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## An agent in the Slovak criminal law

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

## An agent in the Slovak criminal law.

### **Abstract**

*We encounter different terms to label an agent in literature. Even the national legislation does not use a single term. Most often we encounter such terms as „covert investigator”, „secret police”, „undercover cop” or „secret agent”. Not only there is not a single term to refer to this in practice, but vast majority of states differently regulate the specific conditions of usage. This results in different situations and problems in the area of organized crime, which also determines the different police and judicial practice of this institution. For these reasons, we discuss the problem in different arrangements to solve this problem.*<sup>1</sup>

**Keywords:** agent, agent provocateur, agent, undercover, agent without legend.

### **Introduction**

Effective control of crime and in particular its most serious control by using very sophisticated organized forms is a difficult task with which currently copes every state. Each country responds to the solving of problems associated with crime in a different way, which results from the specific conditions of life of the society and the legal tradition of the country. Every good and proven solution is very often transferred to other countries. In this way crime control and exercising of new rights and resources takes its beginning. One of our still relatively new institutions uses to control crime a criminal process

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<sup>1</sup> VIKTORYOVÁ, J. - Blatnický, J.: Methods of inquiry - the assessment of the current situation and possibilities for their further development. Proceedings of the professional work of professional appreciation course for investigators PZ held on 20 4th - 24 4th 2009th Bratislava, Police Academy, 2009, 133 p., ISBN 978-80-8054-471-3.

of an agent, which has become a modern and highly effective tool in the fight against corruption. Application of this institution requires high professional erudition of persons involved in the implementation of the institution, which is reflected in comprehensive, focused and purposeful activities aimed to prepare to conduct actual deployment of an agent and the time after his action is terminated.

### **The agent in the investigation of corruption offenses.**

An agent was first introduced or used in the Slovak Republic or the former Czechoslovakia. The origins of its use in the field of crime can be seen especially in the United States. With the exception of the U.S., mainly in European countries, we can talk about a relatively new criminal procedural institution, under our conditions and means with operative-investigative activity that is significantly involved in identifying and clarifying the most serious forms of crime and identifying the perpetrators, especially in cases where the use of other means, does not lead to the desired result. Introducing an agent institution in our legal system was associated with an extensive discussion on the necessity, eligibility and last but not the least, its constitutionality and legality. The huge boom in crime in the context of social change after 1989, however, brought the legislator to consider the desirability of this institution. Law no. 247/1994 Coll, which amended the Criminal Procedure Act (Act no. 141/1961 Coll.) with effect from 1 January 1994, inter alia, for the first time in history introduced new Slovak law concerning an agent. The institution has undergone several changes and the adoption of the new Criminal Procedure Code no. 301/2005 was modified particularly in § 10 paragraph, 19 and 117. The legal conditions for the use of an agent as a means of operative-investigative activities are governed by § 117th.

These legal conditions are:

- the existence of an exhaustive listing of the crime - which includes corruption,
- the detection being substantially impeded, causing identification and re-

buking of the perpetrator of the offenses differently (evidence)

- the existence of suspicion on the basis of experience gained in the enforcement of the commission of a crime offenders in the past or in the future<sup>2</sup>.

Using an agent is only possible on the basis of an order issued by the President of the Senate (in court), or an investigating judge (in the procedure before the prosecution or pre-trial). Issuing an order to use the agent may an exceptionally good prosecutor (in progress prior to prosecution or pre-trial) under the following conditions:

- it is an urgent matter,
  - the use of an agent is not associated with an entry into a dwelling of others
- an agent under § 117, paragraph is not to be used. Next, the validity of this order of the prosecutor is limited to 72 hours after its release, and in this time it must be confirmed by a judge for preliminary proceedings, otherwise it expires. The provisions of § 117, paragraph 2 constitute a modified range of the procedure of an agent. In general it can be stated that the conduct of the agent has to be generally consistent with the purposes of the Act as expressed in § 1 paragraph 1 and should be proportional to the unlawfulness of the offender. An agent must proactively induce to commit an act. This arrangement is modified in the case of corruption, when there are admitted some forms of initiative proceedings under the following conditions:

- suspected acts of corruption,
- suspected is a foreign public official or a public figure,
- expected crime suspects are justifiably expected without abetting of crimes based on the findings. In legal terms this implies some form of influence on the offender in the case of a plan in which a legal character and corruption does not exclude direct involvement in the implementation of the agent when a perpetrator intends to commit an offense.

An agent acting under covert or without a legend. Severity of the institution of an agent is adapted to the rules of the hearing options. The pretrial hearing is entitled to make an agent covert by the prosecutor while using

<sup>2</sup>2IVOR, J. et al. Criminal procedural law. Second, by a revised edition. Bratislava: IURA EDI-TION, 2010, p. 407 to 410, ISBN 978-80-8078-309-9.

technical equipment for audio and video so that his identity will not be revealed. Before the court it is essential to question an agent by the presiding judge, by using technical equipment for the transmission of video and audio, with a change in appearance and voice of an agent, with the exclusion of the accused, the trustees and the public from the courtroom. Code of Criminal Procedure allows the court to undertake such proceedings when questioning witnesses, being the president of the Police Force, an authorized officer of the Police Force, and an agent presenting obtained facts. The Criminal Procedure Code provides that if an agent is a person other than a member of the Police or a police officer of another country and agrees that his identity can be revealed, there were used for further proceedings provisions of the Criminal Procedure Code of the witness.

An agent may perform his tasks in other countries. This may be the action of the proceedings in another state or in the Slovak Republic. Prerequisite for this process is the approval authority of the State in whose territory the act and decision of the President of the Police (unless otherwise stipulated by an international treaty) will take place. Factors relating to the crime unrelated to the case in which the agent is used, may be used in other proceedings as evidence only if they relate to any of the offenses listed exhaustively in § 117 paragraph.

The literature distinguishes between „agent-provocateur” and „agent-controller”. An agent controller and his application in practice in the investigation to prove the corruption offenses causes not more - not fewer problems. Possibilities and conditions of the use of a secret agent were dealt with on the XVI. International Congress of Penal Law, which in conjunction with the possibilities of using undercover institution and other such methods. Proactive investigations formulate basic requirements that must be met in each case. These requirements are translated into several basic principles for which the European Court of Human Rights declared in case law with more demand on strict and absolute compliance.

## **The principles:**

- a) the legality of using an agent - the agent rules of institution of a controller is included in § 117 Tr. with the exception of those provisions relating to the agent provocateur, the specific principle of legality is covered through the above sections of the Act. They are followed by the law with the conditions and limits of an agent institution. Using an agent (controller) can be regarded as legitimate, if he is in a particular case with the conditions met, the fulfillment of which is in accordance with the current rules of criminal procedure binding the possibility of his use,
- b) the agent using a subsidiarity - is expressed in § 117, paragraph. 1, second sentence Tr. Regulations, in which it is stipulated that the use of the agent is only possible in the case where the detection, investigation and convictions for crimes are otherwise substantially impeded,
- c) proportionality in the use of agent - again, this institution may only be used in detecting, identifying and convicting the perpetrators of the most serious crimes, which include corruption offenses
- d) judicial review - is contained in several provisions of § 117 Tr. Particularly in paragraph. 5 to 7, namely the definition of the range of entities that are authorized to issue an application of an agent (controller), the conditions which must be met in addition to the general requirements including the design and also the command to use an agent, time frame the agent uses and also the range of entities being entitled to decide on the extension of already issued order to use an agent.

Legislation of an agent controller meets the requirements set for its use internationally.

In recent years, often occurring in the theory and practice is an opinion that effective in the fight against corruption would be the exploitation of an agent - provocateur. Already in previous literature, some authors analyze questions of criminal liability of an agent - provocateur.

An agent - provocateur was criminally liable under the Criminal Code for crimes, offenses and misdemeanors no. 117 of 27 May 1852, where the

provisions of § 9 stated: someone who calls for some crime, encourages, challenges, commits, if it was not the result of an action, not consummated seduction of this crime and may be sentenced to a penalty which should be saved as an attempt of crime<sup>3</sup>.

Institution of the use of an agent must be associated only with limited rights that are necessary for the purpose of detecting and proving a particular crime. It is also necessary to respect all the basic principles of criminal proceedings, particularly the principle of proportionality and restraint. Due to the nature and character of the institution of an agent it is possible to obtain information relevant to criminal proceedings as well as the people who take part in it.

An agent operates in the criminal environment in which he obtains information relevant to criminal proceedings. Thus, the information may not always give direct evidence on the importance of a particular matter to which the agent relates, but can focus on fact-finding in the right direction of the police procedures and the action by law enforcement agencies. Slovak criminal procedural treatment of the institution, namely § 117 TP distinguishes agent controller (§ 117 paragraph. 1 TP) and agent provocateur (§ 117 paragraph. 2 TP). Issues, opportunities and contexts of use of a secret agent institution was dealt by the XVI. International Congress of Penal Law. In its conclusions, it was said that the use of agents and resources similar in proactive investigation is possible, but must be made subject to a number of principles. In this context, it was expressed as:

- a.) the principle of legality (legality) of the use of the agent,
- b.) the principle of subsidiarity,
- c.) the principle of proportionality,
- d.) the principle of judicial review.

Strict and consistent application of the principles are declared in several of the decisions and the ECHR. Principle of legality is filled by establishing § 117 TA, which governs the agent and the conditions of his use. The principle

<sup>3</sup> Repík, B.: The European Convention on Human Rights and Criminal Law. I. issue. London: ORAC, 2002, p. 199 et seq.

of subsidiarity is directly expressed in § 117, paragraph. 1 TP, which states that the use of this institution is only possible in the detection, investigation and convictions in a specified range of offenses otherwise much more difficult to detect. Thus, the primary purpose of these proceedings is to use other law enforcement agents. Only in the event that their use would be to detect, identify and convict in substantially more difficult crimes, appropriate use of the institution of an agent is plausible. This provision is also expressed in the principle of proportionality of the agent institution, since its use is possible only in the most serious forms of crime. The agent can be used only when it comes to detecting, identifying and convictions of crimes, corruption offenses, the offense of money laundering and abuse of office. The use of this institution is only possible if the already acquired knowledge gives justified suspicion that one has committed or has yet to commit any of the offenses of the specified range. The question of conflict with fundamental human rights is dealt with primarily by the general basic principles of criminal proceedings. This is particularly the principle of proportionality and restraint in which the competent authorities shall proceed accordingly with the fundamental human rights and freedom of people with whom they come into contact, interfering only to the extent that is necessary to achieve the purpose of the prosecution and the criminal proceedings. Always and in all circumstances authorities are obliged to do so in order to preserve human honor and dignity with respect and in accordance to all basic human rights. The guarantee of the protection of fundamental human rights is made a requirement for strict compliance with the conditions of the use of this institution and the group of entities that may issue an order to use it. Last of the expressed principles, the principle of judicial review, is expressed in § 117, paragraph. 5 to 7 TP . Those are:

- reviewing of the bodies authorized to issue an order to use an agent,
- b.) circuit design of the requirements for an order,
- c.) time horizon binding the use of the agent,
- d.) range of bodies authorized to decide on the extension of the originally issued order to use the agent, if necessary, as well as the length of the extension,



e.) particulars of the order itself<sup>4</sup>.

Activity of the agent (controller) must also meet several other requirements. The first is to comply with TP, which is the proper detection of offenses and their perpetrators of law in such a way as to simultaneously respect human rights and fundamental freedoms (§ 1 TP). The activity of an agent also must be commensurable with the seriousness of those crimes, leading to detection, investigation and convictions which the agent uncovers. At the same time, however, the agent (controller) may induce the initiative to commit the offense. For the purpose of entering into a particular criminal environment and performance of his functions, he has permanent or temporary cover by provided information about his identity, marital status, education, employment and so on (the legend), under which he acts and which serves to protect him. Legislation of an agent - provocateur is contained in § 117, paragraph. 2 TP. The basis of this legislation is in relation to a particular range of criminal offenses and the specific range of people possible of committing crime. According to our criminal process modifications and proactive solicitation an offense might be committed under the condition that the facts indicate that the offender undertook offense without the use of an agent. The scope of these offenses covered by the suspicion of a crime may include all corruption offenses, as provided in III. work VIII. Head of Special TZ. The group of persons in respect of whom the benefit from this institution takes place is composed of public officials and foreign public officials. Range of offenses and the entities to which such provocation may be implied, is significantly reduced. The use of the institution of an agent - provocateur is according to Slovak legislation possible. Its use is ex lege bound to meet three cumulative conditions, in which we include suspicion of corrupt offenses relating to the domestic or foreign public officials with the previously established facts which must show that corrupt crime would be committed, even if the order to use the agent was released.

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<sup>4</sup> David, V., Nett, A.: Corruption in international law, European and Czech. London: C.H.BECK, 2007, p. 294

## **Conclusion**

The issues of police provocations are generally a very delicate problem. Police provocation is usually connected with secret police procedure, which results in an action (act) committed by a person who has become the subject of a subsequent criminal prosecution or to be the subject of the prosecution to be undertaken. „Police provocation in the case thus occurs when the Police knows that a particular person would, under certain circumstances, commit a crime, and for this purpose the terms and conditions are established for the commission of a third party (the agent). This work is a thorough documentation of the course, since information thus obtained is in the nature of criminal proceedings evidence. Of course, in this case it refers to subsequent legislation on the range of bodies that decide on the issuance of an order to use the institution of an agent, on the substrate of which a command is issued for the use of an agent, the time flexibility of the use, rules for the extension of the order to use the agent and requirements of this order (§ 117 paragraph. 5-7 TP).

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