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Information from Intelligence Services in Criminal Proceedings in the Czech Republic

Zpravodajské informace v trestním řízení v České republice[1]

Abstract

The paper addresses the topic of the possibility of using information from intelligence services in the Czech Republic in criminal proceedings, especially its possible use as evidence. Currently, intelligence information serves in criminal proceedings only as operational information. This conclusion is based on a single ruling of the Constitutional Court in a non-representative case, which has become the basis for a blanket and a priori rejection of the evidentiary use of intelligence information in criminal proceedings. However, the ruling itself, inter alia, identifies arguments that justify the actual need for change and the constitutionally compliant way of its solution. A legislative proposal for an amendment to the Code of Criminal Procedure is currently being drafted, which should, in the case of extremely serious crimes of a terrorist nature and espionage, enable evidentiary use of intelligence information obtained by precisely defined and legal means.

Keywords: intelligence services, intelligence information, criminal proceedings, evidence, Czech Republic.

Abstrakt

Článek se zabývá tématem možnosti použití informací pocházejících od zpravodajských služeb v ČR v trestním řízení, zejména otázkou jejich případného použití jako důkazu. V současné době mají tyto informace v trestním řízení pouze charakter operativní informace. Tento závěr vychází z jediného nálezu ÚS, který se stal základem pro paušální a apriorní odmítnutí důkazního použití zpravodajských informací v trestním řízení. Nález ovšem mimo jiné sám označuje argumenty odůvodňující reálnou potřebu změny i ústavně konformní způsob jejího řešení.

[1] The paper was written as part of DVÚ 2/1 Kriminální zpravodajství jako nástroj predikce, prevence, odhalování a objasňování trestné činnosti a zajišťování vnitřní bezpečnosti (Criminal Intelligence as a Tool for Prediction, Prevention, Detection and Clarification of Crime and Provision of Internal Security), researched at the Department of Criminal Police of the Faculty of Security and Law of the Police Academy of the Czech Republic in Prague.

Aktuálně je připravován legislativní návrh novely trestního řádu, který by měl v případě extrémně závažných trestných činů teroristického charakteru a vyzvědačství umožnit důkazně použít zpravodajské informace získané přesně vymezeným a soudem povoleným způsobem.

Klíčová slova: zpravodajské služby, zpravodajské informace, trestní řízení, důkaz, Česká republika.

Introduction

In connection with the current development in the area security threats, in particular, in the form of particularly serious crimes of terrorist nature and acts committed for the benefit of or in association with a foreign power and the need for effective defence against them, there is a question of the search for the possibility of evidentiary use of such information that has been legally and legitimately obtained and implemented using such means, however, which is not accepted as evidence in criminal proceedings in the conditions of the Czech Republic. It is a situation where the state has legally and legitimately obtained information available that may contribute to the clarification of the matter (Section 89 of the Code of Criminal Procedure),[2] however, originating from an entity other than a law enforcement authority. One of these situations stems from the previously respected conclusion on the a priori impossibility of evidentiary use of intelligence information obtained by intelligence services through a legal procedure outside criminal proceedings, especially if obtained through the use of legal authorisations similar to those provided for in the Code of Criminal Procedure, where such use has been authorised by an independent court. Intelligence information can generally be classified primarily according to how it has been obtained and how it is used. Based on the method of its acquisition, it can be distinguished by the statutory definition of the means of obtaining information, more precisely by the individual specific means of obtaining information, which includes persons acting for the benefit of the intelligence services, monitoring, cover documents and cover means, and intelligence technology.[3] Depending on how it is used, it can be distinguished between operational information and information that can be used as evidence in criminal proceedings.[4]

[2] Act No. 141/1661 Coll., on Criminal Procedure (Code of Criminal Procedure) (henceforth "CCP").

[3] See Sections 7 to 15 of Act No. 154/1994 Coll., on the Security Information Service (BIS), or Sections 7 to 16 of Act No. 289/2005 Coll., on Military Intelligence.

[4] E.g., Vaško (cf. VAŠKO, Adrián. Klasifikace zpravodajských informací ve vztahu k trestnímu řízení. In: MICHÁLEK, Luděk; POKORNÝ, Ladislav; STIERANKA, Jozef; MARKO, Michal; VAŠKO, Adrián. *Zpravodajské služby a zpravodajská činnost*. Praha: Wolters Kluwer ČR, 2021, pp. 192-194.) specifies the classification of intelligence information in more detail, including the suggestion for criminal proceedings among them, and within the range of the Slovak legislation, based on the method of obtaining, he distinguishes between information-technical means and information-operational means, which, compared to the Czech legislation, include a wider range of means.

The subject of our research is only such intelligence information that has been obtained using intelligence technology,[5] specifically one of its forms of use – interception of telecommunications, as assessed by the Constitutional Court of the Czech Republic in its Ruling file no. I ÚS 3038/2007, of 29 February 2008 (hereinafter referred to as the "Ruling"),[6] and, in terms of the method of use, such that could be used as evidence in criminal proceedings.

The topic is marginal and the use of intelligence information is rare, in reality, based on the situation in countries where the use of intelligence information as evidence is not excluded, a rather infrequent use, up to a maximum of units of cases, can be observed. However, these are cases of extremely serious crime where, in the event of the state's inability to punish it, its authority in the field of providing criminal justice could be seriously weakened.

At the same time, the topic is sensitive and its discussion is not always entirely rational. In connection with the forthcoming amendment to the Code of Criminal Procedure (CCP), which should allow the use of intelligence information as evidence, there was a discussion in the public space, which often brought emotionally tinged and trivialising conclusions and statements. They could be aptly described by the statement of prof. Musil, the leading expert in the field of criminal law and criminal policy, who states in his article on criminal policy that "*The complexity of the criminal policy process deprives us of the illusion of its rationality and causal determination.*"[7]

This situation is aggravated by the form of the current solution of this issue in the Czech Republic, which is atypical, based on the single, aforementioned ruling in a non-representative case. The ruling itself, inter alia, indicates a constitutionally compliant solution. The actual need for change is justified by the very existence of material reasons consisting in the increasing severity of security threats. Therefore, it is appropriate to summarise and analyse the legal status and legal possibilities of resolving this issue, which deserves a new solution, inter alia, in view of the aggravated current security situation.

The material reasons for the change in the existing interpretation have already been specified by the National Security Audit (NSA),[8] which, inter alia, speaks of the need for a necessary response in the field of particularly serious crime of a terrorist nature and threat to the state by the action of a foreign power. These areas fall within the scope of the intelligence services, which may possess information obtained using legal and legitimate means, the evidentiary use of which, however, is not allowed by the current interpretation of the applicable legal regulation.

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[5] See Sections 7 to 11 of Act No. 154/1994 Coll., on the Security Information Service (BIS), or Sections 8 to 12 of Act No. 289/2005 Coll., on Military Intelligence.

[6] Available from: https://nalus.usoud.cz/Search/ResultDetail.aspx?id=57942&pos=1&cnt=1&typ=result

[7] Cf. MUSIL, Jan. Úloha trestní politiky při reformě trestního práva. *Trestní právo*. Vol. 1998, no. 1, p. 5. At the same time, however, he (ibid.) appeals that this state of affairs should not "*… take away our obligation to strive to find an optimal achievable variant.*"

[8] Cf. *Audit národní bezpečnosti* (National Security Audit). approved by the Government Resolution No. 1125 on 14 December 2016. Available from: https://icv.vlada.cz/assets/media-centrum/aktualne/Audit-narodni-bezpecnosti-20161201.pdf

Currently, intelligence information in criminal proceedings has solely the role of operational information. This conclusion is based on the Ruling,[9] which thus concluded the issue of the evidentiary admissibility of the *recording of the interception of telecommunications traffic* carried out by the Military Intelligence and used in a criminal case conducted for the attempted crime of scheming in a public tender, and in an apparently clear matter (trivial nature of the offence prosecuted, absence of a court order allowing the interception) made a general conclusion on the inadmissibility in the form that was generalised to all intelligence information. This Ruling became the basis for a universal and a priori rejection of the evidentiary use of intelligence information in criminal proceedings.

This conclusion, however, with intelligence information used as a means of evidence other than the assessed use of the telecommunications interception recording (e.g. examination of a witness, document, etc.), is not supported by the Ruling and would be clearly absurd. In these cases, the basic principles of evidence in criminal proceedings simply apply. If the evidentiary use of intelligence information in criminal proceedings abroad is the subject of disputes, it is primarily in the matter of ensuring the protection of the intelligence information, achieving proportionality and subsidiarity of its use, as well as compliance with the right to a fair trial and legality in the process of acquisition and adversarial application thereof, in line with the requirements of the CCP on the application of other evidence.

The aim of the NSA was to verify the ability of the state to identify a specific security threat and take preventive measures against it along with the ability to respond to the ensuing crisis, including answering the question whether the existing legislation was sufficient. As a goal, it set out to find out how the state was ready to face security threats in the most serious areas identified and what its resilience was in a direct confrontation with danger. It assessed whether the legislation was well set up and how flexibly the security system was able to respond. At the end of each chapter, it made recommendations, including legislative proposals ranging from general to very specific recommendations for partial changes. Among the areas in which the NSA sees the biggest threats to the Czech Republic, it recommends using intelligence information as evidence in criminal proceedings specifically for the areas of terrorism, organised crime, and the actions of foreign power, i.e., for areas belonging to the field of competence of the intelligence services, who, by their nature, possess information on these phenomena, legally and legitimately obtained in the scope of their competence corresponding to their function, entrusted to them by law within their mandate and their intelligence function. Of course, this requires a change in the law, namely, in the Code of Criminal Procedure. By making changes to the existing legislation and removing the deficiencies identified by the constitutional court, it would be possible to achieve, in the case of the most serious, precisely defined, crimes, its evidentiary admissibility, or, more precisely, the elimination of its universally set a priori in admissibility.

It is an inexorable fact that criminal justice authorities have to deal with new forms of crime as well as rapid development of new technologies. The means at their disposal in the fight against them are criminal prosecution institutes created in the

[9] Cf. Ruling of the ÚS ČR, file no. I ÚS 3038/2007, of 29 February 2008, https://nalus.usoud.cz/Search/ResultDetail.aspx?id=57942&pos=1&cnt=1&typ=result

last millennium, under completely different conditions. The Constitutional Court of the Czech Republic has also expressed itself on this issue in one of its recent rulings,[10] stating that: "*In order to fulfil the public interest in ensuring the safety of citizens and property values, the state has the task of detecting, clarifying and preventing crime; in order to perform this task effectively, it must not 'lag behind' the perpetrators in its investigative methods, and must have appropriate technical means available.*"[11]

The core of the solution can be found in the Ruling, which, in the case at hand, completely rejected the use of intelligence information. At the same time, however, it defined the conditions to achieve the removal of the a priori exclusion of selected intelligence information from evidentiary use by amending the applicable legal regulation. The proposal for a solution based on the conditions set out in the Ruling is legislatively prepared, and after clarification and correction, reflecting current developments, including abroad, it could lead to an effective solution which respects all legal and constitutional limits as well as the conclusions of the decision-making activities of the European Court of Human Rights (hereinafter referred to as the "Court").

At the same time, the Ruling itself brings a solution to this issue by identifying the shortcomings in the applicable legislation and in the case concerned, while it formulates the conditions it considers necessary for the intelligence information, namely the recording of the interception, to be used in criminal proceedings even in the case of its acquisition by the intelligence service.

In order to conclude on the possibilities of resolving the issue of the possible evidentiary use of intelligence information and its form, it is necessary to analyse the applicable legislation in the Czech Republic, the relevant criminal procedure doctrine and case law of the courts of the Czech Republic and the Court, the form of foreign solutions to this issue, and the existing legislative proposal for an amendment to the Code of Criminal Procedure.

1. Lex lata

- **Definition of evidence in the Code of Criminal Procedure (Section 89(2))**

Criminal procedural regulation, in particular, the basic principles of criminal proceedings, especially in taking evidence, and the existing case law, including the

[10] Ruling of the ÚS ČR of 14 May 2019, file no. Pl. ÚS 45/17, para. 127.

[11] Similarly, in Klass and Others v. Germany (no. 5029/71, judgment of 6 September 1978), the Court formulated its conclusions and material reasons, within precisely defined legal limits, aimed against national security, and consisting in terrorism and espionage. It emphasised that "*two important facts cannot be overlooked: technical advances made in the means of surveillance and the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the state must be able, in order to effectively counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.*" (Section 48).

case law of the Court, are primarily decisive for the conclusion on the possible evidentiary use of intelligence information or the limitation of the use thereof. The starting point may be that according to the applicable legal regulation, the range of evidence referred to in the provision of Section 89(2) of the CCP is only *demonstrative*, and may be supplemented in a specific case by other, not explicitly mentioned forms of evidence. The act allows so not only through a demonstrative list of the listed means of evidence, but also a general formulation according to which "everything that can contribute to the clarification of the matter can serve as evidence". This also expresses a certain limitation of the generally determined range of means of evidence: evidence must be related to the case investigated and must be capable of proving or refuting the fact concerned.[12] Unlike some foreign regulations, however, the Czech CCP does not contain any other *exclusion clauses* that would list all cases of inadmissible means of evidence, procedures, and acts. Their inadmissibility can then be inferred only by interpreting the relevant provisions via case law or professional literature.[13] Fryšták and Jílovec,[14] for instance, cite examples where *judicial practice* did not allow the evidentiary use of a lie detector examination (R 8/1993), a crime report made pursuant to Section 158(1) of the CCP (R 46/1993), an official record of law enforcement authorities on facts found out from the records of persons (R 52/1994) or from a telephone conversation with a witness (R 56/1984), the defendant's statement before experts who had investigated their mental condition (R 49/1968-1) or before a police authority when examining the investigation file before the end of the investigation (R 25/1988-11). Most recently, for example, a criminal complaint has been designated as unusable for evidence.[15] The category of inadmissibility determined by *judicial practice* also includes the intelligence information in question, namely such that has been obtained using intelligence technology, the evidentiary inadmissibility of which in the specified cases (recording of interception) results from the Ruling.

- **Section 8(3) of Act No. 153/1994 Coll., on Intelligence Services of the Czech Republic**

This provision is crucial for assessing the issue of how to handle intelligence information and its further use.

In assessing this issue, we are concerned with the performance of the role of intelligence services as a *source of information in the ongoing management of the*

[12] Cf. PÚRY, František. *Dokazování v trestním řízení.* In: POLČÁK, Radim; PÚRY, František; HARAŠTA, Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015, p. 58. Available from: https://science.law.muni.cz/knihy/monografie/Polcak_Elektronicke_dukazy.pdf [online, cit. 2022-10-29].

[13] For more detail, cf. PÚRY, František. Dokazování v trestním řízení. In: POLČÁK, Radim; PÚRY, František; HARAŠTA, Jakub et al. *Elektronické důkazy v trestním řízení*. 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015, p. 60.

[14] FRYŠTÁK, Marek a Michal JÍLOVEC. Zákonnost důkazů v trestním řízení a její posuzování právní praxí. *Časopis pro právní vědu a praxi.* Vol. 2014, no. 1, pp. 12, 13.

[15] See Stanovisko trestního kolegia NS of 18 September 2019, file no. Tpjn 300/2019, published in 10/2019 Collection of Court Judgments and Opinions of NS ČR.

security situation in the country.[16] Their mission is to provide information on findings addressed to other state authorities, enabling them to perform tasks in their field of competence in a continuous, high-quality and qualified manner. This role is reflected in the Czech legislation in the provisions Section 8(3) of Act No. 153/1994 Coll., on the Intelligence Services of the Czech Republic, pursuant to which the intelligence services provide state authorities and police authorities with information on findings falling within their field of competence; this does not apply where such provision would jeopardise an important interest pursued by the intelligence service concerned. The provisions of Section 8 of the Act on the Intelligence Services are of fundamental importance for the assessment of the usability of the intelligence information and express and define the very purpose of the existence of the intelligence services – provision of reports and information along with the range of their authorised beneficiaries.[17] This provides for the *obligation* of intelligence services to report to the President of the Republic and the government on their activities (Section 8(1)), in cases of findings that cannot be postponed, to provide information directly to the President of the Republic, the Prime Minister and the relevant members of the government (Section 8(2)), and to provide state and police authorities with information on findings that fall within their field of competence (Section 8(3)).[18]

As an exception to this obligation, it allows intelligence services not to provide this information (see Section 8(3) *in fine*) if such provision would jeopardise an important interest pursued by the intelligence service concerned. An important interest pursued by the intelligence service in question (the so-called *reservation of an important interest*) may concern, in particular, ongoing events, methods and forms of activity, identity of members of the intelligence service, etc. However, withholding information may also result from the obligation imposed on the intelligence service by a special regulation, e.g. Section 7(2) (protection of intelligence resources) or Section 15(3) (protection of a person acting for the benefit of BIS) of the Act on BIS, or from the rules of international intelligence cooperation.

Therefore, this provision:

- defines the scope of addressees of intelligence information;
- introduces the *obligation* of intelligence services to provide information;
- defines the scope of this information by the competence of the addressees;

[16] DUCHEK, Jan. Zpravodajské služby při tvorbě a realizaci bezpečnostní politiky. *Vojenské rozhledy.* 2005, no. 1, p. 55.

[17] For more details, see CHROBÁK, Jiří. In: POKORNÝ, Ladislav; CHROBÁK, Jiří; FLIEGEL, Martin. *Zákon o zpravodajských službách České republiky. Zákon o Bezpečnostní informační službě.* Zákon o Vojenském zpravodajství. Komentář. Praha: Wolters Kluwer ČR, 2018, p. 18.

[18] Section 8(3) of the Act on the Intelligence Services reads as follows: "(3) Intelligence services shall disclose to the state and police authorities information about findings that fall within their field of competence; this shall not apply if such disclosure would jeopardise an important interest pursued by the intelligence service concerned."

- its obvious aim and the purpose of Section 8(3) is to *enable* (not to prevent) the transfer of information about findings falling within their scope of competence to state authorities and police authorities;[19]
- in no way specifies the scope or level of detail of this information (it does not say anything about overall or general information); it must be logically such that it is beneficial to the addressee in the performance of their tasks based on their field of competence;
- introduces the so-called *reservation of important interest*, which can be used to justify by the prospective non-provision of information for intelligence reasons.

Therefore, it can be concluded that the aim and purpose of this provision is clearly to *enable* the transfer of information to other public authorities and thus to enable the use of the intelligence information within their activities in the field of their competence, undoubtedly including their decision-making activities.

The main task and mission of the intelligence services is to acquire, collect, and evaluate information from the areas entrusted to their competence and to provide information that they have obtained within their scope of competence, in accordance with the law, to authorised addressees, who can then use it according to their position and field of competence for the high-quality and qualified performance of their tasks. The method of setting and determining the possible method of qualified use of intelligence information is, in a situation where intelligence services themselves are not in a position to use the information obtained in their own decision-making activities, a crucial issue in determining the degree and effectiveness of the use of the results of their work.

2. Doctrine and case law

2.1 Doctrine

As will be further explained, the positive answer to the question of the evidentiary use of intelligence information finds support in the material-formal concept of evidence, which both the case law of courts (Constitutional Court, the Court) as well as the doctrine tend towards.

The consideration of the evidentiary use of intelligence information clearly has a logical basis. The areas of terrorism and intelligence services of foreign powers belong to the scope of competence of the intelligence services as defined by law. Especially in the field of terrorism, this fact is explicitly stated in official government

[19] For more detail, cf., e.g. PROVAZNÍK, J. Použitelnost důkazu získaného zpravodajskými službami v trestním řízení. In: MICHÁLEK, Luděk et al. *Kriminální zpravodajství jako nástroj kontroly trestné činnosti a zajišťování vnitřní bezpečnosti*. Praha: Policejní akademie ČR, 2020. 208 p. ISBN 978-80-7251-506-6, p. 67) states: „I believe... that the purpose of the provisions of Section 8(3) of the Act on the Intelligence Services is the exact opposite of what the Constitutional Court has found – to enable the transfer of information to other public authorities, rather than, on the contrary, to put obstacles to this transfer, or to limit how this information can be treated in accordance with the applicable other procedural regulation." Similar argument can be found in Vučka (VUČKA, J. Použitelnost důkazů opatřených zpravodajskou službou v trestním řízení. epravo.cz 16 July 2020).

documents, see, for example, the resolution of the Government of the Czech Republic of 16 November 2005 No. 1466 on the National Action Plan to Combat Terrorism (updated version for 2005-2007), Annex, p. 2: "One of the basic prerequisites for successfully combating against terrorism is the ability of intelligence services to obtain information on the structure of terrorist organisations, their activities or the possibilities of their support in a timely manner." This fact was further stated in the NSA and concluded by a recommendation to allow the evidentiary use of intelligence information precisely in the cases of this particularly serious crime.

The competence of intelligence services concerns such acts and phenomena, which the criminal law terminology refers to as serious forms of crime, particularly serious crimes, in particular terrorism, organised crime, war crimes, crimes against humanity, etc., where it can be said without exaggeration that "they operate on a worldwide level and threaten to destroy the rule of law."[20] In such cases, the degree of possible participation of intelligence services in the fight against crime is also considered, because standard procedures and principles of criminal law may not be effective in dealing with these forms of crime. The impossibility of evidentiary use of intelligence information is, for example, mentioned in the context of the fight against terrorism as one of the manifestations of the so-called *asymmetry* in combating this phenomenon.[21]

The trend towards formal-material assessment of evidence and a restrained approach to the interpretation of the doctrine of the fruit of the poisoned tree,[22] manifested in more recent case law (in particular, the Ruling of the Constitutional Court of 23 October 2014, file no. 1 ÚS 1677/2013, paragraphs 40-42[23] et seq.) also contribute to the conclusion on the possibility of a strictly defined admissibility of intelligence information, as [24] (critically) highlighted, for example, by Toman.[25] It is

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[20] See REPÍK, Bohumil. Lidská práva a závažné formy kriminality. *Trestněprávní revue*. Vol. 2006, no. 10, pp. 285.

[21] See PIKNA, Bohumil. *Mezinárodní terorismus a bezpečnost Evropské unie (právní náhled).* Praha: Linde, 2006, p. 71.

[22] For more detail on this doctrine, cf., e.g., NETT, Alexander. *Plody z otráveného stromu*. Brno: Masarykova univerzita, 1997; HERCZEG, Jiří. Plody z otráveného stromu a ústavněprávní limity získávání informací v trestním řízení. *Trestněprávní revue.* 2009, vol. 8, no. 3, pp. 65–70 AJ.

[23] This ruling (para. 40) states: "*The principle of free evaluation of evidence (Article 2(6) of the Code of Criminal Procedure requires law enforcement authorities to evaluate evidence both in relation to each other and individually, and thus allows for a differentiated/material approach to procedural defects*."

[24] Further also: Ruling file no. III. ÚS 761/14 of 21 May 2014 (N 103/73 SbNU 659), Ruling file no. III. ÚS 587/14 of 7 May 2014 (N 85/73 SbNU 445), Resolution file no. IV. ÚS 2058/13 of 15 October 2013, Resolution file no. III. ÚS 3318/09 of 19 July 2012, Ruling file no. III. ÚS 2260/10 of 8 March 2012 (N 50/64 SbNU 617), Judgment of the Supreme Court of 7 June 2017, file no. 6 Tz 3/2017, and the Resolution of the Supreme Court of 22 May 2013, 6Tdo 84/2013, wherein the Supreme Court states: "*The Czech criminal process has not adopted the doctrine of the fruit of the poisoned tree, which arose and is being developed in the US, especially in the form of a simplifying statement that the fruit of the poisoned tree must always be poisoned. The basis for the legal finding that the result of the defective conduct of law enforcement authorities in the process of collecting evidence is always absolute ineffectiveness and thus the inadmissibility of evidence in criminal*

shown that the tendency of the courts in their argumentation in recent years is based on the material nature of the evidence, they reject the previously generally accepted strictly formal concept and tend towards a more flexible formal-material concept of evidence. The limiting correction of such an understanding is the respect for the right to a fair trial, the application of which is defined by the rich case law of the Court (see below).

For example, Tlapák Navrátilová[26] points out that the doctrine of fruits is not part of the continental law and the view of Czech legal theory on it is not uniform. However, the prevailing opinion seems to be that not all illegality constitutes inadmissibility of evidence. This view is favoured, for example, by Musil,[27] Nett,[28] and Polčák.[29]

The Constitutional Court of the Czech Republic states, inter alia,[30] that continental criminal proceedings (as opposed to *common law* criminal proceedings) are based on the formal and material nature of the evidence and, as a rule, only such defects of the act that violate the right to a fair trial (Article 36(1) of the Charter and Article 6 of the Convention) lead to the ineffectiveness or inadmissibility of the evidence. The principle of free evaluation of evidence (Article 2(6) of the CCP) requires law enforcement authorities to evaluate evidence both in relation to each other and individually, and thus allows for a differentiated/material approach to procedural defects. Furthermore, the Constitutional Court elaborates[31] that even a rigorous interpretation of the doctrine of the fruit of the poisoned tree does not lead to the conclusion that any fault in obtaining evidence automatically renders the evidence inadmissible. It is always necessary to assess, inter alia, how intense the fault was and whether it was capable of influencing the conduct of the person concerned and the process of execution of evidence. Similarly, it cannot be concluded from this doctrine that the occurrence of unlawful evidence renders all evidence obtained in the proceedings unusable. The inadmissibility may concern only those pieces of evidence that have been causally derived from the unlawful evidence.[32] In particular, according to the previous decision-making practice of the

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proceedings cannot be found in the relevant provisions of the Code of Criminal Procedure governing the taking of evidence in criminal proceedings (Title V of the Code of Criminal Procedure).

[25] Viz TOMAN, P. Zákonnost opatřování důkazů a její proměny v čase. In: *Trestní právo a právní stát.* Plzeň: Aleš Čeněk, 2019, p. 142. 287 p. ISBN 978-80-7380-763-4.

[26] See TLAPÁK NAVRÁTILOVÁ, Jana. Doktrína plodů z otráveného stromu v kontextu nezákonných odposlechů. In: JELÍNEK, Jiří. *Dokazování v trestním řízení v kontextu práva na spravedlivý proces*. 536 pages. Praha:Leges, 2018, p. 226.

[27] MUSIL, Jan. Několik otazníků nad judikaturou ústavního soudu ČR v době postmoderny (na příkladu prohlídky jiných prostor a pozemků). *Kriminalistika.* 2011, 44(1), p. 226, 227.

[28] NETT, Alexander*. Plody z otráveného stromu*. Brno: Masarykova univerzita, 1997.

[29] POLČÁK, Radim. *Důkaz a informace*. In: POLČÁK, Radim; PÚRY, František; HARAŠTA, Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno, Masaryk University, Faculty of Law, 2015. 253. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia no. 542. ISBN 978-80-210-8073-7. pp. 34-35).

[30] See the ruling of the ÚS of 23 October 2014, file no. 1 ÚS 1677/2013, para. 40.

[31] See the ruling of the ÚS of 23 October 2014, file no. 1 ÚS 1677/2013, para. 41.

[32] For example, Polčák (see POLČÁK, Radim.; PÚRY, František; HARAŠTA, Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno, Masaryk University, Faculty of Law,

Supreme Court and the Constitutional Court, a case where evidence that has not been applied, although it may have been relevant in the assessment of the facts,[33] i.e. “omitted” evidence, can be considered a typical case, which, due to the deviation from the limit of the free assessment of evidence, is considered to be a violation of the right to a fair trial.

In this context, the question of where the approximate category of truth itself, based on the principle of ascertaining material truth, has disappeared from the internal formal structure of the application process.[34] For instance, Klíma,[35] from the point of view of constitutional principles as part of the concept of the rule of law, emphasises that the essence of evidence and its procedural setting are already part of the public function of ascertaining material truth, which is *ex lege* the so-called legal burden on the state power.

In connection with the issue under question, it is possible to draw attention to the information theory of evidence[36] defined by Polčák, testifying to and supporting the trend described above. This theory is based on the concept of evidence as factual information organising the process of authoritative application of law, which allows for systematic and methodologically consistent work with evidence in connection with other foundations of the process of authoritative application of law, where the most important categories are those of formal and material (or absolute and relative) truths, free evaluation of evidence, practical certainty, and evidentiary reliability. A comparison of the different perception of the institute of inadmissibility of evidence in Anglo-American and European legal cultures is also beneficial to the significance of the free evaluation of evidence. Polčák[37] points to the fact that in post-communist Europe, inadmissibility is in practice equated with the illegality of obtaining evidence and, as a result, leads to a formalistic clinging to the legend of the poisoned tree, or to the assumption that the evidentiary fruit of a tree suffering from any, albeit cosmetic, defect is fatally poisonous to the process of authoritative

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2015. 253. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia no. 542. ISBN 978-80-210-8073-7. Pp. 34-35) describes this doctrine as a formalist legend that has no place in procedural law in the standard functioning of the institutions of a democratic rule of law and states that equating inadmissibility with the illegality of obtaining evidence is, as a result, fatally poisonous to the process of authoritative application of the law.

[33] Cf. Ruling of the ÚS, file no. IV. ÚS 335/05 of 6 June 2006.

[34] See POLČÁK, Radim; PÚRY, František; HARAŠTA, Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno: Masaryk University, Faculty of Law, 2015. 253. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia no. 542, p. 31. ISBN 978-80-210-8073-7.

[35] See KLÍMA, Karel. Ústavněprávní základy práva na spravedlivý (trestní) proces. In: JELÍNEK, Jiří. *Dokazování v trestním řízení v kontextu práva na spravedlivý proces.* Praha: Leges, 2018, p. 27. 536 p.

[36] POLČÁK, Radim. In: POLČÁK, Radim; PÚRY, František; HARAŠTA Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno, Masaryk University, Faculty of Law, 2015. 253. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia no. 542, pp. 34-35, 44. ISBN 978-80-210-8073-7.

[37] Ibid.

application of law. In contrast, in the countries of Anglo-American legal culture,[38] it is an extensive doctrine combining formal and contentual elements in a complex structure.

The assessment of the question of the admissibility of the intelligence information should also be independently subjected to the institute of omitted evidence, which has so far been the subject of interest of legal theory only rarely.[39]

2.2 Case law of the Czech Republic

The aforementioned Ruling of the ÚS ČR, file no. I ÚS 3038/2007 of 29 February 2008, plays a pivotal role in the assessment of the topic of evidentiary use of intelligence information in the Czech Republic.

In the Czech Republic, intelligence information, specifically information that has been obtained using intelligence technology, falls into the category of inadmissible evidence as established by *judicial practice*. Its evidentiary inadmissibility in the specified case (interception recording made by the intelligence services) results from the Ruling.

At this point, there is a specific situation in the Czech Republic. On the one hand, there is a significant will, based in particular on the recommendations contained in the conclusions of the aforementioned NSA, to amend the CCP in such a way that the evidentiary use of information obtained by intelligence services using intelligence technology authorised by the court is not *a priori* excluded from the evidentiary use, and on the other hand, there is the aforementioned Ruling, according to which the evidentiary use of the recording of the interception made by the intelligence service is inadmissible. This Ruling was issued in a case that can be described as less serious, where the level of threat did not reach the level necessary to result in breaking the right to privacy.[40] In addition, the Constitutional Court itself indicates in its Ruling the possible evidentiary use of the recording of the interception made by the intelligence service under certain conditions specified in the Ruling: these should be legal regulations identical to the requirements of the Code of Criminal Procedure together with the high seriousness of the act.[41] In the same Ruling, the Constitutional Court outlined the possibility of the opposite conclusion

[38] See, e.g., KRONGOLD, H. L. A. A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions. *Dalhousie Journal of Legal Studies.* 2003, vol. 12, p. 97 et seq. Reference according to POLČÁK, Radim, cited, p. 35.

[39] See, e.g., MULÁK, Jiří. Zásada volného hodnocení důkazů. In: JELÍNEK, Jiří. *Dokazování v trestním řízení v kontextu práva na spravedlivý proces.* Praha: Leges, 2018, pp. 150-151. 536 p. POLČÁK, Radim. Důkaz a informace. In: POLČÁK, Radim; PÚRY, František; HARAŠTA Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno, Masaryk University, Faculty of Law, 2015. 253. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia no. 542, pp. 35-37. ISBN 978-80-210-8073-7.

[40] Criminal prosecution was initiated for attempting to plot against public competition, attempting to abuse the power of a public official, and violating the binding rules of business relations. It should be noted here that in this case, intelligence interception would not be admissible even after the adoption of the proposed amendment to the CCP, as it would not constitute a case of a criminal offence for which the evidentiary use of intelligence technology would be admissible.

[41] See Ruling, para. 17 and para. 31.

in the event that the Czech Republic faced an imminent threat of, for example, a terrorist attack, due to which it would be possible to break the constitutional guarantee of fundamental rights in order to protect other assets.

The basic argumentation for the conclusion on evidentiary inadmissibility was formulated by the Constitutional Court in the following points: (a) difference between the purposes of intelligence activities and criminal proceedings (different legal regime and purpose of intelligence interception and criminal interception); (b) lack of legal authorisation (the CCP is silent about the possibility of using interceptions obtained on the basis of other laws as evidence); and (c) lack of guarantee qualities for intelligence interceptions.

Regarding these arguments, the following can be noted:

Re (a), the intelligence services of the Czech Republic are not among those that act as law enforcement authorities and their primary role is not to convict someone of criminal or unlawful conduct. However, the considerations aimed at ensuring that their legally and legitimately obtained information, similarly to information from any entity whose role is not to conduct criminal proceedings,[42] being within a wide range of information that can "contribute to the clarification of the matter" (Section 89 of the CCP), is not *a priori excluded from evidentiary use* are reasonable and understandable. Therefore, it is not possible to talk about the "introduction" of the evidentiary admissibility of the legally defined range of intelligence means used, for which the judge has issued a permit, but about the consideration aimed at removing their *a priori exclusion* from the evidentiary use if they can contribute to the clarification of the case and are able to prove or refute the proven fact, while they meet all legal procedural conditions. Elsewhere in the world, in the matter of evidentiary admissibility, the preferred solution is according to the standard rules of criminal proceedings, namely the principles of evidence, the application of which is related to the judge who decides a specific case,[43] or the evidentiary admissibility of intelligence information is explicitly regulated.[44] Rather, the issue of protection of intelligence information is being discussed in this respect. The experience of countries where the evidentiary use of intelligence information is not excluded shows that its use is quite rare due to its specific nature, the narrow definition of the most

[42] E.g., customs – see R NS of 20 July 2016, file no. *5 T 29/2016*.

[43] Which, incidentally, was also recalled by the Constitutional Court of the Czech Republic in the Ruling, para. 31.

[44] For example, in Slovakia, there is a special law comprehensively (for all authorised entities incl. intelligence services) regulating the use of interceptions (Act No. 166/2003 Coll. on the protection of privacy against unauthorised use of information and technical means and on amendments to certain acts *(Act on Protection Against Interception))* and further also the relevant provision of the Code of Criminal Procedure (Section 119(3)), according to which these are acceptable as evidence in criminal proceedings. For more details, see, e.g., ČENTÉŠ, J. *Spravodajské odpočúvanie jako dokaz v trestnom konaní*. In: KALVODOVÁ, Věra; HRUŠÁKOVÁ, Milana et al. *Dokazování v trestním řízení – právní, kriminologické a kriminalistické aspekty.* 1st ed. Brno: Masaryk University, Faculty of Law, 2015. 503 pages. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia; vol. 539. ISBN 978-80-210-8072-0, pp. 259-270, or VAŠKO, Adrián. *Spravodajské informácie v trestnom konaní.* Praha: Leges, 2021. 152 p. p. 76 et seq. ISBN 978-80-7502-552-4.

serious crimes for which its use is considered, and the existing intelligence limits. Therefore, from the *lex ferenda* point of view, it would be possible to admit the evidentiary use also for information obtained by intelligence services under conditions specified by law, the basis of which is found in the Ruling, i.e., by eliminating the deficiencies found and supplementing the missing conditions.

Re (b), this is probably a wrong understanding of the mandate of the information services of the Czech Republic expressed in Section 8(3) of the Act on Information Services. See above for its specification.

Re (c), in terms of guarantee qualities, there is no fundamental difference between police and intelligence interception. If, for example, the law does not specify the scope of criminal offences, in the proceedings which enable the use of intelligence information it is only an expression of the mandate of intelligence services as defined by law. They are not law enforcement bodies, they do not operate in a criminal law environment, their legal regulation does not use criminal law terminology, the intelligence services do not work with it, their activity is not conditional on committing a crime, thus, the use of the authorisations entrusted to them by law cannot be tied to its committing. Therefore, for example, even a court authorisation to use intelligence technology is not tied to a criminal offence. The conditions for the use of intelligence technology are enshrined in the Act on the BIS and the Military Intelligence and they are based on a prior written permission by the chairman of the Senate of the Supreme Court in Prague, issued on the basis of an application containing the requirements stipulated by law, including the meeting of the condition of subsidiarity, the requirement to minimise interference with fundamental rights and freedoms in achieving the purpose, the maximum period of use, etc.

Although the Ruling dealt with a specific institute – the recording of interception, the application practice erroneously generalised, apparently on the basis of the wording used in para. 24[45] and para. 28[46] of the Ruling, its conclusion on the inadmissibility of evidence in criminal proceedings to refer to intelligence information in general. This conclusion, however, in the case of intelligence information used as a means of evidence other than the assessed use of the telecommunications interception (e.g. examination of a witness, document, etc.), is not supported by the Ruling and would be clearly absurd. These cases were not dealt with by the Ruling, wherein the basic principles of evidence in criminal proceedings are simply applied.

[45] 24. …A different legal purpose limits the palette of usability of *information obtained by intelligence services*.

[46] 28. Military intelligence stepped beyond the limits of the law (Article 2(2) of the Charter) by providing the law enforcement authorities with a highly specific and extensive *set of information*. In relation to criminal proceedings, intelligence services are authorised by the Act on Intelligence Services of the Czech Republic (Section 8(3), see point 24 above) to *provide general information of an operational nature*. Therefore, the personal integrity of the complainant, guaranteed by Article 13 of the Charter, was violated already by the fact that the Director of Military Intelligence provided specific interception recordings to law enforcement authorities, as the law did not foresee this method of handling information obtained by limiting her fundamental right.

When analysing the significance of the Ruling and the arguments used therein, it is undoubtedly important to assess the nature of the so-called operational information and its possible use in connection with criminal proceedings. Therefore, if, according to the Ruling, the record of telecommunications interception made by the intelligence services cannot be used as evidence in criminal proceedings, because it is illegal in this context, the question of the legality of using operational information as a basis for the further action of law enforcement authorities is also legitimate. Although it does not serve as evidence itself, it would not be possible to obtain usable evidence itself without it, because the respective authority would simply not know about it. However, the Ruling, with reference to Section 8(3) of the Act on the Intelligence Services of the Czech Republic, expressly formulates a conclusion on the standard usability of operational information provided by the intelligence service for further steps in criminal proceedings, although not as evidence itself.[47] Thus, it confirms that it can be used to obtain the basis for finding and applying evidence and it is not possible to object with its inadmissibility and ineffectiveness, pointing out that it has been acquired in accordance with a legal act other than the Code of Criminal Procedure. In this context, however, it should be emphasised that the use of information (even as operational) originating from absolutely ineffective evidence is inadmissible. The possibility of using information from absolutely ineffective evidence as operational information and to collect already process-usable evidence on its basis would be a denial of the principles of the rule of law.[48]

In addition to the comments and remarks to the Ruling already made, the following critical reservations may be added:

- The Constitutional Court left unnoticed and did not react to the essential circumstance and specific defect precluding the possibility of using the interception in the case in question, which was the absence of a court order to use the interception.[49] The Constitutional Court did not comment on it or include it in its arguments leading to the rejection of the possibility of use, although this in itself would be a reason for approval.
- In addition to the assessment of the question of the use of the recording of the interception in a specific case, the Constitutional Court generally commented on the admissibility of intelligence information.
- Undoubtedly, the conclusion that the intelligence services are empowered to provide at most *general information of an operational nature* in relation to criminal proceedings by the Act on the Intelligence Services of the Czech Republic is

[47] Without further explanation, it is stated that "in relation to criminal proceedings, intelligence services are authorised at most to provide *general information of an operational nature* by the Intelligence Services Act (Section 8(3), see point 24 above)." Cf. Ruling of the ÚS ČR file no. I. ÚS 3038/07, p. 7, para. 28. "Information obtained through interception by intelligence services cannot be of a higher quality than any *other operational information*." (ibid., para. 29).

[48] For more details, see HERCZEG, Jiří. Zásada „nemo tenetur" a práva obviněného v trestním řízení. *Bulletin advokacie*. 2010, no. 1-2, p. 46.

[49] Cf. Ruling, para. 10. "...the President of the Chamber (VS v P.) stated, however, that the defence intelligence (or military intelligence) did not apply for permission to use intelligence technology against the complainant; i.e., no such permisssion was granted."

erroneous.[50] On the contrary, the meaning and purpose of the provisions of Section 8(3) of the Act on the Information Services of the Czech Republic is to *enable* the transfer of information to other public authorities, not to impose obstacles to this transfer and to limit the way in which this information can be handled in accordance with another applicable procedural regulation. Therefore, it is necessary to ask what would be the benefit of such limited – general – information for the operation of law enforcement authorities.

- Furthermore, the argument about the difference from criminal law principles contained in the Ruling, pointing to the fact that the process of providing information includes the leading individuals of executive power, which the Constitution of the Czech Republic defines as political bodies, does not apply to the intelligence services in general (and it undoubtedly does not apply to BIS); in the case of intelligence technologies, the involvement of the Minister of Defence stipulated by the Act on Intelligence Services consist only in the role of transferring information and has no authorisation or approval powers.
- Last, but not least, the Constitutional Court notes that the competence to interpret the law is attached only to the judge who decides the specific case. Thus, however, it argues for the role of the statutory judge in a particular case to include an assessment of the evidentiary admissibility of the evidence in accordance with the principles of evidence set out in the CCP.

From this, the following conclusions can be drawn:

- In the Ruling, the Constitutional Court correctly ruled that the statutory conditions for the use of intelligence interception were not met in the specific case.
- In the present case, the interception recording could not be used even under the legal regulation envisaged by the proposed amendment to the CCP.
- It was wrongly and inappropriately generalised, misinterpreted, and extended to all intelligence information, regardless of how it had been obtained.
- It contained errors and mistakes (“general” information, etc.).
- The justification is not convincing, in particular, the diversity of purposes remains unexplained – what makes such a situation different from other situations where information is detected, for example, in administrative proceedings and subsequently used as evidence in the criminal proceedings (cf., for example, the customs authority).
- It marked the conditions that would have to be met (by modifying the legal regulation) for its possible use in other cases, namely:
    - determination of guarantee qualities consistent with the Code of Criminal Procedure;
    - definition of the facts of crimes for which such use is possible;

[50] Cf. Ruling, para. 28 (“intelligence services are … empowered to provide at most general information of an operational nature”), para. 29 (“information obtained through interception by intelligence services cannot be of a higher quality than any other operational information”). Available from: https://nalus.usoud.cz/Search/ResultDetail.aspx?id=57942&pos=1&cnt=1&typ=result [online, cit. 2022-10-29].

- existence of a level of imminent threat justifying a proportionate restriction of privacy;
- respecting the possibility of using interceptions obtained under other legal acts; and
- equal handling of information so that all the principles of the criminal process are applied to it, including the adversarial execution of evidence, right to a fair trial, and guarantee of the protection of rights and freedoms equal to other means of evidence.

2.3 Decision-making practice of the ECHR

In view of the obligations for the Czech Republic under international treaties on human rights and fundamental freedoms, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is important in terms of the use of intelligence information, guaranteeing, inter alia, the right to respect for private and family life, home, and correspondence, and the right to a fair trial. Therefore, when assessing the legitimacy of the use of the intelligence information, it is necessary to take into account the case law of the Court on the issue of interference with private and family life, home, and correspondence. Protection of these rights is provided by Article 8 of the ECHR, according to which *"[e]veryone has the right to respect for his private and family life, his home and his correspondence."* According to paragraph 2 of the same article, "*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."* Furthermore, Article 6 of the ECHR, guaranteeing the right to a fair trial, is important from the point of view of criminal proceedings.

From the case law of the Court, decisions that concern interference with the right to privacy by means of interception or institutes which the Court refers to as *secret/covert surveillance*[51] are of particular relevance for the assessment of intelligence information. The case law of interest is also relevant for the use of the authorisation of intelligence services because the Court does not distinguish in its case law between institutes according to which entities use them, i.e., whether they are used by the police (or *law enforcement authorities* in general) or, for example, by intelligence services (see *Klass and others v. Germany* (no. 5029/71, judgment of 6 September 1978); *Weber and Saravia v. Germany* (no. 54934/00, judgment of 29 June 2006*)*; *Uzun v. Germany (*no. 35623/05, judgment of 2 September 2010)*; Szabó and Vissy v. Hungary (*no. 37138/14, judgment of 12 January 2016); etc.; it requires the same conditions and guarantees for all of them, subjecting them to the same test and requiring the same guarantees under the ECHR.

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[51] See, for example, *Roman Zakharov v. Russia* (no. 47143/06, judgment of the Grand Chamber of 4 December 2015)*; Rotaru v. Romania* (no. 28341/95, judgment of 4 May 2000)*; Amman v. Switzerland* (no. 27798/95, judgment of the Grand Chamber of 16 February 2000)*; Bykov v. Russia* (no. 4378/02, judgment of 10 March 2009*); P.G. and J. H. v. the United Kingdom* (no. 44787/98, judgment of 25 September 2001); etc., "*secret measure of surveillance*" (*Uzun v. Germany*), "*secret aural surveillance*" (*Khan v. the United Kingdom, no. 35394/97, judgment of 12 May 2000*).

The issue of interception was dealt with by the Court in several cases, generally unrelated to the criminal proceedings in *Klass and Others v. Germany* (no. 5029/71 of 6 September 1978), in which it defined a fundamental approach to the issue of interception. It emphasised that two important facts cannot be overlooked: technical advances made in the means of surveillance and the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of *espionage and by terrorism* (*emphasis by the author*), with the result that the state must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime." (Section 48). The Convention grants the participating states some discretion in choosing the terms of the surveillance system, but they do not have unlimited freedom to subject persons under their jurisdiction to secret surveillance measures. There must be "adequate and effective guarantees against abuse. This assessment … depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law." (Section 50). Regardless of which monitoring system has been chosen, adequate and sufficient safeguards against abuse must exist. This is an exception to the right to respect for private life and correspondence guaranteed by Article 8(1), and this exception must be interpreted restrictively.

For a certain specification of the safeguards that national law must provide against abuse, we can look at the case *Kruslin and Huvig v. France* (no. 11801, judgment of 24 April 1990) and subsequent case law (see *Amann v. Switzerland*, no. 27798/95, judgment of the Grand Chamber of 16 February 2000, Sections 56–58; *Prada Bugallo v. Spain*, no. 58496/00, judgment of 18 February 2003, Section 30), summarising the minimum safeguards that national legislation allowing "secret surveillance" should contain in order to avoid the risk of abuse: (a) determine the nature of the offences which may constitute grounds for the granting of the authorisation for interception; (b) define the range of persons against whom interception may be ordered; (c) lay down the maximum permissible duration of such measures; (d) determine the procedure to be followed in evaluating, using, and storing the data obtained through interception; (e) contain the preventive measures to be taken when transferring the information thus obtained to third parties; and (f) determine the circumstances in which recordings must be erased or destroyed. In *Szabó and Vissy v. Hungary* (no. 37138/14, judgment of 12 January 2016), it was concluded that, in seeking a fair balance between the interest of the state in the protection of national security and the interests of the individuals concerned, the states enjoy a certain margin of discretion, but the Court must be convinced that the national legislation offers sufficient and effective safeguards against abuse. In order to meet the requirement of predictability of the legal regulation, it is crucial that the act contains clear and detailed rules for secret surveillance; the law must set clear

limits on the exercise of entrusted discretion in order to protect individuals from unreasonable interference with their rights.[52]

From the case law of the Court, the following conclusions can be formulated on the issue of the admissibility of evidence:

- Determining the conditions for the admissibility of evidence in criminal proceedings falls within the competence of national authorities. Therefore, the Court does not rule on the admissibility of certain types of evidence.
- The use of "secret surveillance" (interceptions) as evidence obtained in violation of Article 8 of the Convention is assessed by the Court from the point of view of the right to a fair trial (Article 6). Its task is to assess whether the proceedings, including the way in which the evidence was obtained, were fair as a whole.
- In such a case, it requires an additional guarantee, namely that the guilt is also proven by other evidence.[53]
- In its case law, the Court does not distinguish between institutes according to which entities use them, i.e., whether they are used by the police (*law enforcement authorities)* or, for example, intelligence services; it requires the same conditions and guarantees for all of them, subjects them to the same test, and requires the same guarantees under the ECHR for them.
- Where the intelligence services are unable or unwilling to meet these guarantees, the information provided by them cannot be used as evidence.

3. Selected international solutions[54]

The question of the evidentiary admissibility of intelligence information, and intelligence technology specifically, is viewed diversely around the world.[55] This is

[52] For more details, see, e.g., POKORNÝ, Ladislav. Instituty kriminálního zpravodajství v judikatuře Evropského soudu pro lidská práva. In: MICHÁLEK, Luděk et al. *Kriminální zpravodajství jako nástroj kontroly trestné činnosti a zajišťování vnitřní bezpečnosti*, Praha: Policejní akademie ČR, 2020, pp. 84-100.

[53] See Allan v. the United Kingdom of 5 November 2002, P.G. and J.H. v. the United Kingdom of 25 September 2001, Chalkey v. the United Kingdom of 26 September 2002).

[54] The topic of methods in foreign solutions of evidentiary admissibility of intelligence information is complicated and undoubtedly requires separate in-depth research. Therefore, we will limit ourselves here only to outlining a basic overview of selected existing solutions.

[55] See, e.g., VERVAELE, John A. E. "Terrorism and information sharing between the intelligence and law enforcement communities in the US and the Netherlands : emergency criminal law ?", Revue internationale de droit penal. 2005/3-4 (Vol. 76), p. 409-443. DOI: 10.3917/ridp.763.0409. Available from: https://www.cairn.info/revue-internationale-de-droit-penal-2005-3-page-409.htm [online, cit. 2022-10-29].

Mar JIMENO-BULNES. The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama. New Journal of European Criminal Law First Published June 21, 2017. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206822 [online, cit. 2022-10-29].

ČENTÉŠ, J. Spravodajské odpočúvanie jako dokaz v trestnom konaní. In: KALVODOVÁ, Věra; HRUŠÁKOVÁ, Milana et al. *Dokazování v trestním řízení – právní, kriminologické a kriminalistické aspekty*. 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015. 503 pages. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia;

due to, inter alia, different position of the intelligence services in individual countries, some of which even conduct investigations of selected crimes themselves and thus have the status of law enforcement authorities, while others have the nature of information services and provide only information support for the activities of other state authorities in their respective field of competence.

A large number of states allow the qualified transfer or use of intelligence information obtained by intelligence means, technical methods of the police or other authorities, and only for specified particularly serious offences (Slovakia, Finland, Germany, Poland, Portugal, Austria, Sweden).[56] This approach complies with the principle of proportionality, while only for particularly serious crimes it applies that prosecution outweighs the right to privacy. However, the seriousness of crimes is assessed on the basis of diverse and differing criteria in different states. Still, the determination of the scope of serious crimes defined in this way must be carried out very carefully, because the certainty and accuracy of this definition is one of the essential requirements of, among others, the case law of the Court. For this reason, it is necessary to monitor the development of foreign legislation and decision-making practice in individual countries.

From the point of view of the comparative analysis of the models used, we believe that the closest and most appropriate solution can be inspired by the solutions applied in Germany. The most important reason for this conclusion is the fact that the position and system of the intelligence services in the Czech Republic corresponds, in principle, to the legal regulation and position of the intelligence services in Germany. In particular, these are the basic assumptions and principles of the position of the intelligence services based on the informational nature of the intelligence services and the fundamental respect of the so-called separating imperative, separating the intelligence services from *law enforcement* authorities, which enforce legal order and execute powers of the police, which is excluded in the case of intelligence services on this basis. In certain situations, the legal regulation of the Federal Republic of Germany[57] accepts evidence collected by the intelligence service. The solution consists in fulfilling the doctrine of “measuring and balancing”, using the proportionality test, which also ensures sufficient protection of the human

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vol. 539, pp. 259-270, https://science.law.muni.cz/knihy/monografie/Kalvodova_Dokazovani.pdf [online, cit. 2022-10-29], VAŠKO, Adrián. *Spravodajské informácie v trestnom konaní*. Praha: Leges, 2021, aj.

[56] See SYLLOVÁ, Jindřiška; ZACHOVÁ, Magdaléna. *Důkazní použití informací získaných zpravodajskými službami.* Poslanecká sněmovna Parlamentu ČR. Parlamentní institut. Srovnávací studie č. PI 3.271. April 2023. P. 2. Available from: https://www.psp.cz/sqw/text/orig2.sqw?idd=228802 [online, cit. 2022-10-29]. Born and Leigh (see BORN, H., LEIGH, I. *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*. Oslo, Publishing House of the Parliament of Norway, 2005, p. 40) further indicate the admissibility of intelligence information in the case of special courts for terrorist acts also in Ireland and Spain.

[57] See German Code of Criminal Procedure (Strafprozeßordnung), available at: https://www.gesetze-im-nternet.de/englisch_stpo/englisch_stpo.html [online, cit. 2022-10-29].

rights of the accused.[58] In some form, the solution applied in the Federal Republic of Germany has the form of the existence of a separate, non-public part of the proceedings, in which the admissibility of the intelligence information is exclusively assessed, where the legality, reliability, and circumstances of its acquisition are verified before it can be used.[59] Such a procedure would undoubtedly be appropriate and effective, but in our opinion, in the Czech legal environment, it would be a completely new element, probably difficult to accept. Due to the presumed impracticability of this option, the Dutch regulation consisting in the interrogation of a representative of the intelligence service who would explain the circumstances of obtaining intelligence information,[60] seems to be more suitable and easier to apply in the Czech Republic. As for the Federal Republic of Germany, there is a special uniform arrangement for cooperation between the intelligence services and the prosecutor's office and the police. This is the Federal Act on the Protection of the Constitution (BVerfSchG), which, inter alia, provides for cooperation between the federal and state constitutional protection authorities.[61] The general provisions of the

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[58] Germany does not currently have a fully comprehensive system of legal rules governing the exclusion of evidence collected by intelligence services as inadmissible. Most of the standards have been developed on the basis of the case law of the German courts, which have introduced a new approach to the exclusion of "illegal" evidence in recent years, giving priority to enabling the court to ascertain the material truth. (On the contrary, in the prosecution system of Anglo-Saxon law, the rules excluding evidence from criminal proceedings are primarily aimed at preventing law enforcement from obtaining evidence in an illegal manner.) See The Admissibility of (Counter-) Intelligence Information as Evidence in Court. (Geneva: DCAF). DCAF – Geneva Centre for Security Sector Governance. 2021. Author: Andrej Bozinovski. Geneva, 2021, p. 17. ISBN: 978-92-9222-630-5. Available from: https://www.dcaf.ch/sites/default/files/publications/documents/Admissibility_of_%28Counter-%29IntelligenceInformation_as_Evidence.pdf [on line, cit. 2022-10-29]. Ibid (p. 29), for a more detailed expression of the preference for this doctrine by the respected *think tank* Geneva Centre for Security Sector Governance (DCAF).

[59] The possibility of using this procedure (in combination with other elements) is pointed out, for example, by Provazník (PROVAZNÍK, J. *Použitelnost důkazu získaného zpravodajskými službami v trestním řízení*. In: MICHÁLEK, Luděk et al. Kriminální zpravodajství jako nástroj kontroly trestné činnosti a zajišťování vnitřní bezpečnosti. Praha: Policejní akademie ČR, 2020. 208 p. ISBN 978-80-7251-506-6, pp. 69, 70).

[60] See COSTER van VOORHOUT, Jill E. B. *Intelligence as legal evidence. Comparative criminal research into the viability of the proposed Dutch scheme of shielded intelligence witnesses in England and Wales, and legislative compliance with Article 6 (3) (d) ECHR*. Utrecht Law Review [online]. 2006, vol. 2, no. 2, p. 127. https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.29/ [online, cit. 2022-10-29].

[61] *See Section 20(1), the essential part of which reads as follows: "Section 20 Transfer of information by the Federal Office for the Protection of the Constitution to law enforcement and security authorities in matters of the protection of the state and the constitution, (1) the Federal Office for the Protection of the Constitution shall transfer to public prosecutors and, subject to the power of the public prosecutor to conduct factual investigations, to the police, information which has come to its knowledge, including personal data, if there are genuine indications that such transfer is necessary for the prevention or prosecution of offences in the area of state security."* Cit. according to SYLLOVÁ, Jindřiška; ZACHOVÁ, Magdaléna. *Důkazní použití informací získaných zpravodajskými službami.* Poslanecká

Code of Criminal Procedure (*Strafprozeßordnung, StPO*) apply to the use of any information provided. If the information is passed by the intelligence service, it can be used only under the conditions set out in the Code of Criminal Procedure.

However, the relevant provision on the transfer of intelligence information was significantly affected by the case law of the Federal Constitutional Court, which annulled part of this regulation adopted in 2019.[62] By decision of 28 September 2022, 1 BvR 2354/13, the First Chamber of the Federal Constitutional Court ruled that the statutory provision on the disclosure of information to the Federal Office for the Protection of the Constitution under the Federal Law on Constitutional Protection (BVerfSchG) was not in conformity with the fundamental right to informational self-determination under Article 2(1) in conjunction with Article 1(1) of the Basic Law (Constitution). The provisions of the act concerned violate the clarity of standards and the principle of proportionality. In addition, there is no specifically standardised requirement for protocoling. The contested provisions applied – with regard to the fundamental rights concerned, but under restrictive provisions – until 31 December 2023. In particular, it follows from the decision[63] that *transfer to a law enforcement authority may only be considered in the prosecution of particularly serious offences and where it is presumed that there is a suspicion justified by certain facts, for which specific circumstances constitute the factual basis. The contested provisions do not comply with these requirements. The first sentence of Section 20(1) of the BVerfSchG does not directly mention the legal interest to be protected when regulating the transfer of data collected by the intelligence services to avert danger; not all of the listed crimes can be classified as particularly serious crimes.*

In particular, the reasoning of the Federal Constitutional Court requires an absolutely clear, exhaustive, and explicit definition of the range of particularly serious offences in question.

4. Possible solutions, draft amendment to the Code of Criminal Procedure

Despite all the shortcomings of the Ruling, which is the only existing one on the subject and it is devoted to a non-representative case, along with a number of arguments inferring its defects, errors, or omissions, it must be concluded that the current legislation and the subsequent case law do not allow to draw a conclusion on the evidentiary admissibility of a recording of an interception made by the intelligence service in criminal proceedings. Therefore, information obtained through the use of intelligence interception can only have the nature of operational information to be used in the further progress of the proceedings. However, this situation quite accurately and specifically reveals those shortcomings and obstacles in the

sněmovna Parlamentu ČR. Parlamentní institut. A comparative study č. PI 3.271. April 2023, p. 24. Available from: https://www.psp.cz/sqw/text/orig2.sqw?idd=228802

[62] See SYLLOVÁ, Jindřiška; ZACHOVÁ, Magdaléna. *Důkazní použití informací získaných zpravodajskými službami.* Poslanecká sněmovna Parlamentu ČR. Parlamentní institut. A comparative study, no. PI3.271. April 2023. P. 25, 26. Available from: https://www.psp.cz/sqw/text/orig2.sqw?idd=228802 https://www.gesetze-im-nternet.de/englisch_stpo/englisch_stpo.html

[63] Ibid.

legislation and interpretative argumentation in the case law, which, rather than the impossibility of their constitutionally conforming solution, indicate the superficiality or even the incorrectness of the argumentation used.

The removal of the a priori exclusion of the possibility of evidentiary use of an interception recording could be achieved both by a new ruling of the Constitutional Court in the case of a crime that would show sufficient gravity that could lead to breaking the right to privacy, or by the adoption of a new legal regulation – an amendment to the Code of Criminal Procedure, which would eliminate deficiencies in the applicable legal regulation and fulfil the conditions lacking in the Ruling. However, given the obvious illusory nature of the former of the options, the only plausible solution is through an amendment to the Code of Criminal Procedure.

Draft amendment to the Code of Criminal Procedure

The recommendations contained in the NSA has resulted in a draft legislative amendment that, in accordance with the reservations contained in the Ruling, would set the same level of protection of the rights and freedoms of individuals when using intelligence interception and similar institutes regulated in the CCP, as well as respecting the special requirements imposed on the activities of intelligence services.

The draft amendment to the CCP should lead to the elimination of deficiencies identified in the Ruling as well as to the elimination of a priori exclusion of intelligence information from the scope of evidence (as is the case with information coming from any entity whose role is not to conduct criminal proceedings, which, however, may contribute to the clarification of the case).

The general argumentation of a different purpose of the activities of intelligence services is not appropriate - the new regulation is not intended to lead to the acquisition of information by intelligence services with the aim of obtaining evidence for criminal proceedings, rather, to the use of information already existing and legally and legitimately obtained under the Acts on BIS or Military Intelligence and then applied in accordance with the Code of Criminal Procedure.[64] No change would be introduced; it is not assumed that the intelligence services should newly use the intelligence technologies for the purpose of obtaining evidence in criminal proceedings, it is only a matter of removing the a priori exclusion of a certain type of evidence obtained outside criminal proceedings by another authority in the scope of its competence, which proves that it can serve as evidence in a specific case, i.e., that it is related to the matter being clarified and is capable of proving or disproving the fact in question, while it meets all legal requirements.

Thus, the individual institutes defined as part of the application of the intelligence technologies under Section 8(1)(a), (b) and (c) of the Act on BIS or Act

[64] See the use of information by other authorities – customs: resolution of the Supreme Court of 20 November 2013, file no. 5 Tdo 1010/2013, published in the Collection of Court Judgments and Opinions under no. Rt 34/2014, and judgment of the Supreme Court of 20. 7. 2016, file no. 5 Tz 29/2016, published in the Collection of Court Judgments and Opinions under no. Rt 50/2016). They provide that the results of the control carried out by the customs authority are usable as evidence not only in administrative proceedings, but also in prospective criminal proceedings. (e.g. customs – R NS of 20 July 2016, file no. *5 T 29/2016).*

on Military Intelligence[65] should become usable as evidence; they correspond to the institutes regulated in the CCP under Sections 86 to 87c of the CCP (seizing and opening of consignments, their substitution and tracking), Section 88 (interception and recording of telecommunications traffic), Section 88a (detection of data on telecommunications traffic), and Section 158d(3) (monitoring of persons and things). Due to the guarantees of the right to privacy, as elaborated in the case law of the Constitutional Court and the Court, it is proposed to allow the use of evidence in the CCP only for such information that has been obtained using intelligence technology that is comparable to individual institutes regulated in the Code of Criminal Procedure and allowed by an independent court. The current practice related to other types of intelligence-based resources remains unchanged.

In an effort to define the most appropriate range of criminal cases for which the intelligence information could be used as evidence in criminal proceedings under certain conditions, the draft is based, in particular, on the fact that such a procedure should be implemented only in cases of the most serious crime, for which the use of information obtained outside criminal proceedings is acceptable from the point of view of protected interests (and these include, in terms of the trend of their increasing seriousness and harmfulness, terrorism and espionage).[66] Of course, other conditions set out in the proposal need to be met. The introduction of the same treatment of specified evidence regardless of whether it has been obtained by an intelligence service (BIS or military intelligence) or law enforcement bodies is also significant and non-negotiable. [67]

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[65] Specifically, it concerns the search, opening, examination, or evaluation of transported consignments pursuant to Section 8(1)(a) of the Act on BIS (and the same provision of the Act on Military Intelligence), interception, recording of telecommunications, radiocommunications, and other similar traffic pursuant to Section 8(1)(b) of the Act on BIS (and the same provision of the Act on Military Intelligence), data collection on telecommunications, radiocommunications, and other similar traffic pursuant to Section 8(1)(b) of the Act on BIS (and the same provision of the Act on Military Intelligence), and the acquisition of video, audio, or other recordings pursuant to Section 8(1)(c) of the Act on BIS (and the same provision of the Act on Military Intelligence).

[66] Offences included to the organised crime category are not addressed in the draft, as recommended in the NSA.

[67] The draft amendment to the CCP was approved by the Government of the Czech Republic by Resolution No. 767 of 4 November 2019. According to the draft, in Section 89, the following paragraphs 3 and 4 are inserted after paragraph 2: *“(3) Information obtained by intelligence services under the acts governing their activities based on the use of intelligence technology consisting in searching, opening, examining, or evaluating transported consignments, intercepting or recording telecommunications, radiocommunications, and other similar traffic, in obtaining data on telecommunications, radiocommunications, and other similar traffic, or in making video, audio, or other recordings may serve as evidence only if*
(a) criminal proceedings are being conducted for
1. particularly serious crime referred to in Title IX or Title XIII of the Special Part of the Criminal Code;
2. particularly serious crime, a constituent element of which is the intent to enable or facilitate the commission of a terrorist offence or offence of participation in a terrorist group (Section 312a of the Criminal Code), financing of terrorism (Section 312d of the Criminal

The aim of the draft is, therefore, to set up a standard solution that would:

- ensure the ability and authority of the state to ensure criminal justice in the cases of extremely serious crimes of a terrorist nature and other related activities contrary to the interests of the Czech Republic committed for the benefit of a foreign power;
- establish a prerequisite for the removal of the a priori exclusion of this category of legally and legitimately provided information from evidentiary use;
- be based on the general principles of evidence in criminal proceedings;
- be based on the confirmation that the competence to interpret the law relates only and exclusively to the judge who decides in a specific case;
- remove the deficiencies alleged in the Ruling of the Constitutional Court I ÚS 3038/07;
- set the conditions the fulfilment of which was lacking according to the Ruling of the Constitutional Court; and
- define the conditions of possible admissibility (level of guarantees, importance of the protected interest, exhaustive list of facts); and, at the same time, would also:
- maintain respect for the limits stemming from the specific nature of the status and activities of the intelligence services,[68] which include: protection of classified

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Code), support and promotion of terrorism pursuant to Section 312e(3) of the Criminal Code, or the threat of a terrorist offence (Section 312f of the Criminal Code); or
3. crime of espionage (Section 316 of the Criminal Code); and
(b) it is information that would otherwise be impossible or significantly difficult to obtain.
(4) the information referred to in paragraph 3 shall be treated by the law enforcement authority from the moment of collection, according to its nature, similarly to information obtained under the provisions of this Act on the seizing and opening of consignments, their substitution and tracking, interception and recording of telecommunications traffic, detection of data on telecommunications traffic, or monitoring of persons and things."
Accordingly, in the Act on Military Intelligence, it is proposed to insert a new paragraph 4 in Section 8 after paragraph 3, which reads as follows: *"(4) If the facts identified by the intelligence services indicate that any of the offences referred to in Section 89(3)(a) of the Code of Criminal Procedure has been committed, the intelligence services shall provide the police authority with information on these facts, including recordings and protocols, permits to use intelligence technology, and other documents, if available, that comprehensively capture the procedure and findings of the intelligence services; this shall not apply if the provision would jeopardise an important interest pursued by the intelligence service concerned*." See the draft act amending Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended, and some other acts. Available from: https://apps.odok.cz/veklep-detail?pid=KORNBB6HZA5Q.

[68] For more detail, see POKORNÝ, Ladislav. Limity důkazního použití zpravodajských informací. *Časopis pro právní vědu a praxi.* Vol. 29, no. 4, 2021, pp. 741-758. https://journals.muni.cz/cpvp/article/view/15188/14672. A unique tool for protecting intelligence information in court proceedings is the British Justice and Security Act 2013. See Justice and Security Act 2013 Chapter 18. Available from: http://legislation.gov.uk/ukpga/2013/18/pdfs/ukpga_20130018_en.pdf. This gives civil court judges the opportunity to conduct proceedings in secret and exclude unverified persons, including parties to the proceedings, where the court works with classified evidence or where members of the intelligence services appear. The reason is the protection of intelligence officers and the argument that foreign intelligence services are not willing to

information and protection of sources of intelligence information (in particular, persons acting for their benefit and intelligence means); respecting the so-called reservation of an important interest of the intelligence services (Section 8(3) *in fine* of the Act on the Information Services of the Czech Republic); and rules related to the cooperation of the intelligence services (*liaison*), in particular, the so-called *third party rule.*

If we should sum up the arguments for the possible removal of the impossibility to use the records of intelligence interceptions as evidence in criminal proceedings, they can be generally found, in particular, in:

- *the actual development and nature of committing serious crime and current security threats;*
- *solutions existing in foreign legal regulations (Slovakia, Germany, the Netherlands, and others);*
- *the development of criminal law doctrine in the field of evidence;*
- *the mandate of the intelligence services,* whereby they act, inter alia, as a source of information in the continuous managing of the security situation in the country;
- *legitimacy of the use of legally obtained information by intelligence services as state authorities;*
- *unjustified fears of abuse of the intelligence information by applying identical rules in the execution of evidence;*
- *the absence of justified fears of jeopardising the activities of the intelligence services while maintaining the so-called reservation of important interest;*
- *the development of the decision-making practice of the Constitutional Court of the Czech Republic and the Court;*
- *the Ruling of the ÚS ČR, file no. I. ÚS 3038/07 itself,* which, inter alia, identifies deficiencies the elimination of which would obviate the reasons for the negative conclusion;
- *the need to provide the courts with the necessary degree of discretion, enabling them to respond to the multifaceted reality, but also to the evolving human rights legislation and decision-making practice, especially of the Court.*

We believe that the presented proposal corresponds to the above arguments. However, taking into account the legislative developments in Germany, it would be appropriate to consider the exclusion of point (a)(2) from the proposed amendment to the CCP. Therefore, the draft amendment to the CCP, compared to the NSA recommendation, already narrowed down to the category of organised crime, would be further restricted by excluding point (a)(2) (i.e. including “only” terrorist targets or motives), thus minimising the range of the criminal acts concerned, limiting it only to the most serious of them, i.e., those that fatally threaten the security of the state and its citizens, where the inability of the state to punish such acts would threaten the basic trust in the state’s capacity to ensure criminal justice.

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share information with the British for fear that their data or the identity of information sources would be made public through British courts.

5. Summary of *lex ferenda* recommendations

It is clear that the current situation is not optimal. The elimination of the existing shortcomings and weaknesses and the removal of the a priori exclusion of the possibility of evidentiary use of an interception recording could be achieved either by a new ruling of the Constitutional Court, issued in the case of a crime of sufficient gravity to lead to breaking the right to privacy, or by the adoption of a new legal regulation – an amendment to the Code of Criminal Procedure that would set out the conditions lacking in the Ruling. Whereas the first option is unrealistic, we are in principle inclined to amending the CCP based on the submitted government proposal. This is obviously aimed at eliminating the shortcomings pointed out by the Ruling and sets out the conditions which the Constitutional Court lacked and which it formulated as conditions for possible admissibility. These conditions could be established in the Czech legal system by removing the reasons that led the Constitutional Court to the original conclusion and by setting new identical conditions and guarantees for the execution of evidence obtained by intelligence techniques and similar institutes in the Code of Criminal Procedure.

In formulating the *lex ferenda* recommendations on the evidentiary use of intelligence technologies, the content of the above-mentioned draft can be, in principle, agreed with.

The draft also meets the requirements contained in the case law of the Court, which does not distinguish between the institutes according to which entities use them and requires the same conditions and guarantees for all of them. In particular, the proposal sets out the nature and range of criminal offences for which interception recordings could be used as evidence, defines the range of persons against whom interception may be ordered, lays down the maximum permissible duration of these measures, and sets out the procedure to be followed in the evaluation, use, and storage of data obtained through interception, identical to that set out in the CCP. It also seeks to respect the conclusion that the power to interpret the law is related to the judge who decides a particular case. An essential and non-negotiable condition for the evidentiary admissibility of intelligence information is that it must meet the same conditions as those that would have to be met if the information had to be acquired by any of the procedures under the CCP, with the exception of the need to be obtained during the course of criminal proceedings.

Conclusion

According to the applicable legislation and the relevant judgment of the Constitutional Court of the Czech Republic (I. ÚS 3038/07), the evidentiary use of the recording of the interception made by the intelligence service in the Czech Republic is not allowed. The basic argumentation for this conclusion was formulated by the Constitutional Court in the following points: (a) difference between the purposes of intelligence activities and criminal proceedings (different legal regime and purpose of intelligence interception and criminal interception); (b) lack of legal authorisation (the Constitutional Court is silent about the possibility of using interceptions obtained on the basis of other laws as evidence); and (c) lack of guarantee qualities for intelligence interceptions. However, the Constitutional Court does not absolutely exclude the use of information obtained by intelligence services as evidence in

criminal proceedings. In the event of a change in the legislation respecting its reservations, the Constitutional Court indirectly lays down certain requirements, in particular: 1) guarantee of quality required by the Code of Criminal Procedure; and 2) level of imminent threat, due to which it would be necessary to break the constitutional guarantees of fundamental rights in order to protect other goods.

By enshrining the conditions contained in the Ruling, removing the existing differences resulting from the different nature of the activities of the intelligence services and *law enforcement* bodies, as well as respect for the limits of the intelligence services using the institute of the so-called reservation of important interest pursued by the intelligence services, the reasons that led to the conclusion in 2008 that the recording of the interception carried out by the intelligence services was inadmissible could be removed in the legal order of the Czech Republic. These ambitions are attempted to be fulfilled by the government's draft amendment to the Code of Criminal Procedure, which should lead to the elimination of the shortcomings alleged by the Ruling, setting out the conditions that the Constitutional Court lacked.[69]

The aim of the draft amendment to the CCP is to set up a standard solution that would eliminate the existing differences and set the same view and treatment of intelligence information so that all the principles of the criminal process are applied to it, including the adversarial execution of evidence, right to a fair trial, and guarantee of the protection of rights and freedoms equal to other means of evidence.

Such a solution would:

- create a prerequisite for removing the a priori exclusion of this category of information from evidentiary use;
- be based on the general principles of evidence in criminal proceedings;
- be based on confirmation that the competence to interpret the law relates only and exclusively to the judge who decides in a specific case;
- remove the deficiencies alleged in the Ruling of the Constitutional Court I ÚS 3038/07 and define situations of possible eligibility; and
- correspond to the applicable case law of the Court.

[69] Recently, the topic has become more urgent and the proposal for a legislative solution by way of an amendment to the Code of Criminal Procedure has returned to the spotlight. A very animated reaction was provoked by a particular case of suspected criminal espionage in which the perpetrator would apparently avoid punishment, among other reasons, because under the current state of the law, intelligence information cannot be used as evidence in court. On the initiative of the Ministry of the Interior, in cooperation with the Ministry of Justice, work has resumed on an updated legislative proposal aimed at enabling the evidentiary use of intelligence information in the most serious cases. Cf, e.g., *Ruský „krtek" z ministerstva zahraničí zřejmě unikne trestu, Vysvětlujeme proč.* DeníkN, 16 September 2022, https://denikn.cz/963025/rusky-krtek-z-ministerstva-zahranici-zrejme-unikne-bez-trestu-vysvetlujeme-proc/. Komentář: *Kauza „Krtek" je test autority státu. A špion se směje.* Dnes, 20 September 2022. https://www.idnes.cz/zpravy/domaci/kauza-krtek-autorita-stat-spion-rusko-rozvedka.A220919_152529_domaci_lis. [online, cit. 2022-10-29]; furher, cf., e.g., *Špioni mají přijít o beztrestnost. Jakub Michálek navrhuje využít důkazy tajných služeb o nejhorších zločinech u soudu.* https://www.pirati.cz/tiskove-zpravy/dukazy-tajnych-sluzeb-maji-byt-pouzitelne-u-soudu.html.

This would create two possible ways of providing information by intelligence services – the current procedure under Section 8(3) of the Act would be maintained, by which information with the quality and nature of operational information would be provided by intelligence services in the existing way, and newly, according to the wording of the proposed paragraph 4 of the Act, with the quality and nature of evidence.

There are several aspects that may serve as arguments for a positive answer in favour of the evidentiary admissibility of the recording of the intelligence interception in criminal proceedings. These include, in particular, the actual development and nature of committing serious crime, the definition of the mandate of the intelligence services as a source of information in the ongoing management of the security situation in the country, especially in such sensitive areas as terrorism and espionage, the level of protection of the rights and freedoms of individuals provided by the legal regulation of the conditions for the use of intelligence technology, the development of the decision-making practice of the Constitutional Court of the Czech Republic and the Court, the comparison with the solutions of this issue abroad, but also the state of knowledge achieved in the doctrinal field. By evaluating the summary of the above-mentioned aspects, a positive answer to the question of the prospective use of intelligence interceptions as evidence in criminal proceedings seems possible and desirable.

In the event that the considered change in the legislation is not adopted and the *status quo* is maintained, the legitimate potential to prosecute, in individual but extremely serious and harmful cases, the perpetrators of particularly serious crimes of a terrorist nature and others associated with activities contrary to the interests of the Czech Republic and committed for the benefit of a foreign power would remain unfulfilled. These are cases that, by their importance and nature, can significantly affect the authority of the state and its ability to ensure criminal justice.

List of references used

Commentaries

POKORNÝ, Ladislav; CHROBÁK, Jiří; FLIEGEL, Martin. *Zákon o zpravodajských službách ČR, Zákon o Bezpečnostní informační službě, Zákon o Vojenském zpravodajství. Komentář.* Praha: Wolters Kluwer ČR. 2018. ISBN 978-80-7552-378-5.

Textbooks, monographs

ČENTÉŠ, J. *Spravodajské odpočúvanie jako dokaz v trestnom konaní*. In: KALVODOVÁ, Věra; HRUŠÁKOVÁ, Milana et al. *Dokazování v trestním řízení – právní, kriminologické a kriminalistické aspekty.* 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015. 503 pages. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia; vol. 539, pp. 259-270. ISBN 978-80-210-8072-0.

KLÍMA, K. Ústavněprávní základy práva na spravedlivý (trestní) proces. In: JELÍNEK, Jiří. Dokazování v trestním řízení v kontextu práva na spravedlivý proces. Praha: Leges, 2018. 536 p.

NETT, Alexander*. Plody z otráveného stromu*. Brno: Masarykova univerzita, 1997.

PIKNA, Bohumil. *Mezinárodní terorismus a bezpečnost Evropské unie (právní náhled).* Praha: Linde, 2006, p. 71.

POKORNÝ, Ladislav. Instituty kriminálního zpravodajství v judikatuře ESLP. (Ch. 4, pp. 84-100). In*:* MICHÁLEK, Luděk a kol. *Kriminální zpravodajství jako nástroj kontroly trestné činnosti a zajišťování vnitřní bezpečnosti*. Praha: Policejní akademie ČR, 2020. 208 p. ISBN 978-80-7251-506-6.

POLČÁK, Radim. Důkaz a informace. In: POLČÁK, Radim; PÚRY, František; HARAŠTA Jakub et al. *Elektronické důkazy v trestním řízení.* 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015. 253. *Spisy Právnické fakulty Masarykovy univerzity.* Řada teoretická, Edice Scientia no. 542. pp. 35-37. ISBN 978-80-210-8073-7.

PROVAZNÍK, Jan. Použitelnost důkazu získaného zpravodajskými službami v trestním řízení. In: MICHÁLEK, Luděk a kol. *Kriminální zpravodajství jako nástroj kontroly trestné činnosti a zajišťování vnitřní bezpečnosti.* kap. 2, pp. 57-70. Praha: Policejní akademie ČR, 2020. 208 p. ISBN 978-80-7251-506-6

PÚRY, František. *Dokazování v trestním řízení.* In: POLČÁK, Radim; PÚRY, František; HARAŠTA, Jakub a kol. *Elektronické důkazy v trestním řízení*. 1st ed. Brno: Masarykova univerzita, Právnická fakulta, 2015. ISBN 978-80-210-8073-7.

REPÍK, B. Lidská práva a závažné formy kriminality. *Trestněprávní revue*. Vol. 2006, no. 10, pp. 285.

TLAPÁK NAVRÁTILOVÁ, J. *Doktrína plodů z otráveného stromu v kontextu nezákonných odposlechů*. In: JELÍNEK, Jiří. *Dokazování v trestním řízení v kontextu práva na spravedlivý proces*. Praha: Leges, 2018, p. 226. 536 p.

TOMAN, P. Zákonnost opatřování důkazů a její proměny v čase. In: *Trestní právo a právní stát.* Plzeň: Aleš Čeněk, 2019, p. 142. 287 pages. ISBN 978-80-7380-763-4.

VAŠKO, Adirán. *Spravodajské informácie v trestnom konaní.* Praha: Leges, 2021. 152 p. ISBN 978-80-7502-552-4.

VAŠKO, Adrián. *Klasifikace zpravodajských informací ve vztahu k trestnímu řízení*. In: MICHÁLEK, Luděk; POKORNÝ, Ladislav; STIERANKA, Jozef; MARKO, Michal; VAŠKO, Adrián. *Zpravodajské služby a zpravodajská činnost*. Praha: Wolters Kluwer ČR, 2021.

Expert papers

DUCHEK, Jan. Zpravodajské služby při tvorbě a realizaci bezpečnostní politiky. *Vojenské rozhledy.* 2005, no. 1.

FRYŠTÁK, Marek a Michal JÍLOVEC. Zákonnost důkazů v trestním řízení a její posuzování právní praxí. *Časopis pro právní vědu a praxi.* roč. 2014, no. 1. https://journals.muni.cz/cpvp/article/view/5612/4708

HERCZEG, Jiří. Zásada „nemo tenetur" a práva obviněného v trestním řízení. *Bulletin advokacie*. 2010, nos. 1-2.

MUSIL, Jan. Úloha trestní politiky při reformě trestního práva. *Trestní právo.* Vol. 1998, no. 1.

MUSIL, Jan. Několik otazníků nad judikaturou ústavního soudu ČR v době postmoderny (na příkladu prohlídky jiných prostor a pozemků). *Kriminalistika.* 2011, 44(1),

MUSIL, Jan. Několik otazníků nad judikaturou ústavního soudu ČR v době postmoderny (na příkladu prohlídky jiných prostor a pozemků). *Kriminalistika.* 2011, 44(1).

Stanovisko ČAK k novele umožňující použití zpravodajských informací jako důkazu. *Bulletin advokacie.* 2020, nos. 1-2, p. 11 et seq. https://www.ilaw.cas.cz/casopisy-a-knihy/casopisy/casopis-pravnik/archiv/2022/2022-3.html?a=3656

POKORNÝ, Ladislav. Limity důkazního použití zpravodajských informací. *Časopis pro právní vědu a praxi*. Vol. 29, 2021, vol. 4. https://journals.muni.cz/cpvp/article/view/15188/14672

SYLLOVÁ, Jindřiška; ZACHOVÁ, Magdaléna. *Důkazní použití informací získaných zpravodajskými službami.* Chamber of Deputies of the Parliament of the Czech Republic. The Parliamentary Institute. Comparative study No. PI 3.271. April 2023. Available from: https://www.psp.cz/sqw/text/orig2.sqw?idd=228802

Case law

Ruling of the Constitutional Court of the Czech Republic of 29 February 2008, file no. I ÚS 3038/2007.

Ruling of the ÚS ČR of 14 May 2019, file no. Pl. ÚS 45/17.

Judgment of NS of 20 July 2016, file no. *5 T 29/2016.*

Resolution of NS of 20 November 2013, file no. 5 Tdo 1010/2013, published in Collection of Court Judgments and Opinions under no. Rt 34/2014.

Judgment of NS of 20 July 2016, file no. 5 Tz 29/2016, published in Collection of Court Judgments and Opinions under no. Rt 50/2016.

Klass and Others v. Germany (no. 5029/71, judgment of 6 September 1978).

Amman v. Switzerland (no. 27798/95, judgment of the Grand Chamber of 16 February 2000).

Rotaru v. Romania (no. 28341/95, judgment of 4 May 2000).

Khan v. the United Kingdom, no. 35394/97, judgment of 12 May 2000).

P. G. and J. H. v. the United Kingdom (no. 44787/98, judgment of 25. September 2001).

Weber and Saravia v. Germany (no. 54934/00, judgment of 29 June 2006).

Bykov v. Russia (no. 4378/02, judgment of 10 March 2009*).*

*Uzun v. Germany (*no. 35623/05, judgment of 2 September 2010).

R. Zakharov v. Russia (no. 47143/06, judgment of the Grand Chamber of 4 December 2015).

*Szabó and Vissy v. Hungary (*no. 37138/14, judgment of 12 January 2016); etc.

Internet sources

“National Security Audit” https://www.vlada.cz/cz/media-centrum/aktualne/audit-narodni-bezpecnosti-151410/

Draft Act amending Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended, and some other acts. Available from: https://apps.odok.cz/veklep-detail?pid=KORNBB6HZA5Q

Draft Act amending Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended, and some other acts. Available from: https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=642&CT1=0

Špioni mají přijít o beztrestnost. Jakub Michálek navrhuje využít důkazy tajných služeb o nejhorších zločinech u soudu. https://www.pirati.cz/tiskove-zpravy/dukazy-tajnych-sluzeb-maji-byt-pouzitelne-u-soudu.html [online, cit. 2022-10-29].

Komentář: *Kauza „Krtek" je test autority státu. A špion se směje.* Dnes, 20 September 2022. https://www.idnes.cz/zpravy/domaci/kauza-krtek-autorita-stat-spion-rusko-rozvedka.A220919_152529_domaci_lis [online, cit. 2022-10-29].

Ruský „krtek" z ministerstva zahraničí zřejmě unikne trestu, Vysvětlujeme proč. DeníkN, 16 September 2022. https://denikn.cz/963025/rusky-krtek-z-ministerstva-zahranici-zrejme-unikne-bez-trestu-vysvetlujeme-proc/ [online, cit. 2022-10-29].

VUČKA, Jan. Použitelnost důkazů opatřených zpravodajskou službou v trestním řízení. *epravo.cz* 16 July 2020. Available from: https://www.epravo.cz/top/clanky/pouzitelnost-dukazu-opatrenych-zpravodajskou-sluzbou-v-trestnim-rizeni-111466.html

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