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Relationship between Prosecution Office and Police in the Czech Republic after Amendment of the Rules of Criminal Procedure and the Police Act of 2001

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Introduction

This paper focuses on some aspects of the relationship between the prosecution office and the police. This issue can be viewed firstly from the point of national legal regulation (which is necessarily different in various countries) and secondly from the international point of view.

In this respect articles 21 to 23 of Recommendation of the Committee of Ministries (Rec) (2000) 19 of 6th October 2000, regarding the role of public indictment in the criminal justice system, stipulate that, in general, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police. Countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, should take effective measures to guarantee that the public prosecutor may:

a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that he/she deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional cooperation between the public prosecution and the police.[42]

Otherwise, however, articles 22 and 23 of the Recommendation reveal the compelling gap between the two systems – the continental and the Anglo-American one. In countries applying the continental type of law the prosecutors

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[42] Cf. art. 21 – 23 of Rec (2000) 19.

control, or at least supervise the police activity, issue instructions to the police regarding specific matters or issue instructions generally focused on implementation of criminal policy (with special emphasis on forms of criminality causing the biggest problems in the given country and historical situation – organized crime, drug crime, economic and financial crime, money laundering control, bribery, extremely grave criminal acts, offences against morality including criminal sanctions against pornography, commercial sexual abuse of children and trafficking in people, and the like).

While the prosecutors have all these or even additional competences towards the police (sometimes even authorization to determine which policemen can perform the investigation, authorization to propose their disciplinary punishments in the event of breach of duties), a question rises whether the prosecutors are able to perform all these extensive powers in respect of the police at all. In the countries applying the Anglo-American system the main point is – besides meeting the general duties provided in Article 21 of the Recommendation (i.e. the check of police investigation prior to commencement of criminal prosecution and providing for protection of fundamental rights and freedoms within the police activity) – to achieve an efficient co-operation of the two independent bodies involved in criminal procedure – prosecution office and police. Both models indicated above have their advantages and disadvantages. The continental concept is based on the idea that the police activity interferes in sensitive spheres of the life of people and society; therefore it must be subject to control. This may often result in refusal to take personal responsibility and transfer of accountability to prosecutors (even responsibility for the investigation itself). The Anglo-American conception puts emphasis on independence and responsibility of the police and prosecutors, while the control of the police activity is applied to an accurately defined extent only. It may result in a situation that this concept would appear to be insufficient as regards certain extremely grave forms of criminality; the prosecutors are given some more competences (as to the control of the police) at least in respect of these forms of criminal acts.

Detailed analysis of the strong and weak points of the above-mentioned policies is not the objective of this contribution. The fact is – as stated by declaratory memorandum to the Recommendation – that both systems have become closer to each other recently. The criminal process in Europe has been undergoing a very complex period. There are difficulties in proving criminality properly in spite of employment of the most advanced investigating methods. The effectivity of criminal proceedings has decreased as a consequence of inability to affect the gravest forms of criminality (this applies particularly to organized crime). Therefore, both systems try to use the positive knowledge and experience of the other system. This trend is inherent to the Czech Republic too; it has been fully confirmed by extensive amendment of the Rules of Criminal Procedure, Criminal Code, the Police Act and other acts of 2001.

Retrospective view

Legal regulation effective in the Czech Republic before 2001 could be characterized as application of a uniform type of control for all crimes irrespective of their gravity (e.g. murders were cleared according to almost the same control model as the less grave crimes). Prosecutors performed a full-valued supervision of the investigation stage only (after commencement of

criminal prosecution by notification of accusation to the specific person). At the stage of procedure before commencement of criminal prosecution they had very limited competences (to require data from banks, tax bodies, security-administrating bodies and organizations, to follow the course of verification of suspicion of crime, in exceptional cases to influence the course by issuing appropriate instructions). At the stage of investigation which, according to the Czech terminology of criminal proceedings, followed after commencement of criminal prosecution, they had extensive powers (to issue instructions regarding the investigations, to review files, to have reports on important acts submitted, to carry out an individual act or the entire investigation, to send back the case to be supplemented, to remove the case from an investigator and assign it to another one, to cancel the investigators' unlawful acts, and the like).

The police investigators who were responsible for proper and complete investigation of the case held a very strong position. They were authorized to issue binding instructions even to the police bodies. These bodies played a rather auxiliary role, with their activities focusing more on verification of suspicion of criminality. This resulted in danger of duplicity, when one policeman was verifying the matter and the other policeman was investigating the same. The same acts were often repeated (especially interrogation of persons).

Although it was generally stated before 2001 that the prosecutor performing supervision in pre-trial criminal proceeding was *dominus litis* of this stage of the proceeding, the legal regulation and the resulting practice did not quite confirm such conclusion. Numerous obligations were imposed on a prosecutor that essentially enabled him to ensure that only persons for whom the suspicion of commitment of crime had been sufficiently substantiated were prosecuted and that the fundamental rights and freedoms of such persons in pre-trial proceeding would be fully respected; thus the prosecutor was able to create favorable preconditions for public criminal suit in a trial by court. Such a model, however, could work satisfactorily only in those ideal cases in which no conflict situations occurred between the bodies responsible for criminal prosecution, when the positions of prosecutor and police investigator were occupied by persons combining thei efforts to clear up a criminal case so that it can be closed in an adequate manner (bring a case before court, conditional discontinuance, refer the case to another body, and the like). It is unfortunately quite realistic that such conflicts may develop (which is just the case of less idyllic relationships among prosecutors, investigators and police bodies; we also have to mention the level of professional training of the prosecutors and policemen, the policy on which their activity has been based in pre-trial proceeding and the practice applied on the basis of such policy).

Moreover, there was an apparent imbalance of the roles of the prosecuting attorney and the police investigator. Investigators were unquestionably those who influenced the course of pre-trial proceeding to an absolutely decisive extent; starting from notification of accusation, decision against which person some securing measures shall be taken, to closing the investigation and assessing whether petition for indictment shall be submitted or the matter shall be closed up on merits in a different manner (especially by discontinuing the criminal prosecution or referring the case to another body). This is not to say that all the positive efforts of the investigators aimed at having a case file including everything substantial would be spent in vain. The point is, however, that the relationship between the prosecutor and investigator can never be the

relationship of equality, should the regulation of pre-trial stage of proceedings achieve the expected purpose. It is the prosecutor who is responsible for the result of pre-trial proceedings and it is also the prosecutor who represents the public indictment before court. Therefore, he must definitely be the decisive agent in this stage of proceeding.

Problems could be found not only in practice (the investigator notified of the accusation conducted the whole investigation, while the prosecutor's role was not always active enough). Another problem lay in the fact that the legal regulation provided for such an accentuated position of the investigators, *inter alia*, by emphasizing the investigator's obligation to proceed impartially and objectively towards the accused, for example to collect also evidence questioning the accused person's guilt and by regulating the institute of denial to meet the instruction given by prosecutor to the investigator. Investigators often construed the inconsistency between the prosecuting attorney's instruction and the law from the fact that the prosecuting attorney required a larger amount of acts to be performed within pre-trial proceeding (he mostly did so in conformance with requirements of courts that sent the case back for additional investigation). The investigator had numerous powers available in respect of police bodies – the application thereof, in consequence, may have resulted in the fact that most acts within pre-trial proceedings were carried out not by the investigator himself, but the police bodies which, in conformity with the amendment of the Rules of Criminal Procedure of 1993, should have only an auxiliary role. Moreover, competence disputes often occurred between both units of the police of the Czech Republic that fulfilled tasks in criminal proceeding. The disputes sprang here from the different approaches to the matter, and in the situation when the investigators and police bodies were united into a single police organization the Rules of Criminal Procedure did not provide sufficient opportunity to the prosecutor to resolve such conflicts.

Basic features of the relationship between the prosecutor and the police according to amendments of the Rules of Criminal Procedure and the Police Act of 2001

The amendment of the Rules of Criminal Procedure implemented by the Act No. 265/2001 Coll. has become the fundamental turning point of the last five decades even from the point of relationship between the prosecution office and the police because the general declaration of the principle that the prosecutor is the "master" of pre-trial proceeding is accompanied by a very detailed regulation of the issues aimed at fulfilling this general principal.

Above all, the amendment has significantly shifted the prosecutor's activity far into the so-called "pre-process" stage of procedure. Namely, it has changed the definition of beginning of the pre-trial proceedings which no longer start by commencement of criminal prosecution or implementation of urgent or nonrecurring acts, but already by the police body issuing the record of commencement of criminal proceeding acts in order to clear up and verify the facts reasonably attesting that a crime has been committed.

It is supported by the fact that the amendment has shifted the regulation of operative searching means (fictitious transfer, surveillance of persons and property, and use of police agent) from the Police Act No. 283/1991 Coll. as

amended by later regulations into the Rules of Criminal Procedure. Only regulation of "supporting" operative searching means remained in the Police Act (safety technology, cover documents, use of informer, etc.). Similar regulation is contained in the Customs Act because the customs bodies fulfill the tasks of police body in respect of crimes committed by breaching the customs regulations.

An extremely detrimental practice occurred particularly in consequence of the amendment of the Rules of Criminal Procedure of 1993 (which focused the attention of the prosecutors primarily to the stage after commencement of criminal prosecution). The prosecutor assumed no essential responsibility for verification of criminal complaints and other suggestions for criminal prosecution up to the moment preceding the commencement of criminal prosecution or implementation of the above-mentioned urgent or nonrecurring acts; this was mainly due to the fact that the prosecutor was given no real competences within this stage. Only after the pre-trial proceeding had commenced in the case, could he start performing the supervision over complying with the law within this proceeding.

Since the amendment of the Rules of Criminal Procedure has come into effect in 2001, the prosecutors have performed supervision over the complying with the law from the very beginning of the criminal case, i.e. from the moment when the record of commencement of criminal proceeding acts prepared by the police body has been served on them (or as soon as they learn that the police body has performed the necessary urgent and nonrecurring acts – e.g. search of crime scene – and subsequently has issued the said record).

It required an essential change in philosophy of approach to supervision in pre-trial proceeding. By then, the supervision focused rather on review of written materials delivered from the police, determination of complaints, settlement of requests of the accused and injured persons for review of the investigator's procedure, implementation of inspections in some more significant matters, while greater emphasis was put on written form again. The amendment of the Rules of Criminal Procedure should have resulted in increased activity of prosecutors to the effect that they would concentrate to a larger extent on regular and consistent co-operation with persons doing service in the police body and field work (including participation in the acts performed by the police body).

It is, however, very difficult to achieve such change in understanding the supervision of the prosecutor in pre-trial proceeding. It is, *inter alia,* due to the fact that the amendment has strengthened significantly the prosecutor's position in the whole pre-trial stage of the process, but on the other hand it makes much higher demands on quality and level of this activity. Although the requirements generally increased in respect of prosecutors, the personnel and material background for their activity was not always adequate. After January 1, 2002, when the quoted amendment came into effect, there were frequent difficulties resulting from insufficient number of prosecutors (about 20% less than needed) and office staff of the prosecutors' offices.

In conformity with the changed policy of supervision over pre-trial proceeding is the fact that the amendment vests in the prosecutor the exclusive power to determine all methods of termination of pre-trial proceeding (apart from sovereign authorization to submit indictment, motion to approve the settlement and to discontinue conditionally the criminal prosecution, discontinuance and

suspension of criminal prosecution and referral of the case to an other body have been added). It should be the task of the police to verify the criminal complaints and other suggestions for criminal prosecution and to investigate offences subject to the exceptions provided by law (which is the investigation of offences committed by policemen and members of the Safety Intelligence Service where the investigation is conducted by a prosecutor). The prosecutor is the official securing the administration of justice in criminal proceedings until submission of indictment.

The organization of the police investigation has become the most discussed part of the amendment.

Based on the amendment, a joint Criminal Police and Investigation Service has been formed.

In terms of the restructuring of the general criminality and economic criminality departments, groups of staff were established (called documentalists, or criminalists, or operative staff) involved in detecting general and economic crimes. One investigation department has been formed in each division (out of the former investigators). The activity of these two groups was closely interconnected as they were managed by a single chief.

The benefit of this structure consisted in the improvement of mutual co-operation of the operative staff and staff involved in investigation, which was particularly obvious in more complex or grave cases. In less grave matters, summary proceeding with lower amount of clarified facts was conducted according to the amended Rules of Criminal Procedure.

When performing the tasks in criminal proceeding, the police body is bound only by instructions of the prosecutor to which it is subordinate within the process. Its operating subordination within the police is not affected thereby. The concern expressed in discussions over the amendment of the Rules of Criminal Procedure, i.e. that the policemen acting in criminal proceeding in the suggested role will be given instructions not only by the prosecutor, but also by internal police officials, is fundamentally inadmissible. Superiors-in-rank within the police are responsible for education, material and personnel background, they may provide methodological assistance and perform operating inspection. During these activities they must not interfere with the prosecutor's power to issue instructions and check on the work of the police body.

Conclusions

It follows from the aforementioned that the Czech legal regulation of mutual relationship between the prosecutor's office and the police is fully based on principles inherent to the continental type of proceedings. It means that the prosecutor controls and checks on the police to the extent to which they fulfill tasks in the criminal proceeding. It should be added that the possibility for objections to instructions of the prosecutor was cancelled by the amendment of 2001.

On the other hand, the prosecution office cannot issue general instructions to the police, nor can it formulate the principles of criminal policy or its implementation

in practice. This is the task of the Police Headquarters and the Ministry of Interior. Prosecutors participate in the education of the policemen, but the decisive role here belongs to the Police Headquarters and Ministry of Interior again. The prosecutor may remove the case from a police body and assign it to another police body. He is not authorized, however, to decide which persons shall be on duty in the police body. He may give rise to disciplinary punishment, but it is not a proposal on which the disciplinary body has to decide. It is really a mere suggestion, not a proposal.

The Czech criminal procedure theory attaches to the opinion of the continental penal theory that the police activity interferes with the citizens' rights and freedoms, processes personal data, and all of this requires that the police be subject to supervision. Upon fulfilling the tasks in criminal proceeding it is fully justified that this supervision is performed by the element playing a dominant role in pre-trial proceeding – i.e., the prosecutor.

Supplement: Police organs conducting preparatory proceedings in the Czech Republic

According to the Czech Criminal Code (§ 12 par. 2), police organs are departments of the Police of the Czech Republic and in proceedings for criminal acts committed by the police, the department of the Ministry of the Interior for Inspection Activity (also titled, Inspection for the Ministry of the Interior), while the same position is assumed held in:

a) matters of criminal acts committed by members of the armed forces by authorized organs of the Military Police;

b) matters of criminal acts committed by members of the Corrections Service of the Czech Republic by authorized organs of this service;

c) matters of criminal acts committed by members of the Security and Information Services by authorized organs of the Security Information Services;

d) matters of criminal acts committed by members of the Office for Foreign Relations and Information (after amendment No. 539/2004 Coll.) by authorised organs of the Office for Foreign Relations and Information (like for the case of the Security and Information Services, this involves intelligence or reporting services);

e) the position of police organs is also held by the authorized customs organs in matters of criminal acts committed by violation of customs regulations, import and export restrictions, or transit of goods, as well as in cases when it involves a criminal act committed by members of the armed forces or armed forces staff and services, as well as by violation of legal regulations when removing and purchasing goods in member states of the European Community, if these goods have been transported across the state borders of the Czech Republic and in cases of violation of tax regulations, if the customs organs are the tax administrators according to special legal regulations.

Unless established otherwise in the Criminal Code, the aforementioned bodies are authorised to assume all tasks for criminal proceedings belonging to the activities of a police organ.

The concept "police organ" in the Czech Criminal Code is of a kind of legislative abbreviation. It does not merely refer to organs of the Police of the Czech Republic. When the law employs this expression ("police organ"), it is also for the sake of simplicity, in order to avoid continuous mention of the specific role performed by all the aforementioned organs.

The Czech procedure setup, however, is different (in the context of preparatory proceedings), as it is partly the procedure prior to initiating criminal prosecution (verification), and partly the investigation (the procedure after initiating criminal prosecution is conducted in the Czech Republic by issuing a decree for initiating criminal prosecution, while previously this had been communicated to the suspect personally).

This segmentation is significant also with respect to the fact that the police organ may act in the relevant stage.

In the context of the procedure prior to initiating criminal prosecution, all the aforementioned police organs may be active, although only the police organs of the Police of the Czech Republic have entirely universal (general) scope. All the others have authority that is considered only for some criminal acts.

Investigations may be held only by the organs of the Police of the Czech Republic or by public prosecutors. These may always conduct investigations and in some cases – if it involves a criminal act by police, members of the Security and Information Services or the Office for Foreign Relations and Information – even compulsory investigations may be held by the public prosecutor. Investigations may not be conducted by other police organs. These may conduct individual tasks in the context of cooperation (e.g. with the public prosecutor carrying out the investigations, if he/she is not sufficiently capable to conduct the investigation alone), in the context of requisitioning or when established by law. The public prosecutor may entrust this competence, for example, in an abbreviated (simplified) form for preparatory proceedings by the police, which in the meantime have performed abbreviated preparatory proceedings and the public prosecutor has directed the performance of the investigation.

Investigations are performed by the Criminal Police Service and investigations by the Police of the Czech Republic in the departments established by special legislation (in departments with territorial restrictions on activities and in departments with authority throughout the territory of the Czech Republic – e.g. the National Anti-Drug Headquarters, the Department for Detection of Organized Crime, the Department for Detection of Corruption and Financial Crime).

The procedure prior to initiating criminal prosecution is performed primarily by police incorporated into the basic departments of the police (district police departments, railway police, transport police), the Inspection of the Ministry of the Interior, authorized sections of the Military Police, Customs Administration, etc.

Police organization is based on regulations from the Ministry of the Interior and the procedure when performing tasks in criminal proceedings is bound by the instructions of the head of police. The public prosecutor's office takes only an advisory role in relation to these internal (organizational) regulations. The content of these regulations may not be affected immediately (nor the organization of the police in criminal proceedings). Instructions of a general character issued by the Supreme Public Prosecutor are binding only for public prosecutors, not directly to police officers (the police). Considering the fact that the public prosecutor proceeds according to these instructions of a general nature, the activity of the police is indirectly affected. For example, if the instructions of a general nature establish a binding procedure when compiling a proposal for arresting the accused, the activity of the police is undoubtedly governed by these regulations (e.g. they must provide for the tasks of submitting the documents noted in the instructions of a general nature as required for an arrest).

The position of the police officer conducting tasks in criminal proceedings has been limited, so that it is bound by the instructions of the public prosecutor; in other matters related to the performance of services a police officer is bound by the instructions of his/her superiors. The amendment contained in § 3a par. 3 of the Police Act ensures that after the voluminous amendment to the Rules of Criminal Procedure, the principle of procedural independence of the police has been preserved for conducting tasks in criminal proceedings. The director of the police departments performing inspections for the police could also significantly affect police officers; principally, however, their orders may not contradict the instructions of the public prosecutor or inhibit their purpose. Superiors in the police also ensure the activities of the police both materially and with personnel and resolve, for example, questions about the training and specialization of police officers.

In conclusion, it is important to add that the public prosecutor may also employ the cooperation of the police in proceedings after the submission of an indictment. For example, if they need to furnish certain evidence for prosecuting the indictment. The court may require the police to deliver written material (decisions) or to delegate persons for performing a task.