

# Fighting Against Organized Crime With the Use of Agent Provocateur. The Experience of Slovak Republic. Outline of Issues

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**Abstract.** In subject literature devoted to police formations in various countries, we can find a lot of terms describing essentially the same institution concerning the police officer's secret actions — "undercover", the so called "police agent". In the legal and penal order of many countries the terminology concerning the police agent's institution has not been standardized until now, no single term covering this issue has been elaborated so far. The most frequent terms that may be encountered are: "secret investigative agent", "secret police officer", "undercover agent", "covert" or "secret agent". Not only are we dealing with a situation in which in practice there is no one international and universal term describing this issue, but also in majority of European countries there are various determinants and criteria enabling the practical use of this "tool, designated for the fight against criminality. The factors that affect it include, for example: the implications provided to law enforcement authorities by domestic and international activities of organized crimes which, in turn, forces us to identify and define emerging threats and to modify and adjust practical actions concerning the police, prosecutor's office and courts in their fight with this specific kind of criminal activity. For this reason, we may be able to find various doctrines concerning the procedure of using the institution of the police agent' in the fight against criminality all over the world. The article has been prepared as part of the research project called "Understand the Dimensions of Organized Crime and Terrorist Networks for Developing Effective and Efficient Security Solutions for First-line-practitioners and Professionals" (Project: TAKEDOWN, H2020-FC2-2015, No.: 700688).

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## Introduction

The successful fight against criminality and, above all, fighting against its most dangerous forms, such as organized crime, is a very difficult task which all contemporary countries face.

Each country has its own character conditioning individual approach to the issue of criminality which results from, inter alia, social aspects of this country, and from the tradition concerning the functioning of its legal and penal system.

As indicated by the experiences based on international cooperation, tried-and-tested algorithms of fighting against criminality in a specific country are often implemented to a doctrine for the conduct in other countries.

That causes the creation of new mechanisms used in the fight against criminality, and the entities designated to it receive the new instruments and funds in order to perform their assigned tasks.

One of these instruments, which is still considered innovative in Slovakian doctrine, concerning fighting against criminality, is the introduction of the institution of the police agent to the legal and penal system, that has become a very effective tool in fighting against corruption.

The use of the institution of the police agent requires employing the experts with a high level of general knowledge and impressive professional preparation, who know the mechanisms of a high-crime area thoroughly, including, above all, the ones of a corrupt nature. Such a professional approach to the performance of the assigned tasks manifests itself in, *inter alia*, congeneric, precisely directed and, very importantly — law-abiding actions that are to disclose the corruption-related criminal mechanisms.

The performance of tasks of the abovementioned nature requires perfect conduct during all phases of this specific police operation, starting from individual preparation of the police agent, through their appropriate placing in a criminal mechanism, providing them with direct personal-material-technical support, ending with eliminating the criminal corrupting mechanism and their safe exit from the area where the actions were taken.

The Article has been prepared as part of the research project called “Understand the Dimensions of Organized Crime and Terrorist Networks for Developing Effective and Efficient Security Solutions for First-line-practitioners and Professionals (Project: TAKEDOWN, H2020-FCT-2015, No.: 700688)”.

## **The use of the institution of the police agent in fighting against corruption offences**

The first cases of using the institution of the police agent in fighting against corruption offences were reported in the United States.

Apart from the United States, especially in Europe the police agent is a relatively new instrument in the arsenal of measures of legal and penal system of various countries.

In our European conditions, different forms of operating or investigative actions have played and are still playing a huge role.

The police agent’s institution is a very effective tool in fighting against the worst forms of organized crime. It allows to get to the roots of the existing criminal conspiracies more effectively than other kind of operation activity available in the police arsenal; it helps with identifying criminal mechanisms, discloses criminal involvements and networks, and finally it allows to identify and adjudge the criminals. The institution is particularly useful in a situation where other generally applied methods and forms of the police work fail to bring the desired effects.

Introduction of the police agent’s institution into Slovak Republic’s legal order was preceded by the discussion of, among others: the law enforcement authorities, judicial system representatives and social side in the area of the country’s real needs

for this kind of solution and its compliance with the existing law, constitutionality and legality. The increasing level of criminality resulting from structural transformation and social changes after 1989 reassured the lawmakers in the necessity of implementing the police agent's institution in the country's legal and penal systems.

According to Act 247 from 1994, adopted by Slovak Republic's Parliament, which amended the applicable Code of Penal Procedure (Act 141 of Czechoslovak Socialist Republic from 1961, as amended), of 1 January 1994, the police agent's institution was incorporated to the legal order. The incorporated institution of the police agent went through some changes in several years' time and its final form was included in the amendment of the Code of Penal Procedure (Act No. 301/2005, amending the Act of the Code of Penal Procedure). The change concerned, inter alia, the Art.10 of the Act, which defined the term of the police agent<sup>1</sup>.

The conditions concerning the use of the police agent in an investigative and operational action shall be regulated by Art.117 of the Code of Penal Procedure. These basic, legislative determinants include:

- occurrence of criminal offences prohibited by law, which include, inter alia, corruption;
- impossible, or significantly impeded, disclosure of evidence of criminal activity using other widely used methods of investigative and operational activity;
- occurrence of a reasonable suspicion, on the basis of information gathered during the investigative proceedings, of committing a corruption offence in the past or of planning one.

The use of the police agent is possible only with the approval of the presiding judge (if the proceedings are on the juridical stage and the participation of the police agent at this stage of the proceedings is essential) or the approval of the presiding judge of this particular investigation who cooperates with the prosecutor being in charge of the case, on the stage of collecting the evidence in the proceedings and of preparation of the material essential to press the charges, or after implementing preventing measures, for example pre-trial detention, towards the disclosed perpetrators.

The police agent may also be used to activities in exceptional cases with the consent of the prosecutor in charge of this case, provided that the conditions below are fulfilled:

- The present operating situation consents to the use of the police agent to be granted as a matter of urgency (without undue delay);

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<sup>1</sup> The police agent is, in accordance with Art.10 of the Code of Penal Procedure, the police officer of Slovak Republic's Police Organization or the police officer of other country who, on the basis of the orders from judicial authorities conducting criminal proceedings or of any other authorities which lead to detecting the perpetrators of offences of corrupt nature including, inter alia, crimes concerning abuse of power by civil servants as well as laundering money from corruption and economic offences. In the performance of tasks aiming at disclosure, proving and conviction of the perpetrators of corruption offences, a person other than the police officer of Police Organization may also participate as the police agent with the consent of Minister of Interior of the Slovak Republic.

- The police agent shall not enter the private flats of individuals flats while performing their duties;
- Legal conditions other than mentioned in Art. 117 of the Code of Penal Procedure occur and need immediate use of the institution of the police agent.

The prosecutor's approval of the use of the police agent must be accepted within 72 hours after being granted by the judge presiding over this investigation because after this time it loses its legitimacy and all the evidence collected by the police agent in that time cannot be used in the case.

In Art. 171 of the Code of Penal Procedure the police agent's scope of responsibilities was indicated. It can be generally stated that the use of this instrument must comply with the aims included in Art. 1 item 1 of the Code of Penal Procedure and is supposed to be characterized by the proportionality of the functioning adequately to illegality of the perpetrator's activity. During their actions, the police agent cannot encourage to commit a criminal act or participate in an offence. This restriction may be modified, particularly in case of fighting against corruption offences. The police agent may take a particular initiative in this situation under the following conditions:

- A reasonable suspicion of preparing to commit a criminal act or if a corruption offence occurred;
- A public officer of the Slovak Republic or a civil servant of any other country is a suspect;
- The police agent has information stating that the preparation to commit a corruption offence is the suspect's own initiative and no third parties influenced this decision.

In accordance with legally existing sanctioned proceeding doctrine and upon the existence of the above-mentioned conditions, the police agent may influence the conduct of a perpetrator planning on committing an offence that removes the traces of a corruption offence. The range of empowerment given to the police agent in this way does not exclude their participation in the criminal mechanism, whose author is the main initiator of the offence<sup>2</sup>.

The police agent works under the adopted legend without one<sup>3</sup>. The institution of the police agent takes into account the possibility of its procedural use in ongoing investigations. If there is a necessity of the police agent's participation in procedural activities, including for example their participation in confrontation, on the basis of which preventive measures in a form of provisional detention of the suspects may be applied, the person authorized to carry out these activities is the prosecutor who is obliged to perform them with the use of technical measures designed to enable the identification of the agent's identity (including their physical appearance, voice).

During the proceedings on juridical stage only the preceding judge of the hearing is authorized to question the police agent, and only in exceptional situations

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<sup>2</sup> Ivor J, a kol., *Trestné právo procesné. Druhé, doplnené a prepracované vydanie*. Bratislava: IURA EDITION, 2010, pp. 407–410.

<sup>3</sup> The term "legend" shall be understood as false information including agent's data, namely its false identity, family situation, education and employment. The true identity of the police agent working under a legend is secret, and its real data are only known to forces authorized to making decisions about its use.

when it is not possible to verify the available information for purposes of court proceedings in any other way. Such a hearing takes place with the use of technical means that enable the identification of the police agent or in a situation in which the defendants, their attorneys and other people participating in the proceedings and those not having the access to state secrets have been removed from the courtroom for the duration of the police agent's hearing.

During the proceedings before the court, the Code of Penal Procedure allows to investigate the police agent who, with the agreement of the Head of Slovak Republic Police Force, may communicate the information, relevant to criminal activities, gained during the operating activities as the police officer's witness. What is more, the Code of Penal Procedure also allows, when the police agent's tasks were performed by a person who was not a police officer of the Slovak Republic Police Force or other country's police officer, the judicial hearing of this person as a witness, after receiving the questioned person's permission to reveal their identity. In this case, the questioned person's legal protection is guaranteed by the general provisions of the Code of Penal Procedure pursuant to the witnesses' rights and obligations.

The police agent may perform their assigned tasks also in the territory of another state. Such a situation takes place when the police activities are initiated and coordinated by other country's law enforcement authorities, international police organizations or when the Slovak police are its initiator and everything takes place within the frames of broadly understood international cooperation. The condition that enables the police agent's work in another country is the permission of the competent authority responsible for public safety and order, to perform the police operations. The above-mentioned permission must be documented by the decision made by the Head of the Police of the country on whose territory the activities, including the police agent's work are being fulfilled, unless ratified agreements and international agreements relevant to the area of fighting against criminality provide otherwise.

Evidence of other crimes obtained through the actions of the police agent unrelated to the initiated police operation in which the agent was involved, may be used in other proceedings as evidence only if they relate to crimes listed in Art.117 (1) of the Code of Criminal Procedure.

In Slovak specialist literature we can recognize two notions of the police agent i.e. "agent provocateur" and "agent controller"<sup>4</sup>. The institution of the police agent controller and their use in proceedings (investigations, inquiries) including, among others, procedural proceedings targeted at proving a corrupt offense, does not cause any major problems.

The possibilities and conditions of using the institution of the police agent were dealt with by the 16th International Congress of Penal Law, which demonstrated the enormous potential of this crime-fighting instrument and pointed to other available correlations such as the so-called proactive investigative work. During the Congress its participants also formulated (in the form of a recommendation) the indispensable and basic principles that must be fulfilled in case of making decision on inclusion of the police agent to the activities. These principles, as a result of legal intervention, have been implemented into the doctrine for the conduct which

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<sup>4</sup> Cimr V, K zákonnosti provokace trestného činu policajnými orgány. *Trestní právo*, 2001, č.2, p.12.

is accepted by the European Court of Human Rights. The Court issued human rights rulings in the European Convention on Human Rights and the additional protocols thereto, and repeatedly pointed to the need for strict and absolute observance of these principles. These principles should include:

- *the principle of legality of the use of the police agent institution* — the legal basis for the use of the police agent in the activities of the Slovak police is specified in Art. 117 of the Code of Criminal Procedure with the exception of the provisions relating to the agent provocateur. The detailed legal terms of use of this instrument are provided for in the various sub-paragraphs of the aforementioned. The paragraph also contains provisions on restrictions on the use of the police agent. The use of a police agent (agent controller) is lawful only if the conditions required by all of the abovementioned are met by the CCP;
- *principle of subsidiarity of use of the police agent institution* — this principle is specified in Art. 117 (1), sec. 2 of the CCP. The use of the police agent is only possible in the activities aimed at revealing the offence, detecting and prosecuting the perpetrator when other precautionary measures have not been used for this purpose and are known to cause no charges;
- *the principle of proportionality of the application of the police agent institution* — the use of the police agent is only possible in actions aimed at revealing the perpetrators of the most serious crimes including offences of a corrupt nature.;
- *the principle of judicial review* — that principle is provided for in Art. 117, in particular in Art.117 (5-7) of the CCP which presents entities entitled to authorize the use of the police agent (agent controller). This part of the article presents the detailed information in addition to formal requirements, which should be included in applications for the authorization to use an agent and determine the time it takes to perform an activity, as well as identify entities authorized to extend the duration of the activity.<sup>5</sup>

Slovak law standards concerning the use of the institution of the police agent meet the requirements accepted on the international arena. In recent years, it has often been argued among practitioners and theorists about crime, that the effective tool in combating corruption could be the use of the so-called agent provocateur. In the years preceding the introduction of the police agents into the arsenal of police measures, some authors of scientific papers devoted to the fight against crime analysed the possible criminal liability of the agent provocateur.

The first information about the criminal liability of the agent provocateur (in present-day Slovakia) was contained in the Criminal Law Act No.17 on Crimes, Offences and Misdemeanours of 27 May, 1852. In Art. 9 of this act the following was concluded: "Whoever persuades or coerces others to commit a crime is prepared to commit a criminal offence (even if the offence has not been punishable by criminal liability), and the court may impose sanctions on inciting or assisting within the limits of the threat envisaged for the offence". J. Kallab<sup>6</sup> points out to the controversial matter of the criminal liability of the agent provocateur for raising in another person an intention to commit an offence but the offence will

<sup>5</sup> Ivor J, *op. cit.*, pp. 407–408.

<sup>6</sup> Kallab J, *Trestní právo hmotné platné v zemi české a moravskoslezské*. Praha, Melantrich, 1935, p. 72.

not take place because it will be thwarted by, for example, the police previously informed about the plan by the agent. If the agent provocateur succeeds in preventing the offence, they should not bear criminal responsibility, although they incitement to commit an offence which eventually does not happen as the result of their activity.

A. Miříčka<sup>7</sup> states that the situation when the agent provocateur is considered to be the person assuming no penal liability for preparing or committing a criminal offence only because they informed the police about this fact is a very problematic issue. If the agent provocateur's intention was one of an offence, their activity should be interpreted as directly involved in the preparation to commit an offence for which they ought to be responsible. Another situation may occur in which the perpetrator intends to commit an offence before the "cooperation" with the agent provocateur. In such case, according to the author, the police agent should also bear criminal responsibility because they get information about planning the offence but for instance, do not prevent it. According to this author, incitement to commit an offence is strictly prohibited and should be — without any derogation — punishable.

According to the German Penal Code (1988), if a person is only in the planning phase and does not pursue any activity aimed at committing a criminal offence, criminal liability cannot be called a criminal offence (Art. 22 (2) of the Penal Code). The criminal liability appears when the initiator is already prepared to commit an offence. If an offence stops only in the planning phase and there is no attempt to commit it, the police agent provocateur, participating in this planning, does not incur any criminal liability in the light of the German law (Art. 22 (8) of the PC).

H.H Jeschek, who is considered to be one of the greatest contemporary experts on the issue of the police agent provocateur, presented in 1973 a scientific thesis which implied that, in order to speak of the criminal liability of an agent co-planning an offence, the absolute condition must be met that the potential perpetrator, as a result of incitement by the policeman, was determined to commit an offence from the very beginning of the planning stage. On the other hand, if, despite plans to commit an offence, the behaviour and activity of the potential perpetrator does not indicate readiness or willingness to execute plans of committing an offence, then the agent provocateur remains unpunished.

The decision of the Supreme Court of the Czech Republic provided for in the Resolution 18 of 2000 (a set of resolutions 18 / II-97/2000 CR) concerning the criminal liability of the police agent provocateur is also very interesting. The Supreme Court stated that it is unacceptable to violate Art. 39 of the Charter of Fundamental Rights and Freedoms (promulgated on 16 December 1992), which forms part of the Constitutional Order of the Czech Republic and Art. 7 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms through the participation of the State (in this case, the police officers) in the form of a crime scene (i.e., intention, preparation, attempt or execution). In other words, the situation when the state bodies are involved in any phase or activities aiming at committing an offence is unacceptable.

<sup>7</sup> Miříčka A, *Trestní právo hmotné — Část obecná i zvláštní*. Praha: Spolek československých právníků. Vyšehrad, 1934, p. 94.

Selected issues in the area of the police provocation at the stages of committing the offences are also considered by V. Cimr.<sup>8</sup> Using his own many years of experience as a lawyer, he gives an example of a policeman who was accused of abuse of power provided for in Art. 158 (1), sec. a and § 2 sec. and the acceptance of material benefits specified in Art. 160 (1,3) of the PC.

V. Cimr mentioned the example of a Czech police officer from the criminal division who for several months managed a form of operational work aimed at the disclosure of prohibited acts. As part of his duties, he met his informant who was a member of two groups of “entrepreneurs” suspected of committing economic offences. After a few months of performing the operations with his informant, the officer was removed from the case by the superiors, on the basis of an anonymous report. The police officer, who was transferred to other tasks, was not informed of the reasons for his removal. The authors of the anonymous report were, as it turned out later: a police informant and an entrepreneur committing economic offences with whom this informant was cooperating. In the anonymous report, the police were accused of improper conduct during contacts with “entrepreneurs” belonging to the group which was a competition for the group connected with the informant. It was suggested that the police officer accepted the financial benefits. The Inspectorate of the Ministry of Interior of the Slovak Republic (author’s note: hereinafter referred to as IMISR, equivalent to the Home Office of the Head Police Department). After a three-month break, two police officers met again. The policeman had already suspected that the offence was committed in conjunction with other criminals. During these meetings there was no mention of any bribe. After these meetings, the cooperation between the IMISR officers and the informant, who confirmed that the police accepted material benefits from him as well. After this acceptance, the police officer and the informant met (on the initiative of the informant) in person and talked on the phone a few times, which was recorded with the use of operational techniques (including telephone eavesdropping) without the court’s consent, required by applicable law. The officers of the IMISR prepared for an informant, who was managed by them as the agent provocateur, the envelope with a content of CZK 250,000 (about PLN 40,000). He was supposed to hand it over to the police officer during their next meeting. The amount of bribe paid by the IMISR officers was suggested by the agent provocateur. During dinner, the agent provocateur placed the envelope beside the police officer without saying a word, and the police officer silently put it down, without opening it. At that moment, IMISR officers intervened and detained the policeman without waiting for what he would do next with the envelope. According to V. Cimra, this was an obvious example of unlawful provocation. The Court of First Instance did not refer to the charge that the police provocation was unlawful and sentenced the policeman to four and a half years of imprisonment. After appealing, the Court of Second Instance did not address the issue of provocation by upholding the judgment. The revocation filed by the lawyers for the Supreme Court caused the sentence to be set aside and the police case remains unfinished. Judges of the Supreme Court ruled that the first and second instance judgments were issued in violation of the provisions of Chapter 5 of the Charter of Fundamental Rights

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<sup>8</sup> Cimr V, *op. cit.*, pp. 11–14.



and Freedoms (Right to Judicial Protection and Other Legal Protection). The ruling was based, among others, on the fact of the transfer of the amount of CZK 250,000 from the Police of the Czech Republic to the informant, agent provocateur, by the officers of the IMISR, and this amount was used in the provocation initiated primarily by the informant and directly addressed against the police officer, and the circumstances surrounding the case did not emerge undisputed that the accused was interested in participating in this criminal mechanism. What is more, the conduct of the IMISR officers, who transferred this amount of money to the agent provocateur, expecting him to hand over the money to the police, thus making it possible to obtain evidence enabling prosecution of the officer, was regarded as unconstitutional and having no legal basis. In its ruling, the Supreme Court also pointed out that the amount of money that was given to the policeman was set in a rather peculiar manner, as the IMISR officers had allocated it at the informant's discretion, and this was the key factor in determining the legal classification of the offence. The Supreme Court decided that the attitude of IMISR officers was illegal and unconstitutional and the evidence obtained was unlawful and inadmissible in criminal proceedings.

The institution of the agent provocateur was also included in the Slovak Penal Code in Art. 117 (2). The induction of another person to commit an offence in the form of police provocation is consistent with the applicable legal order provided that the following conditions are met:

- legitimate suspicion of corruption;
- any public official or a representative of state administration of another country is suspected;
- the circumstances indicate that the potential perpetrator wanted to commit the offence regardless of whether or not the consent to the introduction of the police agent's actions was issued.

Provisions of Art.30 (3) of the Penal Code describe the separate circumstances that exclude the criminal liability of the agent. The essence of these circumstances lies in the exclusion of the unlawfulness of the agent's actions, even though there is a situation in which their conduct has met the requirements of a bribery offence (Art. 332–335 of the Penal Code) or of an indirect bribery offence (Art.336 (2) of the Penal Code) and the agent was not forced by anyone, nor was there a situation where they would have to commit the offence for fear of their relatives' lives. The exclusion clause must meet two basic conditions:

- the agent must seek directly to disclose and identify the perpetrator of the bribery offence (Art. 332–335 of the CC) or an indirect bribery offence (Art. 336 (2) of the CC);
- the agent can only act on the basis of the provisions of the Code of Criminal Procedure, which means that the provocateur must, before commencing their activity, be legally established as the agent provocateur, based on Art. 10 (20,117) of the CCP.

If the provocateur decides to hand over the property to another person with the intention of disclosing the offence and notifying the law enforcement agency and has not been established before the act by an agent in accordance with the provisions of the Code of Criminal Procedure, their conduct will be subject to criminal liability as they will not comply with the provisions provided for in Art. 30 (3) of the CC.

## **Comparative analysis of the functioning of the police agent institution in selected countries**

In specialist literature, the police provocation is defined as a situation in which the police authorities have obtained reliable information about a person who is under certain circumstances to commit a particular offence and is seeking to disclose the offence through the use of legally available tools that have created opportunities for them. The intrinsic element of any police provocation is to document all phases of its course, especially using operational techniques to obtain unquestionable evidence that will then be used in criminal proceedings against the perpetrator.

In the criminal justice system of European countries and in the provisions of the European Court of Human Rights, the institution of the agent provocateur is in principle rejected. In the reality of the Slovak Republic, the institution of the agent provocateur is also used very rarely, although it is included in Art. 117 (2) of the Penal Code. The legal conditions governing the use of the police agent's institution are designed in such a way so that the conditions for a fair hearing (the right to a fair trial) can be fulfilled. It is regulated by Art. 6 item 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the jurisprudence of the European Court of Human Rights, it is not impossible to use the police agent institution, but such activities must be clearly defined, strictly protected and accompanied by specific criminal law guarantees, even in case of stopping drug trafficking.

The results of the analysis of functioning of the police agent institution in criminal systems of other countries indicate that this tool is applicable in particular in the scope of disclosing corrupting crimes and prosecuting the perpetrators. There are obviously some differences concerning the police agent, included for instance in the area of law or doctrine of conduct in individual countries, and these most frequently concern the scope of use of this tool, the procedure of agent authorization, the boundaries of allowability of using them and the circumstances excluding unlawful nature of undertaken actions. Legal grounds and possibility of applying the agent institution corresponds to the current needs of each society in the scope of obtaining possibly lowest level of corruption. It is worth to note that social needs in the scope of fighting corruption are not limited only to the area of an individual country and thus, to the internal penal system, but a supranational legal order, the perception of which was guaranteed by international agreements, also falls under the analysis and social pressure. For instance, in accordance with Art. 23 of the United Nations Convention against Corruption of 27 January 1999, the countries-signatories are obliged to accept such legislative solutions and doctrine proceedings, including introduction of special investigator techniques and detection tools, which will allow for optimization of the process of obtaining proofs in the scope of fighting this type of crime. European Council, under the auspices of which close to two hundred international agreements were concluded, concerning many significant threats in the scope of for instance human rights' protection, in the explanation of the above noted Act states that one may use, among others, the following special investigation techniques: secret agents, the use of eavesdropping devices, telephone tapping, internet networks monitoring and computer database monitoring. The position provided for in Art. 4 of the Convention on Laundering, Search, Seisure and Confiscation

of the Proceeds from Crime of 8 November 1990 was similar in tone, allowing for the use of techniques supporting the process of the identification of criminal mechanisms and facilitating the detection of illegal cash flows, whilst strengthening the proofs of the conducted proceedings at the same time. Taking into consideration the above presented positions or doctrines of proceedings, one may state that not the conditions or the moral side of using the agent institution for the fight against corruption-related offences constitute the problematic area of considerations, but rather the assessment of their actions, perceived, among others, through the prism of initiative and own activity. The way of perceiving this issue clearly divides the experts and supporters of various legal concepts concerning the agent institution..

Current system solutions in the presently binding order of the Slovak Republic and concerning the functioning of the institution of the police agent are rare not only in the context of the law in force in other European countries., but also on the world scale. Even the solutions accepted in the United States are considered as model ones, from experiences used by European countries upon creating their own institutions of the police agent are not entirely identical with the doctrine of proceeding binding in Slovakia in this regard. In Slovakia the legal provisions which define the possibility of using the institution of the police agent are listed in the legislation classified as the Act, whilst this issue in the legal order of the United States is regulated by the Legal Acts of lower rank, being the decree of the Minister of Justice. American judicature, in which the problem of the police agent was noted, is very extensive, but even though it constitutes an official binding interpretation of law, the significantly arguing tone of this judicature enables drawing clear and important conclusions from the point of view of legal solutions binding in other countries. There are certain differences concerning the police agent between the USA and the countries of the old continent, and they seem visible at the level of applying solutions for the binding doctrine of conduct. The use of this instrument in American reality is not only related to combating corruption, but is equally effectively applied for fighting other types of offences as well.

The results of comparative analysis indicate that from the global point of view the issues of legislative approach to the institution of the police agent are currently moving in three directions. The first direction is the classic approach to the institution of the police agent, expressing full consent to the application of this instrument in fighting crime, as it takes place in Slovakia, Russia and the United States.

The second stream is represented by the countries which perceive the use of the police agent as allowable in specific cases and in the limited scope. This group includes Great Britain and Finland.

The last group, where the police provocation is not allowed, includes Canada, Portugal, Spain and Austria.

The most often occurring similarities upon the use of the institution of the police agent in the countries which apply this tool in fighting crime include:

- Ban on the agent activity in the scope of instigating a crime;
- False identity of an agent, which constitutes a legal problem;
- Judicial authorities are informed of plans of using the agent prior to commencing actions by them or straight after initiating provocation,
- The police agent enters without any restrictions in the scope of accepted tactics actions targeted at fighting drug-related offence, whilst in the scope of fighting other types of offence, certain ramparts to their actions occur.

Furthermore, the principles which differentiate individual country doctrines of conduct while using the police agent include:

- Provisions concerning the police provocations both in legislature of the rank of an act, as well as legislation related for instance to decrees (the United States);
- Only the policemen or the court police officers may participate in the police provocations (Great Britain);
- Persons performing the tasks of the police agent bear diverse responsibility for potential breaches of legal order during actions, depending on the degree of offence (Germany);
- The degree of protection of witnesses participating in the police provocations is diverse (from basic legal protection covered for instance in the Code of Penal Procedure to protection envisaged for crown witnesses, incognito witnesses and persons threatened, performed by the police.

## The use of police agent as personal proof source

Present legislation of the Slovak Republic, concerning the institution of the police agent, according to the Act No. 301 of the Criminal Code of 2005 with subsequent amendments, allowing their hearing both at the stage of the prosecutor's proceeding as well as before the court (during *in rem* proceedings, as well as during *in personam* proceedings, and at the jurisdictional stage during the main court session). Regulations concerning the questioning of an agent and doctrine related to their participation in court actions are adequately changed so that during these actions their identity is not disclosed. This stems from the fact that the police agent was a direct crime witness or has reliable information of the committed offence and the perpetrator.

As previously indicated, the hearing of an agent is possible on two stages of criminal proceedings:

- In the frames of preparatory proceedings/ investigation (based on the provisions of Art. 120–140 of the CCP);
- And in exceptional situations during criminal proceedings (based on the provisions of Art. 261–267 of the CCP).

During preparatory proceedings the only party authorized to conduct the police agent's hearing is the prosecutor. The police officer, in accordance with Art. 10 (8) of the CCP is not entitled to perform court actions with participation of an agent as a witness. The chairman of the panel of judges of the court proceedings questions the agent. The prosecutor is obliged to conduct the court actions with participation of the agent so that their identity was not revealed. For this reason it is possible to use technical devices which enable the hearing of an agent to be remotely subject to modification of vision and sound<sup>9</sup>.

In exceptional situations it is allowed to question an agent in the court hearing. However, the Act does not precisely indicate at which stage of the criminal proceedings it is possible to launch such a hearing. In a situation when the police agent's testimony, used in the court proceedings as a court witness, is contradictory to the explanations of the accused or the testimony of other witnesses, the act

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<sup>9</sup> Ivor J. a kol., *op. cit.*, pp. 410, 478–479.

does not allow the possibility of conducting the court action of confrontation with the agent, even in the case when the existing discrepancies cannot be explained in an alternative manner. The confrontation is only possible when the agent has expressed consent for the disclosure of their identity<sup>10</sup>.

In relation to the performance of proceedings supervised by the prosecutor (investigation, inquiry) with the use of the agent's testimony as a proof, a certain conflict of interest occurs, which is expressed on one hand by a strive for a fully legal application of the principle guaranteeing the right to protection and the right to a fair trial and due process, while, on the other hand, for preserving an important social interest related to the principle of confidentiality-in this particular case the data of the person who acted as the police agent.

Provisions of the Criminal Procedure Code for Slovak Republic do not allow for disclosure of identity of the police agent even when their activity had finished and the information obtained by law enforcement and justice indicate that they are no longer under any threat whatsoever (Art. 117(10) of the CCP)<sup>11</sup>.

## Conclusion

The police agent acts on the fringes of the law, balancing between what is legally permitted and prohibited. Acting in this way they may easily exceed the allowable boundaries and fall into conviction that they are free to do whatever they wish to. Their actions must be thus restrained by certain principles which they themselves should abide by strictly. They must comply with the rule of legality, which means that their actions must be compliant with the provisions of the Code of Criminal Procedure and proportional in the scope of disclosure, detection and combating of offences and their perpetrators. Based on the facts specified in this elaboration, one may wish to note that the use of the agent provocateur in the entire criminal system is arguable. Agent-provocateur should be considered a person who on their own actively encourages or directs other persons to commit an offence, having a prior planned intention of bringing the perpetrators of these offences before the court.

The past practical experiences show that the institution of agent provocateur is not necessary to disclose, detect and fight corruption offences. Police ought to use in each case of disclosure of mechanism of corruption nature where transfer of pecuniary benefit was not yet passed on-upon prior promise of its acceptance, not by agent-provocateur by agent-controller.

(jm)

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<sup>10</sup> *Ibid.*, pp. 411, 628.

<sup>11</sup> Polák P, *Svedok v trestnom konaní*. Bratislava: EUROKÓDEX, s.r.o., 2011.

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**Streszczenie.** W literaturze przedmiotu poświęconej formacjom policyjnym w różnych krajach można znaleźć wiele terminów opisujących zasadniczo tę samą instytucję w odniesieniu do tajnych działań policjanta — „tajniak”, tak zwany „agent policji”. W porządku prawnym i karnym wielu krajów terminologia dotycząca instytucji agenta policji nie została do tej pory ujednoczona, jak dotąd nie opracowano żadnego terminu obejmującego tę kwestię. Najczęściej spotykanymi terminami są: „tajny agent śledczy”, „tajny policjant”, „tajny agent”, „agent działający pod przykrywką” lub „tajniak”. Nie tylko mamy do czynienia z sytuacją, w której w praktyce nie ma jednego międzynarodowego i uniwersalnego terminu opisującego pojęcie, ale także w większości krajów europejskich istnieją różne uwarunkowania i kryteria umożliwiające praktyczne wykorzystanie tego „narzędzia, przeznaczonego do walki z przestępczością”. Do czynników, które na to wpływają, należą na przykład konsekwencje dla organów ścigania związane z krajowymi i międzynarodowymi działaniami w zakresie przestępczości zorganizowanej, co z kolei zmusza nas do identyfikowania i definiowania pojawiających się zagrożeń oraz modyfikowania i dostosowywania praktycznych działań dotyczących policji, prokuratury i sądów w walce z tym specyficznym rodzajem działalności przestępczej. Z tego powodu możemy znaleźć różne doktryny dotyczące procedury korzystania z instytucji „agenta policji” w walce z przestępczością na całym świecie. Artykuł został przygotowany w ramach projektu badawczego „Zrozumienie wymiarów przestępczości zorganizowanej i sieci terrorystycznych w celu opracowania skutecznych rozwiązań w zakresie bezpieczeństwa dla praktyków i osób zawodowo zajmujących się tymi zjawiskami” (projekt: TAKEDOWN, H2020-FC2-2015, nr: 700688).

**Резюме.** В литературе на тему полицейских иностранных формирований много терминов, описывающих по существу один и тот же вид деятельности полицейского, связанный с оперативной работой — работа «сыщика под прикрытием», так называемого «полицейского-агента». В правовой и уголовной системах многих стран понятия, используемые для обозначения института полицейского-агента, до сих пор не согласованы и даже не определены крайние сроки решения данного вопроса. Самыми распространенными понятиями являются «секретный следственный агент», «тайный полицейский», «тайный агент», «агент под прикрытием» или «сыщик под прикрытием». На практике не только не существует единого международного и универсального понятия, но также в большинстве европейских стран разные условия и критерии, на основании которых можно использовать этот «инструмент в борьбе с преступностью». К факторам, влияющим на это, относятся, например, последствия для правоохранительных органов, связанные с их деятельностью на национальном и международном уровне в сфере борьбы с организованной преступностью, что в свою очередь заставляет определять возникающие угрозы, модифицировать и приспособить методы работы полиции, прокуратуры и судов в борьбе с данным отдельным видом преступной деятельности. В связи с этим, существуют разные подходы к процедуре использования института «полицейского-агента» в борьбе с преступностью во всем мире. Статья подготовлена в рамках исследовательского проекта «Понять масштаб организованной преступности и террористических сетей с целью разработки оптимальных и эффективных решений по обеспечению безопасности агентов под прикрытием и профессионалов». (Проект: TAKEDOWN, H20202020-FC2-2015, №: 700688).

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