
REGULATION OF AGENT AS A TOOL FOR COMBATING ORGANIZED CRIME¹

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Abstract. Security, living environment, or entrepreneurship ecosystem is determined by wide array of factor. We tackle organized crime issues, which can cause potential insolvency. In this article, the authors deal with a set of European Court of Human Rights decisions concerning the right to a fair trial and the use of an agent in criminal proceedings. From the investigated decisions, the authors conclude that the individual Slovak regulation, agent provocateur under § 117 par. 2 second sentence of the Criminal Procedure Code, a priori, is not inconsistent with decisions of the European Court of Human Rights. This is subject to the condition that the provision in question of the Criminal Procedure Code is interpreted in accordance with the principles established in the decisions of the European Court of Human Rights.

Keywords: security; agent; agent provocateur; incitement; crime; European Court of Human Rights

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1. Introduction

Organized crime as phenomenon affect significantly security of society and is among threats to sustainable development processes (e.g. Luzgina, 2017; Kuril 2018a, 2018b; Kiseľáková et al. 2018; Čentéš et al. 2018; Jurkevičius, Pokhodun 2018; Osipov et al. 2018; Mikhaylov et al. 2018; Tvaronavičienė 2018; Ohotina et al. 2018; Finogentova et al. 2018).

The use of agents was introduced (Act No. 247/1994) into the Slovak Criminal Procedure Code (Act No. 301/2005, the Criminal Procedure Code, as amended) in connection with the need to fight organised crime (including economic crime) and related crimes – especially corruption – by having police officers or other persons cooperating with the police infiltrate amongst the perpetrators of such crimes. Balancing conflicting interests is one of the key principles of the legal system as a whole and the criminal law and the law governing criminal investigations in particular. The legal framework for the use of agents must balance, on the one hand, society's interest in detecting and convicting the perpetrators of serious organised crime and other crimes under Section 117(1) of the Criminal Procedure Code, and on the other hand, the social interest in preserving the fundamental rights and freedoms of individuals affected by criminal investigations.

Although the use of agents and other means of criminal investigation can infringe upon several fundamental rights and freedoms, including the right to privacy, they must not infringe upon the right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the

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“Convention”; in the Slovak Republic, the Convention for the Protection of Human Rights and Fundamental Freedoms was published as Notice of the Federal Ministry of Foreign Affairs No. 209/1992). In other words, the end cannot justify all means: detecting and convicting the perpetrators of organised crime or corruption does not legitimise the removal of guarantees of a fair trial. The legal framework established by the second sentence of Section 117(2) of the Criminal Procedure Code authorising the use of “agents provocateurs” – agents authorised to incite persons to commit a crime – in relation to corruption on the part of a public official, where there is evidence that the crime would be committed even without the agent’s incitement, could appear dubious with reference to the right to a fair trial. The following article aims to show that it is possible to interpret this provision in a way that is consistent with the judgements of the European Court of Human Rights.

2. The Agent Provocateur

The aim of the amendment (Act No. 457/2003) allowing the incitement of a public official to corruption was to increase the means available for detecting corruption by making more efficient use of the operational and investigative capacities of agents. With the introduction of the exception to the prohibition of incitement to crime stating that it is permissible to instigate a corrupt transaction with a public official if they would have committed the crime without the deployment of the agent, the law now distinguishes between two situations. The first case is the action of a passive undercover agent, also known as a “surveillance agent” (*agent kontrolór*) who monitors an offence and collects evidence against the offenders for their prosecution. In practical terms, this might mean that an agent responds to an offer from a distributor of narcotics or psychotropic substances and pretends to be interested in buying the goods to map their production and distribution network. The second case is the use of an active agent provocateur based on knowledge and evidence of ongoing corruption on the part of a public official that show that they would commit a crime even without the agent’s intervention, which involves the active proposal of a corrupt transaction and the acceptance of a bribe. A surveillance agent responds to an initiative, for example from a drug distributor. See for example Judgement of the Supreme Court of the Slovak Republic No. 3 Tdo 30/2015 (from the grounds for the judgement): *“An agent cannot be a person who only waits passively in the environment in which they have to move. The key consideration for use of an agent is that agents must act in conformity with the purpose of the Criminal Procedure Code and their actions must be proportional to the unlawfulness of the actions they help to detect, identify or prove. The fact that an agent expresses interest in purchasing drugs, that they meet with the accused several times, ask for a certain quantity of drugs, or ascertain the sale price of the drug is not incitement to commit a crime involving unlawful and active provocation. ... In the last conversation, the agent mentioned to him (the accused) a sum that was available for the purchase of drugs and it was the accused who determined what quantity of drugs could be procured for this sum. In view of the above, the actions of the agent cannot be regarded as a police incitement but as an undercover police operation to detect offenders and gather evidence of their crime.”*

An agent provocateur need not wait for a preliminary offer from a public official involving a request for a bribe. Nevertheless, the police must have prior evidence of corruption on the part of the public official. The European Court of Human Rights (ECtHR) lays down strict rules for the use of agents in its case law. These do not include the distinction between surveillance agents and agents provocateurs, which is specific to Slovakia. The consistent application of these conditions, especially the requirement that the police must have specific evidence of crime before deploying an agent, erases the difference between passive and active agents. An agent provocateur thus becomes an agent inciting evidence of offences an offender is already committing. More recent case law of the Constitutional Court of the Czech Republic has continued the search for the limits of what is permissible for passive agents: see the finding of 21 September 2016, Case No. I.ÚS 2652/16.

3. Judgements of the ECtHR

One of the oldest significant cases in which the ECtHR assessed questions of police provocation is **Lüdi v. Switzerland** (No. 12433/86, of 15 June 1992). In 1983 the applicant was accused of drugs crimes in Germany. The applicant was not detained and returned to Switzerland. The German police informed the police of the Canton of Berne that Mr Lüdi was planning to purchase a quantity of cocaine. The investigating judge opened

a preliminary investigation and ordered the monitoring and recording of the telephone conversations. The Police decided to deploy an officer as an agent in the role of a potential buyer of cocaine. This procedure was authorised by the cantonal police headquarters and the investigating judge was notified. The applicant met with the agent 5 times, always at his own initiative. According to the agent's testimony, Mr Lüdi promised to sell 2 kg of cocaine worth 200,000 Swiss francs. Mr Lüdi was arrested and accused of drug trafficking.

The Lüdi case satisfies prerequisites such as fulfilment of the criterion of judicial supervision and the finding of evidence indicating that the subject of surveillance would commit a crime without the use of the agent. The court did find a violation of the right to a fair trial not because of police provocation but because of a violation of the right to cross-examine witnesses under Article 6(3)(d) of the Convention. The Swiss courts refused a request to call the agent as a witness and the applicant claimed that he had been denied the opportunity to challenge the agent and his testimony.

The best-known case related to police incitement heard before the ECtHR, which is the basis for the prohibition of police incitement, is **Teixeira de Castro v. Portugal** (No. 25829/94, of 09 June 1998). The Portuguese police obtained information about the applicant Teixeira from a person buying hashish for personal consumption who claimed that Teixeira was able to supply this substance. Undercover police accompanied this person to visit Teixeira at home and asked him to sell them 20 grams of heroin. The applicant did not have any heroin in stock but agreed to help obtain it from another person, to whom he went in person and who obtained the substance from another person. The applicant thus obtained three bags of heroin containing 20 grams in total and took them to the person who had first informed the police about Teixeira. During the handover of the substance at this person's house, the police arrested the applicant and found him to be in possession of two more bags of heroin, cash and a gold chain. The court convicted Teixeira and sentenced him to 6 years in prison. According to the national courts, the police incitement was in accordance with national law, because the infringement of the applicant's rights was balanced by an important social interest. Finally, the Portuguese court did not consider the conduct of the police decisive for Teixeira's commission of the offence because other persons brought the police to Teixeira and requested goods from him.

In the introduction to its reasoning, the ECtHR states that the use of undercover police activities is possible and consistent with the provisions of the Convention and it admits that it may be necessary for the investigation of serious organised crime. Nevertheless, the use of such procedures by the police must be consistent with established legal rules. The assessment of the lawfulness of a procedure must be even stricter if information obtained by undercover agents is to be used as evidence in subsequent proceedings. The court sees a fundamental difference between the Teixeira and Lüdi cases, in the latter of which the agents acted under the instruction and supervision of a lawful judge and the grounds for the agent's deployment were identified and evaluated in advance. In the Teixeira case, the police acted on their own initiative – without a ruling or even basic compliance with the principle of judicial supervision – and they did not have relevant information (let alone evidence) that the applicant engaged in criminal activity because they only became aware of Mr Teixeira through an unverified claim that he could obtain the relevant narcotic substance. He did in fact obtain the substance but only at the agents' instigation and through another person. The law enforcement authorities had no information that Teixeira had previously committed a crime or that he might have the intention (inclination) to commit a crime (see paragraphs 38 and 39 of the relevant judgement), even though there should be impunity at this stage in accordance with the principle of *cogitationis poenam nemo patitur* - no one suffers punishment for intent (For more on this issue see: Kratochvíl, 2001).

The Court therefore concluded that the right to fair administration of justice had been violated because the offence had been instigated by the police. Since the ECtHR cites the Lüdi case in its judgement on Teixeira, it probably wishes to indicate that it could have reached a different conclusion if the two criteria mentioned above had been satisfied in the Teixeira case. We consider these criteria to be crucial for determining whether Slovakia's legal framework for the use of agents is inconsistent with the guarantees laid down by the Convention and ECtHR case law based on the Teixeira case. The police's procedure in the Teixeira case would also have violated Slovak law. This point is addressed *obiter dictum* in Order of the Constitutional Court of the Slovak

Republic No. III. ÚS 709/2014: *“With reference to the argument that the police officers deployed as agents instigated, through their actions, the offence for which the applicant was convicted, the Constitutional Court finds that the applicant’s claims were not proven in proceedings before general courts. The Supreme Court responded to this issue in an acceptable manner when it concluded that the agreement of meetings between agents and the applicant and negotiations on the subject-matter of purchase (specific drugs) and their price could not be regarded in and of itself as incitement. It based its conclusions on specific material findings contained in the finding of facts on the case, which fully complies with the requirements for a convincing court judgement consistent with the constitution. In this matter, it is also possible to accept the Supreme Court’s conclusion on the inapplicability of the ECtHR’s judgement in Teixeira de Castro v. Portugal of 09/06/1998 because this judgement essentially related to an incitement to commit a criminal offence in which police agents ordered drugs from a person who only purchased drugs for personal consumption. Under Section 117(2) of the Criminal Procedure Code, an agent must not incite another person to commit a crime at the agent’s own initiative but may participate in an act and respond to circumstances in a reasonable manner.”*

The ECtHR upheld the standards laid down in the Lüdi and Teixeira cases in its judgement on **Vanyan v. Russia** (No. 53203/99, of 15 December 2005). The person acting as an agent in this case contacted the applicant and claimed that they needed heroin because they were suffering from severe withdrawal symptoms. According to the applicant’s own testimony, he was afraid that this person would commit suicide and therefore agreed to obtain a certain quantity of the substance. He then met with the agent, who gave him money with which he went to another person to buy heroin. The applicant saw that the purchased quantity of the substance was insufficient even for his own needs and he told the agent that the goods were of poor quality and that he would return the money to her later. He was then arrested by the police.

In this case, the ECtHR emphasises that the requirements for a fair trial under Article 6 of the Convention mean that the public interest in the fight against drug trafficking cannot be used to justify the use of evidence obtained as a result of police incitement. On this question, the ECtHR refers to the Teixeira case. It also makes an important distinction as to when an agent’s actions are and are not consistent with the requirements of the Convention: if a police agent’s actions instigated an offence and nothing indicates that the offence would have been committed without the agent’s intervention, the action is inadmissible incitement by the police. Subsequent use of evidence obtained in this way is breach of the right to a fair trial. It is not enough for a police officer to declare that the police have information on offences committed by the applicant without a court scrutinising the information and its source (see paragraph 49 of the relevant judgement). Looking from the perspective of Slovak law and using the terminology of Section 117(2) of the Criminal Procedure Code, there were no ascertained facts indicating that an offence would have been committed without use of the agent. Once again, the police procedure in this case was inconsistent with Section 117(2) of the Criminal Procedure Code.

Another case where the ECtHR found the use of an agent provocateur to breach the right to a fair trial is **Khudobin v. Russia** (No. 59696/00, of 26 October 2006). A police agent called the applicant and asked him to sell her an agreed quantity of heroin. The applicant agreed to procure it and met the agent in the street accompanied by Mr M. The agent gave the applicant bank notes marked with dye that was visible under UV light. The applicant took the money and went to the house of another person, Mr G. He gave the applicant a sachet containing 0.05 grams of heroin. The applicant was then arrested in the street by the police.

In its assessment of the case, the ECtHR referred to the Lüdi case and the general admissibility of using undercover investigative methods. Although police can conduct undercover operations, they must not instigate offences – the ECtHR here referred to the Teixeira case (to paragraph 36 of Teixeira de Castro v. Portugal, in particular the last sentence of the paragraph). The ECtHR recapitulates why the Teixeira case involved a breach of the right to a fair trial and emphasises the role of an agent as a person documenting an offence, the importance of adhering to the principle of judicial supervision and the ascertaining of facts indicating previous criminal activity of the subject of surveillance. The court clearly rejects the government’s argument that it is not necessary to obtain information on previous criminal activity and that it is sufficient that the agent is deployed in accordance with national legislation. The key fact is that the evidence did not deal with the question of what

particular information concerning the applicant's illegal actions had been at the disposal of the police before the deployment of the agent provocateur. Such procedure would once again be inconsistent with Section 117(2) of the Criminal Procedure Code.

The ECtHR again found a violation of the right to a fair trial as a result of police incitement in **Constantin and Stoian v. Romania** (No. 23782/06 and 46629/06, of 29 September 2009). This case also involved police incitement in the form of an offer to purchase narcotics.

The nature of the police's improper conduct was again the absence of a finding and proper evidence of criminal behaviour by the applicants indicating that they would commit a crime without the use of an agent. The fact that one of the applicants had previously been convicted of a drug offence is irrelevant to this question (see paragraph 55 of the relevant judgement). What is important is current relevant unlawful activity. A criminal record *per se* is not evidence that a crime would be committed without deployment of an agent.

The court rejected an application for a violation of the right to a fair trial in the case of **Bannikova v. Russia** (No. 18757/06, of 04 November 2010). The Russian Federal Security Service was monitoring telephone calls between the applicant and another person in which the applicant agreed to sell cannabis to this person for further distribution. An agent then contacted the applicant and expressed an interest in purchasing 4.4 g of cannabis. The transaction was documented using marked banknotes and the production of audio-visual recordings. The applicant was arrested. A subsequent search of her home found another 28.6 g of cannabis.

The ECtHR emphasises that it is necessary to apply a substantive test of police incitement based on an evaluation of the contacts between the agent and the subject of incitement before the offence is committed, or to put it more simply: the question is how the agent acts upon the subject of incitement and what facts of what evidence value the police have about the subject's activities at the material time. In this case the court found that the applicant began distributing drugs several months before the deployment of the agent when she was contacted by a person interested in purchasing cannabis. The telephone conversations mentioned above took place later, a week before the deployment of the agent. For this reason, the court found that the agent had not incited the applicant's criminal offence but only stepped in when it was already under way. For more information, see paragraph 69 of the relevant judgement.

If the substantive test is inconclusive owing to the lack of information on the case at issue, it is necessary to apply a **procedural test** asking whether the accused **was effectively able to raise the issue** of police incitement during their trial and how the court dealt with such a plea. With regard to the substantive test, there is evidence that a crime would be committed without the use of an agent in the form of the recordings of the telephone conversations between the monitored person and a third party about occasions of previous sales of narcotic drugs, the remaining unsold stock of narcotic drugs, the emergence of new customers and future transactions. The ECtHR accepted the opinion of the domestic courts that the above is evidence of an intention to commit an offence that the monitored person formed before the agent's intervention (compare with the text of paragraph 75 of the relevant judgement). For the purposes of interpreting the second sentence of Section 117(2) of the Criminal Procedure Code, a recording of a conversation would, by analogy, count as evidence if there was mention of corrupt activity by a public official including past or future corrupt transactions or the like.

The importance of finding evidence that an offence would be committed without the use of an agent and the need for a passive approach by the agent and judicial supervision are emphasised in **Veslov and others v. Russia** (No. 23200/10, 24009/07 and 556/10, of 02 October 2012). An agent contacted the applicant through an intermediary with a request to purchase hashish. The applicant intermediated purchase of the drug from a third party. The agent then claimed in the main proceedings that a week before the incident he had met with the applicant, who had mentioned the possibility to sell drugs. The applicant claimed that there was no evidence that he committed drug offences and would have committed such an offence without the agent's instigation. The other two applicants made the same claims.

The primary concern of the ECtHR was again whether the police had sufficient information justifying the use of an agent. If the information on criminal activity comes from an informant, it is essential to distinguish between an informant who is a private individual and an informant who cooperates with the police. If the informant is a person who cooperates with the police, it is necessary to investigate whether the suspect had already committed an offence before this person began to act as an agent. A further condition is that the agent must act passively. An agent **cannot be deemed to act passively** if they put pressure on a suspect to commit a crime, take the initiative in contacting a suspect, repeat an offer multiple times despite an initial refusal, are intransigent in such actions, stipulate an above average quantity of a substance or an above average price or appeal to the suspect's sympathy by mentioning abstinence symptoms or the like (see paragraphs 90 to 92 of the relevant judgement). In addition to satisfying the aforementioned conditions, it is necessary to observe safeguards against the misuse of agents – specifically to comply with the principle of judicial supervision, meaning supervision by an independent body, ideally a judge. Approval of the use of agents through simple administrative orders issued by the same body that then implements the undercover operation is inadequate (see paragraph 126 of the relevant judgement).

Cases involving the use of an agent to expose corruption can be said to be rare in the case law of the ECtHR. One is the case **Nosko and Nefedov v. Russia** (No. 5753/09 and 11789/10, of 30 October 2014). Both applicants were accused of accepting bribes in the exercise of their medical profession: one applicant for issuing an invalid sick-leave certificate, the other for issuing false medical reports and inspection results. In both cases the police acted on confidential operational information. In both cases the agent made repeated offers of bribes. In the second case, which concerned the issuing of a false claim that a person (the agent) was not under the influence of alcohol, the agent argued to the doctor that if he was found to have been under the influence of alcohol, he would lose his driving licence and then his job, on which both he and his family depended.

The ECtHR considers the significant facts to be the following. The police obtained information on possible offences of the first applicant from a confidential source. They did not check this information or obtain other evidence of a criminal offence. Immediately on receiving the information they decided to use an agent. In the case of the second applicant, information was also received from a confidential source which the police checked over a period of five to six months and formulated into evidence of criminal offences committed by the applicant. No verification or documentation of this evidence took place, however. Another cause of doubt in the case was the decision-making process – the decision to use the agent was a simple administrative decision without sufficient safeguards against misuse. In the ECtHR's view, the most suitable control instrument is judicial supervision. Another cause for concern was the involvement of a third party – a long-time colleague of the applicant through whom the agent had communicated her request. There are also grounds to suppose that if such a request is made by a long-time acquaintance, the suspect would be unwilling to refuse the request. Such actions on the police constitute a form of coercion. Based on these factors, the ECtHR found that the applicants' right to a fair trial had been violated.

The ECtHR has continued to develop the principles laid down in the above cases in its more recent judgements such as **Grba v. Croatia** (No. 47074/12, of 23 November 2017). This case related to the use of an agent in combination with multiple illicit transactions. An agent was deployed as part of an investigation into counterfeit money. The police found that counterfeit money that had been put into circulation had come from the complainant. The first meeting of the complainant and the police agent resulted in the sale of one false banknote with a nominal value of EUR 100. The agent and the applicant then had several meetings culminating in the handover of false banknotes with a value of EUR 600,000 for a price of EUR 21,000. Only then was the applicant arrested. During criminal proceedings, the courts repeatedly questioned both police officers who had operated undercover on the circumstances in which they came into contact with the applicant. According to their testimony, the applicant had contacted them, allegedly to offer them "better money". They were unable to recall the details of the conversation, however. In any case, the applicant was alleged to have said that if they were interested, he was able to obtain a larger quantity of similar banknotes. For his part, the applicant claimed that he had been in financial trouble, had never previously broken the law and that he had been incited to commit his offences by police officers in plain clothes who urgently contacted him about the matter again and again.

Regarding the question of evidence of previous offences, the court recalls that the offence detected by the agent must be ongoing and not a one-time occurrence and the procedure (which in the given case included illicit transactions) may be used to gain trust with an individual with the aim of establishing the scope of his or her criminal activity or to work up to a larger source of criminal enterprise, namely to disclose a larger crime circle. However, the agent must remain passive and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit.

Conclusions

Based on the presented study of ECtHR judgements, the following conclusions can be drawn. The ECtHR distinguishes the substantive question of police incitement – the factors that determine whether an offence was incited by an agent – and the procedural question of the effective ability to raise the issue of incitement in the main proceedings before a national court with the prosecution bearing the burden of proving that police incitement did not take place.

The substantive issue – the indicators of police incitement – must be assessed based on the following factors. The first factor is whether the police have specific and verifiable evidence – not just indications and rumours – that the suspect is committing offences. It is not possible to invoke a domestic legal framework that does not require this (*Khudobin v. Russia*). Verifiable evidence includes information obtained from a recording of a telephone conversation about matters that the public official has previously arranged for a bribe or the prospect for future corrupt transactions (*Bannikova v. Russia, mutatis mutandis*). A criminal complaint alone, if it is not followed up to reveal further evidence of a criminal offence, is insufficient. Likewise, a criminal record in and of itself is insufficient because it is not evidence of ongoing offences (*Constantin and Stoian v. Romania*).

Another factor is the question of whether the agent's deployment is permitted and supervised by an authority other than the one that implements this investigative method. Conformity with the standards laid down by the ECtHR case law could be satisfied by orders and monitoring by the prosecutor's office. In the Slovak Republic, the principle of judicial supervision is applied, which means that a judge orders the use of an agent and then supervises the criminal investigation operation. The law in the Czech Republic is the same. In this regard, the Constitutional Court of the Czech Republic notes that in some cases the law requires a higher standard than that laid down by constitutional and international law as regards intensive interference with fundamental rights and freedoms in criminal proceedings, see order of the Constitutional Court of the Czech Republic, No. Pl.ÚS 3/09: *"In accordance with the generally recognised principle that legislators can provide stronger protection for fundamental rights and freedoms in an "ordinary" law than is required by the constitution or international treaties, the Czech Criminal Procedure Code includes several cases where a court must decide on interference with fundamental rights in a preliminary investigation. Such cases include ... consent for opening a letter under Section 87(1), an order for taping and recording telephone communications under Section 88(2), an order to obtain data on telephone communications under Section 88a(1), and order to observe an accused person in a health care facility under Section 116(2), permission for surveillance if it involves interference with inviolability of the dwelling, with private communications or investigation of the content of other documents or recording kept privately using technical means under Section 158d(3), and use of an agent under Section 158e(4) of the Criminal Procedure Code. As can be seen, legislators did this (going beyond constitutional requirements) on in a few cases involving exceptionally intense interference with fundamental rights and freedoms."*

The judicial supervision avoids the situations that have been criticised by the ECtHR where the use of an agent is approved by a simple administrative act of the police, which then implements the decision without the supervision of an independent body (e.g. *Veselov and others v. Russia, Lüdi v. Switzerland*).

The third factor is the question of whether an agent has subjected a suspect to any form of coercion to commit a criminal offence. Possible forms of coercion include repeatedly making contact with the subject of surveillance despite an initial refusal, the artificial increase of an offered bribe where the initial amount did not motivate the subject of surveillance (*Veselov and others v. Russia*), the involvement of a person that the subject of

surveillance knows well and whose offer the subject of surveillance will not want to reject, whether due to friendship, family ties or politeness, the evocation of pity (Nosko and Nefedov v. Russia) or the like. See also the Opinion of the Criminal Division of the Supreme Court of the Czech Republic, No. Tpjn 301/2014-I.: “... *Police incitement includes police activity that supplements evidence of a criminal offence required by law, deliberately increases the scope of the offence committed by the subject of incitement, or otherwise changes the legal classification of the committed offence to the detriment of the subject of incitement, in particular as relates to circumstances resulting in the imposition of a higher penalty if the person would otherwise have been deterred from the crime in a general sense.*”

Even if a police agent's actions show signs of incitement, this need not result in a violation of the right to a fair trial if accused persons are effectively able to challenge the use of police incitement against them (the procedural aspect of the matter). The ECtHR has long preferred to investigate the fairness of criminal procedure as a whole. See for example in Schenk v. Switzerland, no. 10862/84 of 12 July 1988 par. 46, or Allan v. United Kingdom, no. 48539/99 of 05 November 2002, par. 42: “*While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.*”

This means that it is not necessary to take note of errors in a part of proceedings or assess the validity of specific evidence whose selection and legal basis falls within the competence of national legislation, provided that the proceedings as a whole appear to be fair. The approach can be characterised as a substantive approach in contrast to the procedural approach that requires an investigation of the fairness of every part of the proceedings or evidence (for a more detailed comparison of procedural and substantive approaches in the case law of the ECtHR, mainly covering civil proceedings, see: Gregor, 2017).

An effective objection to police provocation means that the prosecutor is obliged to make a proper investigation and rebuttal of the objection. The prosecutor bears the burden of proof in rebutting the objection of incitement and it is necessary to respect the principle that both parties have the right to be heard, meaning that the defendant should have the opportunity to cross-examine the agent, other evidence of the agent's activity and the evidence that led to the agent's deployment. Inadequate investigation of a suspected case of police incitement, or the conviction of an offender based on information from an agent despite failure to establish beyond reasonable doubt that there had been no police incitement led to the finding of violation of the right to a fair trial under Article 6 of the Convention in Pătraşcu v. Romania (no. 7600/09, of 14 February 2017).

In our view, it is not possible to claim *a priori* that Section 117(2) of the Criminal Procedure Code is inconsistent with the case law of the ECtHR without detailed review of indicators of police incitement. In the case summaries reviewed above, there is no case where the court found a breach of the right to a fair trial or another right where all the conditions for use of an agent laid down by Section 117(2) of the Criminal Procedure Code were met as we interpret them. This includes the frequently cited Teixeira case, where no evidence was presented of offences of the subject of surveillance proving that they would have committed the offence without the agent's involvement, a further problem being the absence of independent (judicial) supervision. The court indicates that the case could have been judged differently if these two elements had been present, as they were in the Lüdi case.

The provisions of Section 117(2) of the Criminal Procedure Code can be interpreted in a manner consistent with case law of the ECtHR and in a way that is inconsistent. If, however, the law enforcement authorities and courts adopt the interpretation of Section 117 of the Criminal Procedure Code set out above based on the cited judgements of ECtHR, apply this interpretation in specific cases and avoid indications of police incitement, conformity can be maintained.

In the event of indications of police incitement of an offence of misuse of public authority inconsistent with the factors laid down in the case law of the ECtHR, evidence obtained in this way cannot be used in further proceedings because the right to a fair trial cannot be violated for the sake of effectiveness.

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