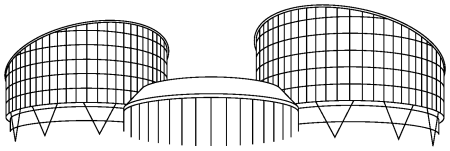

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF VUKOTA-BOJIĆ v. SWITZERLAND

(Application no. 61838/10)

JUDGMENT

STRASBOURG

18 October 2016

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

In the case of Vukota-Bojić v. Switzerland,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 27 September 2016,

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

PROCEDURE

1. The case originated in an application (no. 61838/10) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Ms Savjeta Vukota-Bojić ("the applicant"), on 14 October 2010.

2. The applicant was represented by Mr P. Stolkin, a lawyer practising in Zurich. The Swiss Government ("the Government") were represented by their Deputy Agent, Mr A. Scheidegger.

3. The applicant alleged, in particular, that the secret surveillance of her daily activities ordered by her insurance company had violated her rights under Article 8 and that the proceedings in her case had not been fair in breach of Article 6 of the Convention.

4. On 6 September 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Opfikon.

6. The applicant had been employed as a hairdresser since 1993 and she had compulsory accident insurance under the Federal Law on Accident Insurance (see Relevant domestic law below). On 28 August 1995 she was hit by a motorcycle while crossing the road and fell on her back. She was

hospitalised overnight owing to suspected concussion resulting from the impact of her head against the ground.

7. On 2 October 1995 the applicant was examined by a rheumatologist who diagnosed her with a cervical trauma and possible cranial trauma. On 6 December 1995 her family doctor certified that her injuries had resulted in total incapacity for work until the end of the year.

8. On 29 January 1996 the applicant was examined at the Zurich University Hospital. The doctor who examined her predicted that she could make a gradual return to work. Nevertheless, on 12 June 1996 another doctor in the same hospital declared the applicant totally incapable of work.

9. At the request of her insurance company, the applicant's health was assessed by means of orthopaedic, neurological, neuropsychological and psychiatric examinations by the insurance-disability medical examination centre (COMAI) of St. Gallen. On the basis of the assessment carried out by that centre, the applicant was declared fully capable of work with effect from February 1997.

10. By a decision of 23 January 1997 the insurance company informed the applicant that her entitlement to daily allowances would end on 1 April 1997.

11. On 4 February 1997 the applicant submitted an objection to that decision and enclosed a report of a neurologist, who confirmed an almost permanent headache, limited head movement, pain radiation towards the shoulders and arms with sensory disorders as well as sleep disorders. In addition, the specialist suspected that the applicant had suffered whiplash and that she was affected by a neuropsychological dysfunction.

12. In September 1997 the insurance company rejected the applicant's complaint finding no causal link between the accident and her health problems.

13. The applicant appealed to the Social Insurance Court of the Canton of Zurich (*Sozialversicherungsgericht des Kantons Zürich*).

14. In a decision of 24 August 2000, the Social Insurance Court allowed the applicant's appeal. It overturned the insurance company's decision and remitted the case for further clarifications. Taking into account the partial contradictions that existed between the different medical reports, the court considered that the consequences of the accident for the applicant's state of health were not sufficiently established. Moreover, a doubt remained as to whether the applicant had suffered trauma to her neck and spine. The insurance company was thus required to clarify the issue.

15. The insurance company subsequently ordered a multidisciplinary examination, which was conducted by an institute of medical experts in Basel. In their report the experts concluded that the applicant was totally incapacitated in respect of the duties required in her profession. However, the insurance company challenged this report once it found that a doctor

who had participated in its preparation had previously carried out a private examination of the applicant in the initial stages of the proceedings.

16. The insurance company therefore ordered another medical report, which was delivered on 11 November 2002. The report observed the existence of a causal link between the accident and the damage to the applicant's health, and was accompanied by a neuropsychological report, which noted a brain dysfunction subsequent to a head injury.

17. Meanwhile, by a decision of 21 March 2002 the competent social security authority (*Sozialversicherungsanstalt*) of the Canton of Zurich granted the applicant a full disability pension with retroactive effect.

18. Subsequently, the applicant asked the insurance company on several occasions to comment on its obligation to grant her insurance benefits.

19. On 5 October 2003 another expert report commissioned by the insurance company was prepared solely on the basis of the previous examinations. The medical expert confirmed the existence of a causal link between the accident and the applicant's health problems, and concluded that the applicant's illness had led to a total incapacity for work.

20. On 14 January 2005 the insurance company issued a decision confirming the termination of the applicant's benefits as of 1 April 1997. The applicant lodged a complaint against that decision.

21. On 11 June 2005, another independent physician concluded, solely on the basis of the previously drafted medical reports, that these medical findings were not sufficiently explicit as regards causality. According to him, the applicant's incapacity for work amounted to not more than 20%. He also strongly criticised the approach and findings of other medical experts. On the basis of this report, on 22 September 2005 the insurance company dismissed the applicant's complaint on the grounds of lack of a causal link between the accident and her medical conditions.

22. The applicant appealed, arguing that most of the medical reports had found a causal link and that the only report denying the existence of such a link was based solely on medical reports by other experts instead of on a direct examination.

23. On 28 December 2005 the Social Insurance Court recognised the existence of a causal link between the accident and the health problems the applicant complained of, and allowed her appeal. The matter was referred to the insurance company for it to decide on the right of the applicant to insurance benefits.

24. Thereafter, the insurance company invited the applicant to undergo a medical evaluation of her functional abilities, which she refused. The applicant was then issued with a formal notice within the meaning of Article 43 (3) of the Social Security Act inviting her to undergo the said evaluation and warning her about the legal consequences of failing to do so indicated in the said provision (see § 38 below). No mention of the possibility of covert monitoring was mentioned.

25. Thereafter, on 3, 10, 16 and 26 October 2006 the applicant was monitored by private investigators, commissioned by the insurance company. The surveillance was performed on four different dates over a period of twenty-three days and lasted several hours each time. The undercover investigators followed the applicant over long distances. Following the surveillance, a detailed monitoring record was prepared. Pursuant to that report, the applicant appears to have become aware of the secret surveillance on the last day of implementation of the measure.

26. In a decision dated 17 November 2006 the insurance company refused the applicant's representative access to the surveillance report. The applicant then lodged a complaint with the supervisory authority, namely the Federal Office of Public Health, objecting to the failure to take a decision on her benefits entitlement.

27. On 14 December 2006 the insurance company sent the private investigators' report to the applicant. The report included the surveillance footage and declared that it considered it necessary to conduct a fresh neurological assessment of the applicant. However, the applicant refused to undergo any further examination and asked for a decision on her benefits to be taken.

28. In a decision of 2 March 2007 the insurance company again refused to grant any benefits to the applicant on the basis of the images recorded during the surveillance and her refusal to undergo a neurological examination.

29. The applicant lodged a complaint against that decision, claiming a pension on the basis of a degree of disability of 100% as well as compensation for damage to her physical integrity. She also asked for the surveillance case file to be destroyed.

30. On 12 April 2007 another neurologist appointed by the insurance company, Dr H., released an anonymous expert opinion based on evidence and drafted taking into account all the medical examinations and assessments carried out previously as well as the surveillance images. He found that the applicant's incapacity to work amounted to 10%. Furthermore, he estimated the damage to the applicant's physical integrity at between 5% and 10%. On the basis of the analysis of the surveillance images he concluded that the restriction on her capacity to lead a normal life was minimal.

31. On 14 March 2008 the Federal Office of Public Health gave the insurance company a deadline to decide the applicant's complaint. By a decision of 10 April 2008, the insurance company rejected the applicant's request for destruction of the images and decided to grant her daily allowances and a pension on the basis of a disability degree of 10%.

32. On 6 May 2008 the applicant lodged an appeal with the Social Insurance Court claiming compensation for damage to her physical integrity as well as a disability pension based on 70% disability. In addition, she

claimed interest at 5% on arrears on the daily allowances remaining unpaid since the accident. She also asked for the expert opinion on the evidence taking into consideration the material resulting from the surveillance be to be removed from her case file. The applicant complained that the surveillance had been "reprehensible and inappropriate" and had constituted an "attack on her personality".

33. On 29 May 2009 the Social Insurance Court found in favour of the applicant. In particular, it ruled that owing to the lack of legal basis for the surveillance the monitoring record was not admissible as evidence. As a result, it denied any probative value of the expert opinion based on the evidence, which had taken into account the illegal surveillance. Moreover, according to the court's previous decision of 28 December 2005, the applicant was not required to undergo any further examinations. Therefore, she was entitled to refuse a medical assessment of her functional abilities.

34. The insurance company lodged an appeal against this decision before the Federal Court, criticising in particular the amount of benefits to be granted to the applicant.

35. In its judgment of 29 March 2010, of which the applicant was notified on 19 April 2010, the Federal Court ruled that, in accordance with its earlier jurisprudence (see below § 43), the surveillance of the applicant by private investigators had been lawful and the surveillance file was therefore a valid piece of evidence. After evaluating the surveillance file it found that the medical reports contradicted the images and videos showing the applicant walking her dog, driving a car long distances, going shopping, carrying groceries and opening the boot of the car by moving her arms above her head without noticeable restrictions or unusual behaviour. Moreover, it found that there were discrepancies, not only between the results of the surveillance and the medical reports but also between the medical reports which had been drafted before the surveillance. Finally, the examination of the applicant by a neurologist was necessary and admissible because she had previously refused to undergo an assessment of her functional capacities and a neurological examination, which were required in the circumstances. Accordingly, the Federal Court denied the probative value not only of the medical reports attesting to the applicant's complete incapacity to work but also of the reports attesting to her incapacity to work of a lesser degree. Therefore, the insurance company had acted correctly in ordering a reassessment of her ability to work through a critical review of all previous medical reports. Following an analysis of this expert opinion report based on evidence, the Federal Court held that its findings were convincing. It quashed the decision of the Social Insurance Court, except for the considerations relating to the interest on arrears.

36. Subsequently the applicant lodged a request with the Federal Court for interpretation of its decision in the light of the established case-law concerning the probative value of the medical reports. The Federal Court

dismissed her request, concluding that she had submitted her application not for the purposes defined in this legal remedy, but rather to argue a violation of Articles 6 and 8 of the Convention.

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. The relevant provisions of the Federal Constitution of the Swiss Confederation (classified compilation 101) read as follows:

Article 10 – Right to life and to personal freedom

" ... [2]Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement ..."

Article 13 – Right to privacy

"[1]Every person has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications.

[2]Every person has the right to be protected against the misuse of their personal data."

Article 36 – Restrictions on fundamental rights

"[1]Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

[2]Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

[3]Any restrictions on fundamental rights must be proportionate.

[4]The essence of fundamental rights is sacrosanct."

38. The relevant parts of the Federal Act on the General Part of Social Security Law (*Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts*; classified compilation 830.1; "Social Security Act") read as follows:

Article 28 – Cooperation in the enforcement

"[1]Insured persons and employers shall cooperate freely in the enforcement of the laws on social insurance.

[2]Those who apply for benefits shall provide all information necessary to establish their rights and to assess the amount of benefits due.

[3]Under specific circumstances the applicant is required to authorise all persons and institutions concerned, including employers, doctors, insurance companies and official bodies, to provide such information as may be necessary for the establishment of their entitlement to benefits. These individuals and institutions must provide the required information."

Article 43 – Application process

"[1]The insurer shall examine requests, take of its own motion the necessary investigative measures, and collect necessary information. Information obtained orally must be issued in writing.

[2]Insured persons must undergo such medical or technical examinations as may reasonably be required and are necessary for the assessment of their case.

[3]If an insured person or other applicant unjustifiably refuses to perform their obligation to provide information or to cooperate in the process, the insurer can decide on the basis of the case file as it stands or close the investigation and decide not to address the merits of the case. In that event it must send them a written notice warning them about the legal consequences and providing them with an appropriate reflection period."

Article 55 – Special rules of procedure

"[1]The procedural aspects that are not exhaustively regulated by Article 27-54 of this Act or by provisions of special laws are governed by the Federal Act of 20 December 1968 on administrative proceedings ..."

Article 61 – Procedure

"With the exception of Article 1(3) of the Federal Act of 20 December 1968 on administrative proceedings, the proceedings before the Cantonal Insurance Court are regulated by cantonal law. They must satisfy the following requirements...

c. the court shall establish the facts relevant for the outcome of the case together with the parties; it shall manage the necessary evidence and assess it freely ..."

39. The relevant provision of the Federal Act on Administrative Procedure (*Bundesgesetz über das Verwaltungsverfahren*; classified compilation 172.021; "the Administrative Procedure Act") reads as follows:

Article 12

"D. Establishing of the facts of the case

I. Principles

The authority shall establish the facts of the case of its own motion and obtain evidence by means of the following:

a. official documents;

b. information from the parties;

c. information or testimony from third parties;

d. inspection;

e. expert opinions."

40. The relevant provisions of the Federal Act on Accident Insurance (*Bundesgesetz über die Unfallversicherung;* classified compilation 832.20; "the Accident Insurance Act") read as follows:

Article 1*a* – Insured persons

"[1]All persons employed in Switzerland, including home employees, apprentice trainees, trainees, and volunteers, as well as those working in protected technical schools or workshops, are compulsorily insured pursuant to the provisions of the present Act."

Article 58 – Categories of insurers

"Accident insurance is managed, by category of insured person, by the Swiss National Accident Insurance Fund (CNA) or by other authorised insurers and by a supplementary fund managed by the latter."

Article 68 – Categories and enrolment in the registry

"1. Those outside the competence of the CNA shall be insured against accidents by one of the companies indicated below:

a. private insurance companies subject to the Act of 17 December 2004 on insurance monitoring (LSA) ...

2. Insurers wishing to participate in the management of compulsory accident insurance must be entered in a registry kept by the Federal Office of Public Health. This registry is public."

Article 96 – Processing of personal data

"The authorities in charge of implementing the present Act, or of assessing or monitoring its execution, are allowed to process and require to be processed personal data, including sensitive data and personality profiles, which are necessary in order to perform the tasks that are assigned to them by the present Act, in particular to:

a. calculate and collect payments;

b. establish rights to benefits, calculate, allocate and coordinate them with those from other types of social insurance ...

e. monitor the execution of the present Act ..."

41. The relevant provision of the Civil Code (classified compilation 210) reads as follows:

Article 28

"1 Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.

2 An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law."

42. The relevant provision of the Criminal Code (classified compilation 311.0) reads as follows:

Article 179quater

"Breach of secrecy or privacy through the use of an image-carrying device

Any person who observes with a recording device or records with an image-carrying device information from the secret domain of another or information which is not automatically accessible from the private domain of another,

any person who makes use of information or makes information known to a third party, which he knows or must assume has been produced as a result of an offence under paragraph 1 above,

any person who stores or allows a third party access to a recording that he knows or must assume has been made as the result of an offence under paragraph 1 above,

is liable on complaint to a custodial sentence not exceeding three years or to a fine."

43. The relevant parts of judgment 8C_807/2008 of the Federal Court dated 15 June 2009 (published as 135 I 169), the leading judgment concerning secret surveillance of an insured person ordered by the insurer, read as follows (*unofficial translation*):

"4.2 The respondent is an insurance company, which is registered as an authorised insurer in the Register for the implementation of compulsory accident insurance within the meaning of Article 68 UVG. As such, it is considered a public authority within the meaning of Article 1 § 2 (e) VwVG ... To the extent that it can deliver binding decisions to insured persons, and thus exercises sovereign powers, it has to respect not only the procedural guarantees of administrative law, but also general constitutional principles, in particular fundamental rights....

4.3 The aim of surveillance of an insured person by private detectives is to collect and confirm facts which materialise in the public domain and may be observed by anyone (for example, walking, climbing stairs, driving, carrying loads or performing sports activities). Even when the surveillance is ordered by an authority, it does not give the person undertaking the surveillance the right to interfere with the privacy of the insured person. Unlike a judicially ordered surveillance – for instance, in the context of the Federal Act of 6 October 2000 on the Surveillance of Post and Telecommunications (BÜPF; SR 780.1) – the protection of the insured person from crime remains intact, since private detectives acting on the strength of an administrative order are not allowed to commit criminal acts. In particular, the person in charge of the surveillance has to keep to the framework set up by Article 179quater of the Criminal Code. In contrast to a covert investigation pursuant to the Federal Law of 20 June 2003 on the undercover investigation ... it is not the purpose of such surveillance for the investigating person to create links with the person subject to the surveillance so as to penetrate into their environment ...

5.4 Given that, pursuant to Article 43 [of the Social Security Act] it is incumbent on the insurer to make the necessary clarifications, the said provision – at least in conjunction with Article 28 (2) [of the Social Security Act], which sets out a general obligation on the insured person to provide information – represents a basis for ordering surveillance. It must, however, be examined whether these provisions are sufficiently clear to serve as a legal basis within the meaning of Article 36 § 1 [of the Constitution].

5.4.2 Regular surveillance of insured persons by private detectives represents in any case a relatively minor interference with the fundamental rights of the individual concerned, in particular if it is limited to the area defined at point 4.3 [above] and thus

restricted to the public space ... Part of the literature represents the view that surveillance which is limited to such an extent does not even affect the scope of the fundamental right of privacy (*Ueli Kieser*, supra). The core content of Article 13 [of the Constitution] is not affected by the institution of such surveillance. In principle, information obtained from insured persons, their employers and healthcare professionals is sufficient for a reliable assessment of claims for benefits; further investigation by a private detective is indicated only in a vanishingly small percentage of persons registered with accident insurance cases ... Ordering of secret surveillance is thus of an exceptional nature, as it will only take place if the other clarification measures fail to produce a conclusive result. The overall legal basis for the restriction of the fundamental rights of insured persons is thus sufficiently precise ...

5.7 To sum up, it should be concluded that ordering surveillance of insured persons by accident insurers in the context outlined in point 4.3 [above] is permitted; the results of such surveillance can thus in principle be used for assessment of the issues in question ... The probative value of the records and reports of private investigators can, however, only be granted in so far as they indicate activities and actions which the insured person has exercised without being influenced by those engaging in the surveillance ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained that the domestic authorities had violated her right to respect for private life. In particular, she alleged lack of clarity and precision in the domestic legal provisions that had served as the legal basis of her surveillance. Article 8 of the Convention provides as follows:

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

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

A. Admissibility

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Acts imputable to the State

46. The surveillance measure complained of in the present case was ordered by a private insurance company. However, the said company has been given the right by the Federal Office of Public Health to provide benefits arising from compulsory insurance and to collect insurance premiums partly regulated by law. Under the jurisprudence of the domestic courts, such insurance companies are considered public authorities and are - at least in so far as they adopt binding decisions – obliged to respect the fundamental rights arising out of the Constitution (compare judgment of the Federal Court ATF 135 I 169, consid. 4.2).

47. The Court considers that the same must hold true for the Convention since, as it has already held, a State cannot absolve itself from responsibility under the Convention by delegating its obligations to private bodies or individuals (see, among many other authorities, *Kotov v. Russia* [GC], no. 54522/00, § 92, 3 April 2012). Given that the insurance company was operating the State insurance scheme and that it was regarded by the domestic regime as a public authority, the company must thus be regarded as a public authority and acts committed by it must be imputable to the respondent State (see, *a contrario*, *De La Flor Cabrera v. Spain*, no. 10764/09, § 23, 27 May 2014).

2. Existence of an interference

(a) The parties' submissions

48. The applicant claimed that the systematic recording and storage or publication of images fell within the scope of Article 8. Even when the requirements for the protection of private sphere in a public space were less stringent, as in the case of a person of public interest, they could nevertheless not be unconcerned. In this regard, the Court should primarily consider whether the person involved could reasonably expect to enjoy the privacy afforded to the private sphere when moving in the public sphere ("reasonable expectation of privacy").

49. The applicant pointed out that she was systematically and intentionally followed and filmed by professionals specifically trained for this purpose, which, coupled with the storage and selection of the video material, constituted a serious interference with her right to respect for private life. The impact of the surveillance on her private life was evident in that the insurance company used those images in order to significantly reduce the amount of benefits she was entitled to receive.

50. The Government argued that the surveillance of the applicant was a measure of last resort of an exceptional nature. Under normal circumstances the information provided by the insured persons, their employer and doctors

was sufficient to conduct a reliable assessment of an insurance benefit claim. Surveillance by a private investigator was requested only in a small proportion of cases when other measures of examination had proved inconclusive and the insured person had not fulfilled her or his obligation to provide the requested information. In these circumstances, surveillance aimed at systematically collecting and retaining data on facts that happened in the public arena and that anyone could note, for example the observed person's way of walking, climbing the stairs, driving, carrying loads or exercising.

51. In the Government's view, the surveillance of the applicant could thus only marginally have affected the scope of application of Article 8 of the Convention and did not constitute a serious infringement of her right to respect for private life. This, in turn, also relatively diminished the need for clarity and precision of the legal basis of the surveillance in question.

(b) The Court's assessment

52. The Court reiterates that "private life" within the meaning of Article 8 is a broad term not susceptible of exhaustive definition. Article 8 protects, *inter alia*, a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003‑I; *Perry v. the United Kingdom*, no. 63737/00, § 36, ECHR 2003‑IX (extracts); and *Köpke v. Germany* (dec), no. 420/07, 5 October 2010).

53. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. This may include activities of a professional or business nature and may be implicated in measures effected outside a person's home or private premises (see *Peck*, cited above, §§ 57-58; *Perry*, cited above, §§ 36-37; and *Benediktsdóttir v. Iceland* (dec.), no. 38079/06, 16 June 2009).

54. However, the possibility cannot be excluded that a person's private life may be implicated in measures effected outside a person's home or private premises. A person's reasonable expectation as to privacy is a significant, although not necessarily conclusive, factor (see *Perry*, cited above, § 37).

55. In the context of monitoring of actions of an individual through the use of video or photographic equipment, the Court has held that the normal use of security cameras as such, whether in the street or on public premises, where they serve a legitimate and foreseeable purpose, did not raise an issue under Article 8 of the Convention (see *Perry*, cited above, § 38). However, private-life considerations may arise concerning recording of the data and

the systematic or permanent nature of such a record (see *Peck*, cited above, §§ 58-59; and *Perry*, cited above, § 38).

56. Further elements which the Court has taken into account in this respect include the question whether there has been a compilation of data on a particular individual, whether there has been processing or use of personal data or whether there has been publication of the material concerned in a manner or degree beyond that normally foreseeable (see *Uzun v. Germany*, no. 35623/05, § 45, ECHR 2010 (extracts)).

57. In a case concerning secret video recording of an employee at her workplace made on the instructions of her employer, the Court found that the covert video surveillance during some fifty hours, the recording of personal data, the examination of the tapes by third parties without the applicant's knowledge or consent, the use of the videotapes as evidence in the proceedings before the labour courts, and the domestic courts' refusal to order the destruction of the tapes, had all seriously interfered with the applicant's right to privacy (see *Köpke*, cited above).

58. Turning to the present case, the Court must determine whether the use of the footage and images of the applicant in public spaces obtained by secret surveillance constituted processing or use of personal data of a nature to constitute an interference with her respect for private life. In that connection, the Court observes that the applicant was systematically and intentionally watched and filmed by professionals acting on the instructions of her insurance company on four different dates over a period of twenty-three days. The material obtained was stored and selected and the captured images were used as a basis for an expert opinion and, ultimately, for a reassessment of her insurance benefits.

59. By applying the principles outlined above to the circumstances surrounding the applicant's surveillance, the Court is satisfied that the permanent nature of the footage and its further use in an insurance dispute may be regarded as processing or collecting of personal data about the applicant disclosing an interference with her "private life" within the meaning of Article 8 § 1.

3. Justification for the interference

60. The Court reiterates that any interference can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which paragraph 2 of Article 8 refers, and is necessary in a democratic society in order to achieve any such aim (see *Kennedy v. the United Kingdom*, no. 26839/05, § 130, 18 May 2010).

(a) The parties' submissions

61. The applicant argued that the surveillance had not been in "accordance with the law". In particular, the legal provisions on which the surveillance had been based were not sufficiently certain, precise or clear

and thus not foreseeable as to their effects, in contrast to, for example, the domestic provisions regulating surveillance carried out by the police.

62. In fact, Articles 28 and 43 of the Social Security Act did not specify when, where and under what conditions surveillance was permissible, the time and length of surveillance measures, how the destruction of material obtained in this way was managed by the surveillance company, how the person monitored could complain about the surveillance and the destruction of the images, or how the person conducting the surveillance had to be trained. The law only vaguely defined that surveillance could be carried out when it seemed to be "objectively justified", but did not specify this concept further. It follows that the law was not sufficiently clear for it to be "foreseeable".

63. The applicant further submitted that, according to domestic case-law, the conditions for a surveillance operation to be lawful were the high amount of the claim for damages and inconsistencies in the medical reports at hand. As to the first condition, surveillance would be permissible virtually any time that a victim of a traffic accident claimed a large amount in damages, which was usually the case. As to the second condition, the applicant pointed out that the findings of the medical reports did not depend on the victim of the accident, but on the medical experts in charge, who had often been commissioned by the insurance company itself.

64. The Government argued that the minor interference with the applicant's Article 8 rights had a basis in domestic law which was sufficiently foreseeable and accessible. In particular, the Federal Court repeatedly recognised that Article 43, read in conjunction with Article 28 (2) of the Social Security Act and Article 96 (b) of the Accident Insurance Act formed a sufficient legal basis for the surveillance of an insured person. The said provisions prescribed surveillance as a measure of last resort used when the insured person did not comply with her or his obligation to provide information requested and the insurance company had to process certain data necessary for it to perform the tasks assigned to it in domestic law. The law allowed the collection of data only in public spaces for a limited period of time and made it available only to a restricted number of persons.

65. Moreover, there were effective procedures guaranteeing the respect of the insured person's rights. According to the case-law of the Federal Court, the domestic law did not allow intrusion into the intimate sphere of the person being watched, or the commission of any punishable acts against him or her. Insured persons were protected against the abuse of surveillance measures by a number of domestic law provisions, namely Article 28 of the Civil Code and Article 179^{quater} of the Criminal Code. In particular, it was forbidden to contact the insured person in order to interfere with her or his life, surveillance could be performed only for a limited period of time, and

collected data could be seen only by a small number of people for the fulfilment of the insurer's legal tasks.

(b) The Court's assessment

66. Pursuant to the Court's case-law, the expression "in accordance with the law" within the meaning of Article 8 § 2 requires, firstly, that the measure should have some basis in domestic law. It also refers to the quality of the law in question, requiring it to be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him. It must also be compatible with the rule of law (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Uzun*, cited above, § 60; and *Kennedy*, cited above, § 151).

67. The Court has held on several occasions that the reference to "foreseeability" in the context of secret surveillance measures by State authorities could not be the same as in many other fields (see, as a most recent authority, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 229, 4 December 2015). Foreseeability in that specific context cannot mean that individuals should be able to foresee when the authorities are likely to resort to secret surveillance so that they can adapt their conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances and conditions under which public authorities are empowered to resort to any such measures (see *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116; *Uzun*, cited above, §§ 61-63; *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, §§ 75, 28 June 2007; and *Shimovolos v. Russia*, no. 30194/09, § 68, 21 June 2011). In view of the risk of abuse intrinsic to any system of secret surveillance, such measures must be based on a law that is particularly precise, especially as the technology available for use is continually becoming more sophisticated (see *Uzun*, cited above, § 61).

68. In addition, in the context of secret measures of surveillance by public authorities, because of the lack of public scrutiny and the risk of abuse of power, compatibility with the rule of law requires domestic law to provide adequate protection against arbitrary interference with Article 8 rights. The Court's assessment in this respect depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law (see *Uzun*, cited above, § 63).

(c) Application in the present case

69. Turning to the present case, it is not in dispute that the surveillance measure applied to the applicant was based on Article 43 read in

conjunction with Article 28 (2) of the Social Security Act and Article 96 (b) of the Accident Insurance Act (see §§ 38 and 40 above). These articles, read together, provide that when an insured person does not comply with the obligation to submit the requested information, insurance companies are allowed to take of their own motion the necessary investigative measures and collect necessary information. In particular, they are allowed to process and require to have processed personal data, including sensitive data and personality profiles necessary in order to establish rights to benefits and to calculate, allocate and coordinate them with those from other social insurance funds.

70. There is no doubt that those provisions were accessible to the applicant. What remains to be established is whether they constituted a sufficiently clear and detailed legal basis for the interference at stake in the instant case.

71. In determining whether the provisions of domestic law on which the applicant's surveillance was based complied with the requirement of "foreseeability", the Court notes that the said provisions were limited to obliging the insured persons to "provide all information necessary to establish their rights" (Article 28 (2) of the Social Security Act), allowing insurance companies to "take investigative measures and collect the necessary information" (Article 43 of the Social Security Act) as well as to "process and require [the processing of] personal data" (Article 96 of the Accident Insurance Act) in order to carry out their duties when an insured person refused to cooperate by providing the necessary information herself or himself. In the Court's view, the said expressions did not seem to either expressly include or even imply the recording of images or videos among the investigative measures that could be deployed by insurance companies. However, it observes that the domestic courts, which are primarily called upon to interpret and apply domestic law (see, among many other authorities, *Kopp v. Switzerland*, 25 March 1998, § 59, Reports 1998-II), concluded that the said provisions covered surveillance in such circumstances (see §§ 35 and 43 above).

72. In examining whether domestic law contained adequate and effective guarantees against abuse, the Court takes note of the Government's argument that Article 28 of the Civil Code and Article 179^{quater} of the Criminal Code, coupled with the case-law of the Federal Court (see § 43 above), constituted sufficient safeguards against abuse of secret surveillance measures as they restricted the measure to the actions taken in public and forbid the making of contact with the insured person with the aim of interfering in his or her life.

73. While the above jurisprudence of the Federal Court did provide for certain safeguards as regards the scope of the surveillance measure as argued by the Government (see § 43 above), given the overall lack of clarity of domestic law provisions on the matter, the Court is not satisfied that they

were sufficient to constitute adequate and effective guarantees against abuse.

74. In particular, the Court observes that neither the above provisions nor the cited jurisprudence indicated any procedures to follow for the authorisation or supervision of the implementation of secret surveillance measures in the specific context of insurance disputes. Furthermore, in the absence of any details as regards the maximum duration of the surveillance measures or the possibility of their judicial challenge, insurance companies (acting as public authorities) were granted a wide discretion in deciding which circumstances justified such surveillance and for how long. It can thus not be said that the domestic law had set a strict standard for authorising the surveillance measure at issue (see, *a contrario*, *Uzun*, cited above, § 70).

75. Moreover, the said legal provisions equally remained silent on the procedures to be followed for storing, accessing, examining, using, communicating or destroying the data collected through secret measures of surveillance. It thus remained unclear where and how long the report containing the impugned footage and photographs of the applicant would remain stored, which persons would have access to it and whether she had any legal means of contesting the handling of the said report. The foregoing necessarily increased the risk of unauthorised access to, or disclosure of, the surveillance materials.

76. The Government further argued that the interference with the applicant's right to privacy by way of secret surveillance was relatively small in the light of the public interests at stake, namely the prevention of insurance fraud and, ultimately, ensuring the proper management of public funds. In the Government's view, this placed in context the need for clarity and precision of the legal basis of the surveillance in question. While the Court can agree that surveillance in the present case must be considered to interfere less with a person's private life than, for instance, telephone tapping, it nonetheless has to adhere to general principles on adequate protection against arbitrary interference with Article 8 rights as summarised above (see § 68 above; see also *Uzun*, cited above, §§ 66 and 72).

77. For the above reasons – and notwithstanding the arguably minor interference with the applicant's Article 8 rights – the Court does not consider that the domestic law indicated with sufficient clarity the scope and manner of exercise of the discretion conferred on insurance companies acting as public authorities in insurance disputes to conduct secret surveillance of insured persons. In particular, it did not, as required by the Court's case-law, set out sufficient safeguards against abuse. The interference with the applicant's rights under Article 8 was not, therefore, "in accordance with the law" and there has accordingly been a violation of Article 8 of the Convention.

78. In the light of the foregoing, it is unnecessary for the Court to go into an analysis of whether the measure complained of was also "necessary in a democratic society".

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

79. The applicant further complained of a violation of her right to a fair trial guaranteed by Article 6 of the Convention, which provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

80. The applicant argued that the Federal Court had based its judgment solely on the findings of the expert opinion on the evidence, which in turn was mainly based on the results of the unlawful surveillance. Moreover, the opinion was drafted by Dr H., who was financially dependent on the administration; it was well known that Dr H. worked for the respondent insurance company, and could thus not be considered an independent expert. Moreover, Dr H.'s findings were mainly based on the surveillance report drafted by private investigators that were also economically dependent on the insurance company. Therefore, neither the surveillance report nor the report drafted by Dr H. could be considered impartial.

81. The applicant further submitted that she did not have the opportunity to comment on the images recorded during her surveillance or on the report drafted thereafter. She was unable to challenge Dr H.'s appointment to the evaluation of her case because she was unaware of his identity in advance.

82. In addition, the applicant alleged a violation of the principle of separation of powers, since the insurance company conducted further investigations which were not indicated in the decision of the Social Insurance Court. She also alleged that the Federal Court had violated the principle of *res iudicata* in quashing a lower court's judgment which had become final.

83. The Government argued that, according to the Federal Court's case-law, information gathered through lawful surveillance examined together with the relevant medical report in principle constituted an appropriate means of determining the health status of an insured person and her or his ability to work. On the other hand, the surveillance report taken alone did not constitute a sufficiently reliable basis, as it could only be used as a prima facie indication or a basis for further assumptions. Only an assessment of the surveillance report by a doctor could have led to certainty about the facts. If a private insurance company appointed a private investigator to lawfully monitor a person, Article 96 (b) of the Accident Insurance Act and 43 (1) read in conjunction with Article 61 (c) of the

Social Security Act formed the legal basis for the use of the evidence collected (namely the surveillance report and the video recording) by the Swiss National Accident Insurance Fund.

84. As to the circumstances of the present case, the Government stressed that, under the Social Insurance Court's judgment of 28 December 2005, the insurance company was entitled – and even obliged – to carry out further investigations in order to assess the benefit claimed by the applicant. Moreover, the surveillance report was sent to the applicant on 14 December 2006. Subsequently, on 10 January 2007 the insurance company informed the applicant that it was going to order an expert opinion on the evidence, and gave her until 9 February 2007 to comment on it if she wished to. Furthermore, during the court proceedings the applicant was able to comment on the report at issue, and she availed herself of that opportunity.

85. The Government pointed out that the Federal Court's judgment was not based solely on Dr H.'s report, but also on the decision of the lower court, the parties' submissions and all the medical records available in the file. Furthermore, the expert opinion on the evidence was not based solely on the surveillance report, but also involved a careful assessment of previous medical reports. The Government maintained that Dr H., who was responsible for the report, was an independent neurologist and not an employee of the respondent insurance company. Moreover, another insurance company, where Dr. H. did work as a consultant doctor, was not a party to the proceedings.

86. In conclusion, in the Government's view, the use as evidence of the report prepared by Dr H. did not violate the applicant's right to a fair trial.

B. The Court's assessment

1. Admissibility

87. The applicant's main grievance under Article 6 seems to concern the fact that, when deciding her case, the Federal Court took into account the surveillance footage as well as the medical report based thereon.

88. The Court notes that this part of the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

89. However, the applicant raised a number of further complaints under Article 6. In particular, she complained that neither the surveillance report nor the report drafted by Dr. H. could be considered impartial, as they had been drafted by people who were economically dependent on the respondent insurance company. In that connection, the Government submitted that Dr. H. was not an employee of the respondent insurance company, which

the applicant did not seem to dispute further. In any event, the Court observes that the mere fact that experts are employed by the administrative authorities in charge of examining a case is not sufficient *per se* to deem them unable to perform their duties with the requisite objectivity (see *T.B. v. Switzerland* (dec.), no. 33957/96, 22 June 1999, with further references). Nor does an issue of objectivity arise in that, in the applicant's proceedings, the doctor was both designated as expert and presumably remunerated by the insurance company (see *Spycher v. Switzerland* (dec), no. 26275/12, § 28, 17 November 2015).

90. As regards the remainder of the applicant's allegations under Article 6, in the light of the material in its possession, the Court does not consider that they raise an issue under that provision.

It follows that this part of the Article 6 complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Merits

91. What remains to be established by the Court is whether the fact that the domestic courts relied on evidence obtained in breach of Article 8 also violated the applicant's right to a fair trial as guaranteed under Article 6 § 1 of the Convention.

92. In this connection, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, 12 July 1988, Series A no. 140, p. 29, §§ 45-46; and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

93. It is not, therefore, the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, inter alia, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000‑V; and *P.G. and J.H. v. the United Kingdom*, cited above, § 76).

94. As to the examination of the nature of the Convention violation found, the Court reiterates that the question whether the use as evidence of

information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the circumstances of the case, including respect for the applicant's defence rights and the quality and importance of the evidence in question (compare, *inter alia*, *Khan*, cited above, §§ 35-40; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 77-79; and *Bykov v. Russia* [GC], no. 4378/02, §§ 94-98, 10 March 2009, in which no violation of Article 6 was found).

95. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. Finally, the Court will attach weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare, in particular, *Khan*, cited above, §§ 35 and 37).

96. Turning to the present case, the Court must examine whether the use in administrative proceedings of evidence obtained in breach of the Convention was capable to rendering the applicant's proceedings as a whole unfair.

97. The Court notes at the outset that Article 6 of the Convention is applicable to proceedings concerning social security disputes (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 46, Series A no. 263).

98. As to the overall fairness of the proceedings in the instant case, the Court would observe that in her appeal to the Social Insurance Court of 6 May 2008 the applicant requested that the material resulting from her surveillance be removed from the case file because it constituted an "attack on her personality" (see § 32 above). As a consequence, the Social Insurance Court excluded the surveillance report from the evidence. On appeal, the Federal Court concluded that, under its own jurisprudence, the surveillance had not been unlawful, and so it took the surveillance report into evidence. It followed that the applicant had had the opportunity to challenge the impugned evidence and oppose its use in adversarial proceedings. Moreover, in their reasoned decision, the domestic courts gave ample consideration to the applicant's request in this respect.

99. The Court further observes that the impugned recording, together with the expert opinion issued on the basis of the surveillance, was not the only evidence relied on by the Federal Court as the basis for its decision in the applicant's case. As evident from the Federal Court's reasoning, that court took into consideration other available evidence, in particular the existing contradictions between the medical reports drawn up prior to the surveillance (see § 35 above).

100. In view of the above, the Court finds that the use in the applicant's proceedings of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. Article 41 of the Convention provides:

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

A. Damage

102. The applicant claimed 20,000 Swiss francs (CHF – approximately 18,500 euros (EUR)) in respect of non-pecuniary damage.

103. The Government considered this claim excessive and submitted that the amount of CHF 5,000 (approximately EUR 4,600) would cover any non-pecuniary damage suffered by the applicant.

104. The Court considers that the violation found must have caused the applicant certain distress and anguish. It thus awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

105. The applicant also claimed CHF 37,272 (approximately EUR 34,500) for costs and expenses incurred before the Court. This sum corresponds to 133 hours of legal work billable by her lawyer at an hourly rate of CHF 300.

106. The Government contested this claim and proposed CHF 4,000 (approximately EUR 3,700) as appropriate compensation for costs and expenses.

107. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 15,000 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints concerning secret surveillance under Article 8 of the Convention and use in evidence of material stemming from such surveillance under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

3. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention;

4. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Swiss francs at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Luis López Guerra
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

L.L.G.
J.S.P.

DISSENTING OPINION OF JUDGE DEDOV

I completely agree with the approach used by the Court in respect of Article 6 in the present case (the surveillance report was not excluded from the evidence in the domestic proceedings), but I regret that I cannot support the finding of a violation of Article 8 on the basis that the domestic law did not set out sufficient safeguards against abuse.

The conclusion of the majority is based on the principles of foreseeability set out in the Grand Chamber judgment in *Roman Zakharov v. Russia* (cited in paragraph 67 of the judgment). In particular, (1) when the surveillance is carried out in secret, the risks of arbitrariness are evident; and (2) domestic law must give citizens an adequate indication as to the circumstances and conditions of secret surveillance. In *Roman Zakharov* the applicant could not prove that the surveillance was carried out against him, and the Grand Chamber examined the existence of the above guarantees *in abstracto*.

The present case is quite concrete and full of factual circumstances which could and should be taken into account when applying the general principles. First, there is no evidence of abuse or arbitrariness at any stage (monitoring, storage of materials, access to reports and presentation in the court proceedings). The surveillance was justified by the fact that the applicant refused to undergo a medical evaluation (see paragraph 24 of the judgment), and there were contradictions between the various medical reports drawn up prior to the surveillance, as mentioned by the Federal Court (see paragraph 35) and invoked by this Court in finding no violation of Article 6 (see paragraph 99). The applicant was informed about the secret surveillance, had access to the reports and challenged them in the national courts.

Therefore, both sets of proceedings (at national and international levels) served as an *a posteriori* assessment of the necessity of the interference in a democratic society. Even in the absence of prior authorisation of the measures by an independent and impartial judiciary, the majority preferred to find no violation of Article 6, while employing the same argument to find a violation of Article 8 on account of the unlawfulness of the interference (see, in particular, paragraphs 74 and 77 of the judgment).

The idea behind the "foreseeability" reasoning is to improve the national law. But the Court's privilege (applied equally to any national supreme court) is to demonstrate the deficiency of the system on the basis of concrete examples of arbitrariness, abuse, conflicts or problems in general. Only a problem discovered in a particular case may lead to further regulatory developments. It is difficult to say whether the present case provides a proper basis for that. The majority did not conduct the analysis proposed in this opinion. They did not take into consideration the fact that the activity of private investigators is licensed under national law. One might accept the

idea of prior authorisation of such measures by a court, but even this safeguard was not enough for the Grand Chamber in *Roman Zakharov* because the individual in question might not be informed of the measures if no criminal proceedings were opened against him or her.

There is a more serious problem here, namely the legitimacy of secret surveillance in general. The Federal Court concluded that "regular surveillance of insured persons by private detectives represents in any case a relatively minor interference with ... fundamental rights" because the facts collected "materialise in the public domain and may be observed by anyone (see paragraph 43 of the judgment). This position warrants further debate, but the majority limited themselves to referring to the general issues without addressing this point (see paragraph 73).

The Federal Court's view is based on the nature of the relationships in question and the conditions of surveillance, and not just on the difference between telephone tapping, video recording or visual observation. It states that the national law, which "sets out a general obligation of the insured person to provide information ... represents a basis for ordering surveillance" (see paragraph 43 of the judgment). In a more general sense, the national court is challenging the general principle set out in paragraph 67 of the judgment, according to which "[f]oreseeability...cannot mean that individuals should be able to foresee when the authorities are likely to resort to secret surveillance so that they can adapt their conduct accordingly". This previously held position is a clear demonstration of judicial activism. The principle in question is applicable to all, including those who commit offences. A standard rule does not usually adopt such an activist approach, but rather deals with the proportionality of an instance of interference under a statute: if the law requires private persons to prevent any abuse or offence, the resulting burden must not be excessively high in order not to adversely affect those who do not have any intention to abuse or offend. The standard rule is more balanced, in my view.