalls the case-law of the European Court of Human Rights that the control over the secret oversight measures should be, desirably, entrusted to a court, as the judicial control affords the best guarantees for independence, impartiality and compliance with procedures. The Constitutional Court recalls the case of *Rotaru v. Romania* (Judgment, Grand Chamber, of 4 May 2000, Application no. 28341/95), which reads: "In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure... In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered is in force or afterwards. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities... There has consequently been a violation of Article 8."
63. The Constitutional Court finds that the challenged provision stipulates as follows: "Upon the completion of the application of the measures referred to in Article 116 of this Code, all

information, data and objects obtained through the application of the measures as well as a report must be submitted by police authorities to the Prosecutor. The Prosecutor shall be bound to provide the preliminary proceedings judge with a written report on the measures undertaken. On the basis of the submitted report the preliminary proceedings judge shall evaluate the compliance with his order.” It follows that police authorities, upon the completion of special investigative actions, are obliged to submit to the Prosecutor all materials resulting from the conduct of special investigative actions and a report on the measures taken, while the Prosecutor is bound to provide a preliminary proceedings judge with a written report on the measures taken, so that the preliminary proceedings judge becomes acquainted with the conduct of actions, *i.e.* so that he/she can check whether his/her order has been complied with. The Constitutional Court notes that this is a form of supervision, *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

64. The Constitutional Court recalls that, according to the Law, the authority to order special investigative actions is expressly conferred on a preliminary proceeding judge and such actions may last up to one month and be extended for a term of another month, and they may last up to six months in total, *i.e.* three months in total. In addition, the provisions of the Law stipulate that a preliminary proceeding judge is bound to issue, without delay, a written order ceasing the enforcement of the actions taken, if the reasons for which actions are ordered have ceased. Furthermore, a prolonged duration of special investigative actions must be approved by a preliminary proceeding judge. Therefore, a preliminary proceeding judge has the possibility not to approve the extension of special investigative actions in the event that he/she considers that other circumstances have been created, allowing the application of other methods of obtaining evidence without interference or with a lesser degree of interference with fundamental human rights. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.
65. Furthermore, the provisions of the Law prescribe a preliminary proceeding judge’s obligation to notify, without delay, a person against whom an action has been taken and that person can ask the court to examine the legality of the order and the manner in which the action has been enforced. The Constitutional Court finds that the legislator has thus secured

that the person, who considers that his/her rights and freedoms were violated by the application of special investigative actions, can ask the court to examine the legality thereof, the manner in which they were applied as well as the judicial order constituting the basis of the application thereof. The Constitutional Court finds that the aforementioned is a form of supervision *i.e.* the protection of persons against unlawful interference with their rights and freedoms.

66. In view of the above, the Constitutional Court holds that the legislator has secured that interference with an individual's right is subject to effective supervision.
67. The Constitutional Court concludes that the provisions of Article 199(1) of the Law are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

VI.5. Order for Conducting an Investigation, Article 216(2) of the Code

68. According to the applicant, the provisions of Article 216(2) of the Law are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention. The applicant points out in the reasons for the aforementioned allegations that the order to conduct an investigation does not contain an instruction on legal remedy and that the citizens' right to appeal is not secured.
69. The Constitutional Court notes that according to the case-law of the European Court of Human Rights, the specific rights guaranteed by Article 6 may be relevant before a case is sent for trial, *e.g.* the right to pre-trial proceedings within a reasonable time or the right to defend oneself, as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the provisions of Article 6 (the case of *Kuralić v. Croatia*, Judgment of 15 October 2009, Application no. 50700/07).
70. Moreover, as to the application of the guarantees of Article 6 of the European Convention on pre-trial proceedings or the stages thereof, the European Court of Human Rights first determines whether there is a "criminal charge" for the purposes of Article 6 of the European Convention. The Constitutional Court recalls the case of *Foti and Others v. Italy* (Judgment of 10 December 1982, Applications nos. 7604/76, 7719/76, 7781/77 and [7913/77](#)), according to which *...one must begin by ascertaining from which moment the person was "charged"*;

this may have occurred on a date prior to the case coming before the trial court... such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened ... Whilst "charge", for the purposes of Article 6(1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.

71. In the present case the Constitutional Court recalls that the provision of Article 216(1) of the Law stipulates that the Prosecutor will order the conduct of an investigation if grounds for suspicion that a criminal offense has been committed exist. In addition, the Constitutional Court finds that the challenged provision reads: "The order on conducting the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken." In view of the above, it follows that the legislator "gives" a Prosecutor express authority to conduct an investigation and that an order on conducting the investigation is a Prosecutor's decision on the existence of grounds for suspicion that a specific perpetrator (if known) has committed a criminal offense and that it is a plan for conducting the investigation and that it includes the description of investigative actions. In addition, the Constitutional Court notes that the Law does not stipulate an obligation to submit an order on conducting the investigation nor does it stipulate sanctions for a Prosecutor's failure to issue an order on conducting the investigation. It follows from the above analysis that an order on conducting the investigation is an internal and preparatory act by a Prosecutor. Furthermore, the Law determines that when it is stipulated that the institution of criminal proceedings entails restrictions on the exercise of certain rights, such restrictions, unless otherwise specified, commence upon confirmation of an indictment and, as regards the criminal offenses for which the principal penalty prescribed is a fine or imprisonment up to five years, those consequences commence as of the day the verdict of guilty is rendered, regardless of whether or not the verdict has become legally binding. The

Constitutional Court notes that the issuance of an order on conducting the investigation, *per se*, has no consequence that entails restrictions on the exercise of certain rights by a suspect. The Constitutional Court reiterates that the guarantees under Article 6 of the European Convention apply upon the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, *i.e.* upon other measures or actions which carry the implication that he has committed a criminal offence and which likewise substantially affect the situation of the suspect. The Constitutional Court also recalls that, in the course of an investigation, certain rights of a suspect may be subject to restrictions (measures securing the presence of the suspect, special investigative actions), however, in such a case, a basis for restrictions on the exercise of rights is a judicial decision and not an order on conducting the investigation, as an internal and preparatory act. Taking into account the preceding position that an order on conducting the investigation is an internal and preparatory act by a Prosecutor and that the legislator has not stipulated an obligation that an order on conducting the investigation has to be submitted to a suspect and that an order on conducting the investigation, *per se*, has no consequence, in terms of the Law, that entails restrictions on the exercise of certain rights by a suspect, the Constitutional Court assesses that the applicant's allegations are ill-founded that the challenged provisions are not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 in conjunction with Article 13 of the European Convention.

72. The Constitutional Court concludes that the provisions of Article 216(2) are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention.

VI. 6. Completion of Investigation, Article 225(2) of the Code

73. The applicant pointed out that the provisions of Article 225(2) of the Law are contrary to the standards of a trial within a reasonable time guaranteed by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention in conjunction with Article 13 of the European Convention. In the reasons for those allegations, the applicant stated that this provision regulates the situation where the investigation is not completed within six months, *i.e.* it stipulates that the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation, without prescribing the final time limit for the completion of

investigation. That is contrary to the right to a trial within a reasonable time, and a suspect and damaged person are not afforded the right to complain over the delay of a procedure or other irregularities in the course of investigation, thus the possibility is left for investigation to be conducted for several years.

74. The Constitutional Court finds that the applicant's allegations are essentially based on the allegation that the challenged provision does not foresee the lodging of a complaint, thus leaving a possibility for an investigation to be conducted for a number of years. In that respect, the Constitutional Court observes that the applicant held that the challenged provisions do not meet the principles of the rule of law, *i.e.* that they do not guarantee a fair investigative procedure.

75. The Constitutional Court recalls that the principles of the rule of law require that a law must be clear and precise in accordance with the special nature of the matter it regulates normatively, thereby preventing any arbitrariness in the interpretation and application of laws, *i.e.* the removal of uncertainty concerning the addressee of the legal norm regarding the ultimate effect of the legal provisions directly applicable to them.

76. The Constitutional Court further recalls that the goal of a criminal procedure is to establish the truth, *i.e.* to establish whether a suspect or an accused had committed a criminal offense or not. The Constitutional Court previously noted that an order to carry out an investigation is an internal and preparatory act on the part of a prosecutor, that the legislator failed to prescribe an obligation to communicate the order to the suspect, and that it follows that the suspect needs not have any knowledge that an investigation is being conducted against him/her. In this connection, the Constitutional Court finds that the suspect in that case is not in a state of uncertainty nor does he/she have an interest in the conclusion of the investigative procedure. However, as of the day on which he/she learns about the investigation against him/her, that is to say when his/her rights are restricted during the investigation, the interest and right of the suspect to conclude the investigation are undeniable. Further, the Constitutional Court finds that a criminal procedure is conducted with a view to protect fundamental rights and freedoms of a human and citizen, who, in the event of the enforcement of a punishment, get the status of the damaged persons if any of those rights and freedoms were violated or threatened. Therefore, it is necessary to bear in mind during the investigative procedure the damaged persons as a person whose rights and freedoms were violated or threatened by a criminal offense. In that

respect, the damaged person is a person who has exceptional interest in the conclusion of an investigative or criminal procedure. It follows from the aforementioned that the provisions of the rules of procedure must meet the principles of the rule of law, which will guarantee the respect for the rights of a suspect and a due care for the protection of the rights of the damaged persons, that is to say the fairness of an investigative procedure.

77. The Constitutional Court observes that the challenged provision of Article 225(2) of the Code reads: “If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor’s Office shall undertake necessary measures in order to complete the investigation”. Thus, it follows that the mentioned legal provision does not state explicitly that the investigation must be completed within six months, neither does it state the lengthiest time limit within which the investigation must be completed. Thus, undertaking necessary measures for the purpose of completing the investigation exclusively depends on the margin of appreciation of the Collegium of the Prosecutor’s Office. This is to say that bearing in mind the role of a prosecutor in the Code, who is also a party to the criminal proceedings, the Constitutional Court finds that prescribing the obligation on the Collegium of the Prosecutor’s Office to undertake necessary measures in order to conclude the investigation, the legislator failed to provide an appropriate insurance that the investigation would be completed indeed. Also, it follows that no possibility was prescribed for a suspect to lodge a complaint for the excessively lengthy duration of the investigative procedure, so that the challenged provisions make it possible for an individual charged with a criminal offense to be in a state of uncertainty and lack of information about own destiny for unlimited duration of time. Besides, it follows that the legislator failed to prescribe a possibility for a person damaged by the criminal offense to lodge a complaint over the excessive length of the investigative procedure, so that the person damaged by the criminal offense is in a state of uncertainty as to whether the suspect had committed or not that criminal offense for unlimited duration of time. The Constitutional Court observes that the legislator, in certain cases, prescribed in the Code a possibility to oversee the legality of actions taken during the investigation. For instance that was done in the event of a temporary seizure of objects and documentation, in the event of issuing the order to a bank or other legal person to temporarily suspend the execution of a financial transaction, against an administrative ruling ordering the measures of prohibition, against an administrative ruling ordering the detention and such like. In

view of the aforementioned, the Constitutional Court concludes the legislator was not consistent in terms of law when it regulated a possibility for unlimited duration of investigation, in essence, without prescribing a mechanism for the protection of the rights of suspects and damaged persons. Therefore, the Constitutional Court holds that if the legislator opted for a possibility of unlimited duration of investigation, it had to ensure in the Code simultaneously a direct protection of the rights of those whose rights might be violated.

78. In view of the aforementioned, the Constitutional Court finds that the challenged provision does not meet the principles of the rule of law, that is to say the legislator failed to be mindful of the rights of suspects and the protection of the rights of the damaged persons, thereby jeopardizing fairness in an investigative procedure from the aspect of the reasonable time-limit.

79. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 225(2) of the Code are contrary to Article I(2) in connection with Article II(3)(e) of the Constitution of Bosnia and Herzegovina.

VI. 7. Issuance of indictment, Article 226 paragraph 1 of the Code

80. The applicant emphasized that the provisions of Article 226 of the Law are inconsistent with Article I(2) of the Constitution of Bosnia and Herzegovina and Article 13 of the European Convention. In the reasoning of these allegations the applicant emphasized that this provisions is incomprehensible from the aspect of a trial within a reasonable time, since when the investigation is completed the prosecutor disposes with the information based on which he could either suspend the proceedings or issue an indictment. The legislator is obliged to stipulate a general time limit for the issuance of an indictment, as well as extension of that limit when it comes to the complex or particularly complex cases. In addition, these provisions do not provide for legal remedy against protraction or irregularities in the investigation proceedings, which is inconsistent with the principle of the rule of law, legal security and legal consistency.

81. The Constitutional Court finds that the challenged provision provides as follows: “If during the course of an investigation, the Prosecutor finds that there is enough evidence for grounded suspicion that the suspect has committed a criminal offense, the Prosecutor shall prepare and refer the indictment to the preliminary hearing judge.” The Constitutional Court finds, first and foremost, that the Code prescribes that a criminal procedure may be instituted and

conducted only upon the request of a Prosecutor. It follows from the mentioned provision that the institution and conduct of a criminal procedure require a prosecutor's request. A criminal proceeding may be conducted solely against such a person and for such an offense that the prosecutor has specified in his/her request. In accordance with the aforementioned, following the completion of an investigation a criminal procedure may be conducted solely following an indictment issued by a competent prosecutor and solely against a person specified in the indictment and solely for an offense which is the subject-matter of the indictment. The Constitutional Court further finds that, according to the Code, the Prosecutor shall complete investigation when it finds that the state of affairs is sufficiently clarified in order to file an indictment, and completion of the investigation will be recorded in the case-file. Thus, the legislator obliged the Prosecutor to complete investigation when the state of affairs is sufficiently clarified so that an indictment may be issued, which means that the legislator obliged the prosecutor to prepare and refer the indictment to the preliminary hearing judge if during the course of an investigation the prosecutor finds that there is enough evidence for a grounded suspicion that the suspect has committed a criminal offense. So, the challenged provision does not provide for a time-limit within which the prosecutor is obliged to prepare an indictment, neither is that time-limit prescribed under the provision regulating the matter of completion of an investigation.

82. The applicant challenges the ruling of the legislator who failed to prescribe the time-limit for issuing an indictment. In this connection, the Constitutional Court reiterates that according to the principle of the rule of law, the law must be clear and precise and in conformity with specific nature of the matter subject to normative regulation, thereby preventing any arbitrariness in interpretation and application of law, *i.e.* removal of uncertainty of the addresses of the legal norm with regards to the final effect of law provisions that are directly applied to them. In the legal system which was founded on the rule of law, laws must be general and equal for all and legal consequences should be certain for those to whom the laws will apply. In the case at hand, the legislator determined that the prosecutor shall prepare the indictment if during the course of an investigation he/she finds that there is sufficient evidence to do so. The legislator decided not to specify the time-limit within which a prosecutor is obligated to issue an indictment, while at the same time it failed to ensure in the Code a direct protection of the rights of those whose rights might be violated. The establishment of unconstitutionality of the provision of Article

225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment. From the aspect of the rule of law, it is not relevant which stages in the conduct of investigation were prescribed as necessary by the legislator, but the final result is relevant, for only the adoption of a decision by a Prosecutor's Office removes the uncertainty of persons in question. Therefore, it is necessary to ensure in the present case the continuity of the protection of the rights of suspects and damaged persons.

83. In view of the aforementioned, the Constitutional Court concludes that the provisions of Article 226(1) of the Code are contrary to Article I(2) of the Constitution of Bosnia and Herzegovina.

84. In view of the aforementioned conclusion, the Constitutional Court will not consider whether the challenged provisions of Article 225(2) of the Code are contrary to Article 13 of the European Convention.

VII. Conclusion

85. The Constitutional Court concludes that the provisions of Article 84, paragraphs 2, 3 and 4 of the Code are in contravention of Article I(2) of the Constitution of Bosnia and Herzegovina, due to the non-existence of clear distinction between granting immunity and absolute discretionary power to grant immunity, namely, because of imprecision and vagueness the challenged provisions themselves are contrary to the principle of the rule of law.

86. The Constitutional Court concludes that the provision of Article 117(d) of the Code is contrary to Article I(2) of the Constitution of Bosnia and Herzegovina because the legislator failed to ensure that the interference with this right would take place to such an extent that is strictly necessary for the preservation of democratic institutions, *i.e.* it failed to ensure the proportion between the severity of interference with the right to privacy and the legitimate goal sought to be achieved through the application of that special measure.

87. Bearing in mind that the legislator failed to make any distinction whatsoever between criminal offenses to which the extension of special investigative measures should not apply, and that the presumption for particularly important reasons is imprecisely set and may not serve as a

benchmark for that distinction, the Constitutional Court finds that the challenged provisions of Article 118(3) of the Code in the part relating to the extension of special investigative measures are not in conformity with Article of the Constitution of Bosnia and Herzegovina in connection with Article II(3)(f) of the Constitution of Bosnia and Herzegovina.

88. The Constitutional Court concludes that the provisions of Article 225(2) of the Code are in contravention of Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, because they do not meet the principles of the rule of law, *i.e.* the legislator failed to be mindful of the rights of suspects and the protection of the rights of damaged persons, thereby jeopardizing the fairness in an investigative procedure.

89. The Constitutional Court concludes that the provisions of Article 226(1) of the Code are in contravention of Article I(2) of the Constitution, as the establishment of unconstitutionality of the provision of Article 225(2) of the Code due to the lack of a mechanism protecting the rights of suspects and damaged persons during the investigation would not lead to genuine protection of their rights, if such protection would not apply at the same time to the stage from the completion of investigation to the issuance of indictment.

90. The Constitutional Court concludes that the provisions of Article 84(5) of the Code are not contrary to Articles I(2) and II(3)(e) of the Constitution of Bosnia and Herzegovina, where the applicant fails to provide a single allegation to reason why she held that these challenged provisions are unconstitutional.

91. The Constitutional Court concludes that the provisions of Article 119(1) of the Code are consistent with Article I(2) of the Constitution of Bosnia and Herzegovina, Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, as the legislator ensured that the interference with an individual's right would be subjected to an effective supervision.

92. The Constitutional Court concludes that the provisions of Article 216(2) of the Code are not in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 and Article 13 of the European Convention, as the legislator "described" the order on conduct of an investigation as an internal and preparatory act of the prosecutor and the very order on

conduct of an investigation, within the meaning of the Code, has no effects on a suspect when it comes to making restrictions on some of his/her rights.

93. Pursuant to Article 59(1), (2) and (3), Article 60 and Article 61(4) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

94. Pursuant to Article VI(5) of the Constitution of BiH, decisions of the Constitutional Court shall be final and binding.

Mato Tadić
Vice-President
Constitutional Court of Bosnia and Herzegovina