

# Privacy Neglected

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Control of interception of telecommunications in Kosovo



INSTITUTE FOR ADVANCED STUDIES

doogapod



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## INTRODUCTION

The right to privacy including the confidentiality of correspondence and telecommunications is a fundamental right of the citizens of Kosovo guaranteed by the Constitution. According to the Constitution *“secrecy of correspondence, telephony and other communications is an inviolable right, which may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law”*.<sup>1</sup>

Interception of telecommunications presents the limitation of that right, and is one of the measures of investigation and detection conducted by law enforcement institutions and intelligence agencies. Law enforcement agencies conduct interception of telecommunications intended to investigate criminal offences while intelligence and security agencies conduct interception of telecommunications for security and intelligence purposes justified under national security.

Unlike the right to privacy which has not been regulated further besides the Constitution, interception of telecommunications finds its place in the Criminal Procedure Code (CPC) and the law on Kosovo Intelligence Agency (KIA). Besides that, so far the Government has attempted twice to come up with a law on interception of telecommunications which would be added to the existing legislation on interception. But, neither the first nor the second draft law addresses the right to privacy, thus paying no attention to ways of introducing limits on interception, which, if included (or strengthened where they exist), would reinforce the right to privacy guaranteed by the Constitution.

Analyzing the body of legislation pertaining to the interception of telecommunications and based on interviews conducted with respective institutions, the following deficiencies with regard to the respect of privacy against the interception of telecommunications can be discerned:

- Weak and decentralized judicial control of the interception of telecommunications’ process
- Insufficient internal control of the interception of telecommunications’ process
- Inefficient parliamentary oversight of the interception of telecommunications’ process, and
- Nonexistent control from Ombudsperson

This policy paper is intended to analyze the status of control over interception of telecommunications with regard to the above mentioned deficiencies. The first part of the paper will provide a brief overview of the two draft laws on the interception of telecommunications, and the present

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<sup>1</sup> Constitution of the Republic of Kosovo, Article 36.3, available at: <http://bit.ly/1qzP216>

situation with network operators in the process of interception, while the following parts will be dedicated to the broad judicial control of interception of telecommunications, the insufficient internal control, inefficient parliamentary oversight, and the non-existent control of interception by the Ombudsperson Institution. The last part of the paper will provide conclusions on the actual state of control over interception of telecommunications in Kosovo, as well as recommendations as what steps should be taken in order to improve the interception process and thus improve the situation of the confidentiality of telecommunications and the right to privacy.

## ATTEMPTS TO APPROVE THE LAW ON INTERCEPTION OF TELECOMMUNICATIONS

The **first draft law** on interception of telecommunications has been part of the Government's Legislative Program for 2012, to be drafted by the Office of the Prime Minister and approved by the end of March 2012.<sup>2</sup> In fact, the draft law has been approved in the Government a few months later,<sup>3</sup> on the 3<sup>rd</sup> of December 2012.<sup>4</sup> The draft law was an added piece of legislation to the interception of telecommunications enshrined in the CPC and Law on KIA, and did not have any dispositions by which the confidentiality of telecommunications would be strengthened. Even worse, the draft law anticipated the centralization of interception of telecommunications through an Electronic Administrative Center under the administration and control of KIA,<sup>5</sup> in contradiction with the recommendations of the 2012 Feasibility study for Kosovo that *"a clear distinction between judicial interception and interception for intelligence purposes should be made, in line with European best practices."*<sup>6</sup>

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<sup>2</sup> Legislative Program for 2012, available at: <http://bit.ly/1tJPcnS>

<sup>3</sup> It's been assessed that the law was drafted hurriedly and triggered by the fact of wiretapping issue made public during November 2012 which European Rule of Law Mission in Kosovo (EULEX) has been conducted against a few high Government officials, including the Prime Minister. According to a press release delivered by EULEX on the 4<sup>th</sup> of December 2012, it was made known that the wiretapping has been conducted as part of an investigation process which EULEX was doing against the Ministry of Transport, Post and Telecommunications (MTPT), and that EULEX was not responsible for the fact that the wiretapping ended in the public domain because all the evidence collected during the investigation was handed over to the court and the defence lawyers had received a copy of the same material. Press release is available at: <http://bit.ly/1wLYAft>

<sup>4</sup> Government's decision 01/105 of the 3<sup>rd</sup> of December 2012, available at: <http://bit.ly/1qN1UHL>

<sup>5</sup> Article 4 of the draft law No. 04/L-173 on interception of telecommunications

<sup>6</sup> Commission Communication on a Feasibility Study for a Stabilization and Association Agreement between the European Union and Kosovo, Brussels, 23.10.2012, SWD (2012) 339 final/2, available at: <http://bit.ly/1kZwBBQ>

After the review process of the draft law that has been done in the respective Assembly Committees from January till May 2013<sup>7</sup> where many deficiencies of the draft law were pointed out, the joint recommendation of the EU Office and EULEX that the draft is not in line with European best practices, the Prime Minister asked the Assembly to remove the draft from parliamentary proceedings. According to the record of the Assembly plenary session, the draft law was withdrawn from the Assembly during June 2013.<sup>8</sup>

The **second draft law** on the interception of telecommunications became part of the Legislative Program for 2014, to be drafted by the Ministry for European Integration (MEI).<sup>9</sup> The draft law was approved in the Government in the end of April 2014.<sup>10</sup> As in the first case, the second draft law did not bring anything new with regard to the right to privacy or controlling mechanisms of the interception of telecommunications. The disposition of the first draft law that of “Electronic Administrative Center” which anticipated the centralization of interception in KIA is removed in the second draft. But, the second draft law has only separated the monitoring facilities between Police and KIA, but has given KIA the right to have the interception interface which is normally located in the premises of the network operators only.<sup>11</sup> Even though this is not a centralization of interception as in the first draft law, the part which gives KIA the right to have the interception interface normally located in the premises of the certain network operator, is objectionable .

With regard to the EU Office position on the second draft law, it seems that the mere fact of removing the “Electronic Administrative Center”, which both the EU Office and EULEX had rejected since it meant a centralization of interception, has satisfied it. The content of the second draft law has been criticized in a consultative meeting organized with Civil Society Organizations for the Progress Report 2014.<sup>12</sup>

However, according to the EU Office in Prishtina, “*the draft law satisfies the minimum criteria required for Acquis compliance*”.<sup>13</sup> In the end, the EC Progress

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<sup>7</sup> On the 15<sup>th</sup> of January, the Committee on Internal Affairs, Security and Supervision of Kosovo Security Force established a working group to review the draft law, available at: <http://bit.ly/1njxQJC>

<sup>8</sup> Record of the Assembly’s session held on the 6<sup>th</sup>, 7<sup>th</sup> and 13<sup>th</sup> of June 2013, p. 3, available at: <http://bit.ly/1lvA6SE>

<sup>9</sup> According to MEI, the European Commission has requested from MEI to be the coordinator and in fact lead the drafting process of the law on interception of telecommunications.

<sup>10</sup> Government’s decision 07/186 of 29.04.2014, available at: <http://bit.ly/1B9yKRe>

<sup>11</sup> The elaboration about the place and role of interception interface and monitoring facilities is provided under the following section: the situation with network operators in the process of interception.

<sup>12</sup> Consultation with Civil Society Organizations in relation to the Progress Report 2014 organized by the EU Office, 24.06.2014

<sup>13</sup> Interview at EU Office in Prishtina, 16.07.2014

Report (2014) on Kosovo mentions the law on interception as it still needs to be adopted, meaning that it needs to be adopted in the Assembly, but does not provide any suggestions if the draft law still needs to be adapted by the Government.<sup>14</sup>

According to MEI, the second draft law has been sent for review and comments to Brussels also, respectively in the DG Home Affairs.<sup>15</sup> However, the EU does not have any Regulations or Directives on the interception of telecommunications which oblige the member states as well as those aspiring EU integration to transpose them into national legislation. Therefore, it can be assumed that the comments of the DG Home Affairs should be viewed from the EU Directive on Data Protection perspective and not from the perspective of any interception of telecommunications related legislation. In this aspect, in general the EU has only one Resolution on the lawful interception of telecommunications,<sup>16</sup> but, that Regulation does not constitute obligations of transposing it into national legislation, as is the case with EU Regulations and Directives.<sup>17</sup>

Besides that, both draft laws contain categories of data to be retained from network operators pursuant to the EU Directive 2006/24 on Data Retention which the European Court of Justice (ECJ) in its judgment delivered on the 8<sup>th</sup> of April 2014 declared invalid.<sup>18</sup> Although the judgment was given on the 8<sup>th</sup> of April, the draft law was approved on the 29<sup>th</sup> of April without the working group removing Article 12 on categories of data to be retained (a literal translation of Article 5 of the Data Retention Directive).<sup>19</sup>

Unlike the first draft law which was distributed and discussed in the Assembly, the second draft law is not since the Assembly was dispersed on the 7<sup>th</sup> of May in order to open the way for the parliamentary elections of the 8<sup>th</sup> of June. So far, the new legislature has not started working yet and

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<sup>14</sup> EC progress report on Kosovo (2014), 8.10.2014, Brussels, p. 51, available at: <http://bit.ly/ZsGHTK>

<sup>15</sup> Meeting of the working group to draft the law on interception of telecommunications, where GAP Institute and Group for Legal and Political Studies (GLPS) took part, 28.02.2014.

<sup>16</sup> Council Resolution of 17 January 1995 on the lawful interception of telecommunications (96/C 329/01), available at: <http://bit.ly/1nREmHK>

<sup>17</sup> Anonymous Interview, 23.07.2014, Prishtina

<sup>18</sup> European Court of Justice (ECJ), joined cases C-293/12 and C-594/12, 8 April 2014, available at: <http://bit.ly/1nt3zIw>

<sup>19</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processes in connection with the provision of publicly electronic communications services or of public communications networks and amending Directive 2002/58/EC, available at: <http://bit.ly/1qwRK7F>



the new government has not been created due to the disagreements between the political parties represented in the fifth legislature.

## THE SITUATION WITH NETWORK OPERATORS IN THE PROCESS OF INTERCEPTION

There are three mobile network operators in Kosovo which provide mobile network services to nearly 1.6 subscribers in Kosovo. From this total number, the operator Vala counts 54.7% of subscribers, Ipko 34.2% and ZMobile 11.1%.<sup>20</sup> ZMobile is a virtual part of Vala operator whose subscribers thus count for more than 1 million in total.

In the interaction between law enforcement institutions (for instance Police), the court and the interception subject, network operators are a central player. Simply put, no matter if the Police would file an interception warrant and the court would approve it, there has to be a network operator where the interception subject is subscribed, in order for the interception process to take place. Network operators enable interception only after they receive the interception warrant authorized or approved by the competent court. Network operators possess the physical location called the interception interface where access to the intercepted communications is provided. On the other hand, law enforcement institutions possess monitoring facilities designated as the transmission destination for the intercepted telecommunications of a particular interception subject.

This interaction between the network operators and other actors in the interception process differs in Kosovo. In fact, it is the network operator Vala which does not possess the interception interface since it has handed over that role to Police.<sup>21</sup> Therefore, the Police have the interception interface which enables the interception and the monitoring facility, the transmission destination of the interception. This situation breaches the normal interception process described above. Logically, since both facilities enabling the interception belong to the Police, it is on the will of Police whether the interception warrant is delivered to the court or not. Therefore, this process hinders the judicial control of the interception of telecommunications because courts can simply be ignored by law enforcement institutions.

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<sup>20</sup> Regulatory Authority of Electronic and Postal Communications, first quarter 2014, available at: <http://bit.ly/1CMC0ns>

<sup>21</sup> The reason behind this action can be explained by the fact that the Vala operator is one of the two units of the public company Post and Telecommunications in Kosovo. Since it is part of a public company, it is unlikely that it could have resisted handing over the interception interface to Police.

The same situation applies to interception conducted by KIA since it uses the interception interface of Police where access to the intercepted telecommunications is provided. In every case, KIA has to send a person to the Police in order to record the interception carried out for the purposes of KIA. As in the case of Police, KIA also can ignore the Supreme Court and realize the interception through Police. With the second draft law explained above, there will be a switch of role between Police and KIA since the capabilities under Police today will be transferred to KIA. At the end of the day, it is 65% of the mobile telephone subscribers in Kosovo who potentially may suffer from an illegal interception of telecommunications.<sup>22</sup>

It is worth noting that it is not the same situation with the network operator Ipko. Unlike the operator Vala, the operator Ipko administers its own interception interface and enables interception only in cases of interception warrants approved by the competent court. This interaction and role of the network operator Ipko provides more safety and privacy for the subscribers of Ipko network operator.<sup>23</sup>

## JUDICIAL CONTROL

The CPC in its articles 84-100 describes the application process of covert and technical measures of surveillance and investigation, where the interception of telecommunication takes part.<sup>24</sup> According to these dispositions, the procedure until the interception of telecommunications takes place is developed among the Police, Prosecution and the Court (judge). Even though the process to be developed is not so clear, the mere fact that the Police and the Prosecution cannot intercept without involving the competent court is positive.

However, the involvement cycle of the competent court is placed differently depending on the situation. In emergency criminal cases, a state prosecutor may issue a provisional order for one of the measures (including the interception of telecommunications) which ceases to have effect if it is not confirmed in writing by a pre-trial judge within three days after issuance. If it is confirmed and authorized after three days, the process enters the normal process and the interception is extended up to sixty days. The abovementioned legal dispositions also provide the obligations to inform the individual/s which have been under interception, but do not specify who is obliged to inform, the Police, network operator and also when that should happen, after the three days interim period or after sixty days period.<sup>25</sup>

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<sup>22</sup> Both Police and the Vala operator declined to discuss the situation as presented by other stakeholders during the research phase.

<sup>23</sup> Interview with Arboneta Thaçi and Zana Bejta at Ipko operator, 17.07.2014

<sup>24</sup> Criminal Procedure Code (CPC), No. 04/L-123, Articles 84-100:

<http://bit.ly/11Mpz5z>

<sup>25</sup> CPC, Article 96, points 4 and 4.5.

Moreover, another concern rests with the definition of the state prosecutor which is not the State Prosecutor as Chief State Prosecutor as one person, or an authorized person by him/her, but means the institution of prosecution consisted of prosecutors of basic prosecutions spread in seven regions in Kosovo.<sup>26</sup> Also, the court judges assessing the request of the prosecutor belong to basic courts which are spread in seven regions and 20 branches in Kosovo.<sup>27</sup> Therefore, this much decentralized process of interception of telecommunications between Prosecutors and Judges of the basic levels in Kosovo constitutes a very weak and decentralized judicial control of interception of telecommunications.

Besides the interception of telecommunications in emergency criminal cases, the authorization by the pre-trial judge is given based on the request which determines the person authorized to implement the measure and the officer from the judiciary responsible to supervise such implementation. The authorized person is requested to present a report to the judicial officer on the implementation of the order only fifteen (15) days after the order has been issued.<sup>28</sup> The order is valid for sixty (60) days which if needed, based on the same request, can be extended for another sixty (60) days.<sup>29</sup> However, the CPC does not specify if the order can be extended only once or more after the normal sixty days period.

**Table 1:** Interception of telecommunications depending on the situation, time and actors involved according to CPC

Situation	Emergency	Normal	Extended
<b>Time period</b>	3 days	60 days	Not specified after the first extension
<b>Actors involved</b>	Police and Prosecutor	Police, Prosecutor and Judge (basic court)	Police, Prosecutor and Judge (basic court)

Along with the very flexible control during the 60 days period of interception when the authorized person will have to present a report to the judicial officer after 15 days only, there are no controlling mechanisms which make sure that conditions under which the interception order was issued, have ceased to exist in the meantime or before the 60 days period expires.

A similar procedure is followed in the case of interception of telecommunication conducted by KIA. According to the law on KIA, for the interception procedure to take place, there should be a formal request

<sup>26</sup> Law No. 03/L-225 on State Prosecution, available at: <http://bit.ly/1nFg3wL>

<sup>27</sup> Law No. 03/L-199 on Courts, available at: <http://bit.ly/1oX7NaZ>

<sup>28</sup> CPC, Article 92.2

<sup>29</sup> CPC, Article 94.3

approved either by the Director or deputy director of KIA, and approved by a judge of the Supreme Court.<sup>30</sup> However, this practice is different in times of emergency when the Director or deputy director of KIA can give verbally the authorization to start the interception, which authorization has to be confirmed within 48 hours.<sup>31</sup> Besides the right to intercept for 48 hours (in emergency cases), the role of the certain judge in the Supreme Court terminates with the approval or not of the interception request. As in the case of Police, there are no controlling mechanisms which make sure that the conditions under which the interception order was approved, are still valuable and legitimate until the end of the 60 days period. Moreover, when the 60 days period expires, KIA can apply to extend the interception period but the law doesn't specify as for how much time is needed besides the first 60 days.<sup>32</sup>

**Table 2:** Interception of telecommunications depending on the situation, time and actors involved according to the Law on KIA

Situation	Emergency	Normal	Extended
Time period	48 hours	60 days	Not specified
Actors involved	KIA	KIA and the judge (Supreme Court)	KIA and the judge (Supreme Court)

## INTERNAL CONTROL

First of all, internal control means if the authorized institutions to intercept communications have established controlling mechanisms as part of their internal structures to control the interception process and procedure. Like the differences in terms of judicial control, internal control of the interception of telecommunications differs in Police and KIA. In fact, there are no dispositions in CPC which establish any kind of internal control related to interception of telecommunications. It seems that this aspect is left to the usual oversight from management structures within Police, and Ministry of Internal Affairs. The Police Inspectorate has not responded in our request to discuss the possible internal control of this institution to the interception of telecommunications conducted by the Police.<sup>33</sup>

Law on KIA has determined the appointment of an Inspector General who is appointed to this position in the same way as the Director of KIA. Inspector General is nominated by the President and the Prime Minister, reports directly to the Prime Minister, and can be dismissed only with the

<sup>30</sup> Law No. 03/L-063 on the KIA, Article 28, available at: <http://bit.ly/ZecGYa>

<sup>31</sup> Law No. 03/L-063 on KIA, Article 29

<sup>32</sup> Law No. 03/L-063 on KIA, Article 28.7

<sup>33</sup> Written request made on the 29<sup>th</sup> of September 2014.

same procedure.<sup>34</sup> The Inspector General inspects the activities of KIA including the internal audit process, but there are no dispositions which mandate him to inspect the interception of telecommunications part in KIA. The Inspector General has not responded in our request to discuss about the internal control of the interception of telecommunication's process conducted by KIA.<sup>35</sup>

## PARLIAMENTARY OVERSIGHT

Along with the reform and development of the security sector, two Parliamentary Committees were created to exercise the security sector oversight: Committee on Internal Affairs, Security and Supervision of Kosovo Security Force (KSF),<sup>36</sup> and Committee on the Oversight of KIA.<sup>37</sup>

The oversight of Police along with the Ministry of Internal Affairs falls to the Committee on Internal Affairs, while that of KIA falls under the Committee on the oversight of KIA. Both Committees write reports about their oversight activities during a legislature period, but they are rarely published. Reports on their activities for the past legislature of the Assembly have not been made available.<sup>38</sup>

With regard to the oversight of KIA by the Committee, the non-presence of KIA Director in this Committee on the 2<sup>nd</sup> of May 2014<sup>39</sup> when he was invited to report in front of the members of this Committee, is of great concern and shows the level of oversight towards KIA. The next day, the Committee realized a visit to KIA premises in order to have a closer view on the vetting process. This visit was mainly triggered by complaints of public officials toward KIA about the vetting process and especially after the chief of the vetting process was proved to have falsified graduation diplomas and been arrested. Moreover, the resignation of the deputy Director of KIA just two days before he had to appear in the Committee, and the resignation of the Director of Anti-terrorism in KIA are serious acts which damage the image as well as the functionality of the KIA. Moreover, the hesitation of KIA to report in front of the Committee members since they don't have security clearances is another obstacle which hinders the Committee's oversight over KIA. The fact that the Committee members don't have security clearances is not that KIA has undergone that process and they were proved not to be eligible, but there is confusion as who

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<sup>34</sup> Law No. 03/L-063 on KIA, Article 9.

<sup>35</sup> Written request made on the 29<sup>th</sup> of September 2014.

<sup>36</sup> Duties and responsibilities of this Committee are described with the Regulation of the Assembly.

<sup>37</sup> Duties and responsibilities of this Committee are described with the law on KIA.

<sup>38</sup> The Coordinator of both Committees has not responded in our written request made on the 7<sup>th</sup> of July to have access on mandatory reports of both Committees.

<sup>39</sup> Indeksonline, Bashkim Smakaj ignores the Committee, 02 May 2014, available at: <http://bit.ly/1q6iRbV>

would be the competent authority to check or scrutinize members of such Committee. The question whether it is KIA which they have the oversight of - or should there be another institution - is still open and under discussion.

Given that there are no available data about their activities with respect to oversight of the security sector institutions and Kosovo Police and KIA in particular, it is impossible to make an assessment about their activities related to the oversight of interception of telecommunications in both KIA and Kosovo Police.

## OMBUDSPERSON

The Ombudsperson Institution is established by law as an independent institution for the *“protection of rights, freedoms and interests of all persons in the Republic of Kosovo and abroad from illegal actions or failure to act of the bodies of public authorities of the Republic of Kosovo”*.<sup>40</sup> Proposed by the respective Assembly Committee, the Ombudsperson is appointed by and reports to the Assembly. The present Ombudsperson was appointed in 2009<sup>41</sup> as the first local Ombudsperson whereas an international had been serving as Ombudsperson in Kosovo since its establishment in 2000. He is appointed for a five year term, without having the right to be re-appointed, has five deputies (two of them come from other communities in Kosovo, one from Kosovo Serb Community and the second from other non-majority communities in Kosovo). The Ombudsperson Institution counts 51 staff<sup>42</sup> members (both professional and administration) distributed in 8 offices across Kosovo.

The Ombudsperson has the competences to investigate complaints received from any natural or legal person related to assertions for violations of human rights, can initiate investigations on its own initiative, and may initiate matters to the Constitutional Court. Also, the Ombudsperson is responsible to draw attention to cases when institutions of the Republic of Kosovo violate human rights and to make recommendations to stop such cases and when it is necessary to express his opinion on attitudes and reactions of the relevant institutions relating to such cases. Moreover, the Ombudsperson can advise and recommend to the institutions of Kosovo about their programs and policies in order to ensure the protection and advancement of human rights protection in Kosovo, can recommend modification of laws in force to the Assembly, has access to files and

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<sup>40</sup> Law No. 03/L-195 on Ombudsperson, Article3, available at: <http://bit.ly/1aDxYD3>

<sup>41</sup> On the 4<sup>th</sup> of June 2009 the Assembly of Kosovo appointed Mr. Sami Kurteshi the first local Ombudsperson in Kosovo for a mandate of five years.

<sup>42</sup> Annual financial report, budget of the Republic of Kosovo, Ministry of Finance, p. 71: <http://bit.ly/1Et4Qdc>

documents of every institution in the Republic of Kosovo, and may require any institution to cooperate with the Ombudsperson.<sup>43</sup>

Among other cases based reports, the Ombudsperson Institution publishes regularly annual reports which present the status on the respect and implementation of human rights and fundamental freedoms in Kosovo. The right to privacy including the confidentiality of telecommunications is one of the rights addressed by Ombudsperson Institution.<sup>44</sup> In its annual report (2012), the Ombudsperson Institution finds that *“security from misuse of illegal interception of telecommunications in Kosovo, the right guaranteed by the Constitution, is equal to zero. There is not even a minimal security from abusive interception of telecommunications in Kosovo. Local responsible authorities as well as those international in Kosovo have failed completely in providing security on all kinds of communications in Kosovo”*.<sup>45</sup>

Given the very low awareness of the Kosovo citizens with regard to the misuse of the interception of telecommunications, the Ombudsperson Institution has received only one complaint in 2010 related to the interception of telecommunications. However, in terms of its own initiative, the Ombudsperson Institution has not realized any visits either in Kosovo Police or KIA to have a closer view on the process of interception of telecommunications. Neither of these institutions submits any reports to the Ombudsperson Institution.<sup>46</sup>

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<sup>43</sup> Law No. 03/L-195 on Ombudsperson, articles 15.1, 15.3, 15.7, 16.1.2, 16.1.6, 16.3 and 16.6.

<sup>44</sup> From 2010 onwards, the right to privacy including the confidentiality of telecommunications is separately addressed in annual reports of the Ombudsperson Institution.

<sup>45</sup> The Ombudsperson Institution, twelfth annual report, 1 January – 31 December 2012, addressing the Assembly of Kosovo, p. 41, available at: <http://bit.ly/1oY08sQ>

<sup>46</sup> Interview with Tafil Rrahmani, Director of the Investigation Department in the Ombudsperson Institution, 11.07.2014

## Conclusion and Recommendations

Given the elaboration above, the following conclusions can be drawn:

1. The privacy issue or the confidentiality of telecommunications in interception of telecommunications is not respected. The legislation is much more concerned about interception and rarely concerns about the confidentiality of telecommunications as part of the right to privacy guaranteed by the Constitution.
2. The current draft law on interception of telecommunications approved in the Government in the end of April 2014 does not strengthen the controlling mechanisms of the interception of telecommunications. Controlling mechanisms present guarantees for the confidentiality of telecommunications and the right to privacy.
3. The current draft law mixes the location premises of the monitoring facility and interception interface. According to the draft law, the interception interface belongs to both the network operator and KIA. Interception interface is always located in network operators' premises.
4. Judicial control is assessed as too wide since the control by court is spread among seven basic courts and twenty branches therein. The state prosecution as it is referred by the CPC does not mean one person such as the Chief State Prosecutor, but means the institution of the prosecution which includes prosecutors of the basic prosecutions.
5. Internal control is insufficient especially that within Police. CPC does not include specific dispositions as to what is the internal control of the interception. It is more promising in the case of KIA since the Inspector General mandated to inspect the activities of KIA is independent since he is nominated the same procedure as the Director of KIA.
6. Parliamentary oversight is inefficient given that the Committee on Internal Affairs exercises a broad oversight over the security sector and the interception of telecommunications in Police is not on its radar. However, there are some briefings by the Director of KIA as well as the Inspector General which as far as they are made public, deal more with some other issues rather than with the potential misuse of interception of telecommunications. Resignations and other scandals happened in KIA which have seriously damaged its image in public, and unavoidably affect the functionality and consolidation of KIA.



7. The Ombudsperson Institution does not have formal relations or interactions with either Police or KIA with regard to interception of telecommunications. This institution neither receives any reports from KIA or Police nor has realized any visits in these institutions. As far as complaints from the citizens are concerned, there has been only one complaint received by the Ombudsperson Institution in 2010.

Given the conclusions above, the following recommendations can be drawn:

- The new Government should begin to draft a new law built around a balance of data retention and privacy protection. The draft law should be as complete as possible and address the interception of telecommunications thoroughly.
- Unlike the earlier practices, the Government should set up two working groups to work on the new draft law: a core group consisting of experts which will write the basics and the heart of the law, and a larger group consisting of line Ministries and Institutions where the input of the core group would have to be discussed in a general format.
- The core working group should take examples from the regional countries, and avoid the complexities and duplications among CPC, Law on KIA, and the new law. A clear separation of powers as well as a distinction between the interception for judicial and interception for intelligence purposes should be made.
- The new law should make a clear separation between the monitoring facility and interception interface location premises. Monitoring facility goes with the law enforcement institution whereas the interception facility with network operators.
- Minister of Internal Affairs or the General Director of Police should be the one approving or not the request of Police to intercept.
- Judicial control of interception of telecommunications conducted by Police and Prosecutors should be less decentralized. There should be a limited number of positions specified by the new law who will review and in fact authorize the interception of telecommunications.
- As in the case of interception by KIA where the Supreme Court is the authority to approve or not the request, a similar if not the same institution should be only competent authority to approve the request from Police.

- Internal control should be strengthened by inserting it as one of the central elements in the new draft law on interception of telecommunications. As of today, the internal control is much better regulated in the case of KIA rather than in Police.
- Committee on Internal Affairs should invite in a public hearing the Director of Police about the process of interception of telecommunications developed by the Police. This is to be followed by visiting the Police, especially the premises where the interception of telecommunications is developed.
- The Ombudsperson should according to its mandate, advise and recommend to the Government the improvement of the draft law on interception of telecommunications in order to ensure the protection and advance of human rights and freedoms in Kosovo.
- The Ombudsperson should according to its mandate require Police and KIA to cooperate with the Ombudsperson, conduct visits to interception of telecommunications' premises in these institutions, and receive reports about interception of telecommunication activities in both Police and KIA.
- The EU Office in Kosovo should recommend an adaption of the draft law in the Government, before it is submitted to the Assembly for the final approval.





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