The right to retain privileged communication between the attorney and his client

Confidentiality of communication between an attorney and his client, especially regarding matters where the client might have committed a criminal offence, is a foundation of client's right to effective criminal defence. There is a big media scrutiny lately, around the case of Czech-Iranian entrepreneur Sharam Abdullah Zadeh. Parts of his communication with his defence counsels, acquired in accordance with § 158d of statue no. 141/1961, Criminal Procedure Code (hereinafter "CPC") – surveillance of persons and items – appeared transliterated in another criminal cause, where Mr. Zadeh is also accused. This approach of the criminal bodies has been sharply condemned by the Czech defence Union, which even filed a criminal complaint[1], and also by the Czech Bar Association.[2] This case reopens the issue of (1) permissibility of intercepting the communication between the accused (suspect) and his defence counsel (attorney) and (2) its limits. Notwithstanding the fact, that the Constitutional Court of the Czech Republic already stated in 1995, that the communication between a defence counsel and his client enjoys an exception from the constitutionally acceptable breach of confidentiality of messages.[3] It appears, however, that the situation has somewhat changed since. I would like to focus on this issue in this article,[4] though the protection of confidentiality of information between a client and an attorney is definitely wider (e.g. a search of premises, where the defence counsel resides and practices).

Regarding the constitutional foundations and jurisprudence

Article 13 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter "the Charter") guarantees the protection of confidentiality of messages, when it states that: "*No one may breach the secrecy of written messages, or the secrecy of other records and documents that are kept in privacy, sent by mail or in any other way, except for cases determined by the law. The same secrecy is granted to messages relayed by telephone, telegram, or any similar device.*"

We can agree with the Constitutional Court of the Czech Republic, as results from its judgment no. I. ÚS 3038/07 of 29th of February 2008, that communication (protected under Article 13 of the Charter) represents a projection of private life, and is therefore a private matter (the verdict I. of the judgment and its reasoning, especially article 14, which is in general protected by the Article 7 section 1 of the Charter (*"Sanctity of a person and its privacy is guaranteed. In can only be limited in cases*

[1] See criminal complaint of the Czech Defence Union of 22th of February 2017, available at: http://www.uocr.cz/unie-obhajcu-cr-podala-trestni-oznameni/.

[2] See standpoint of the Czech Bar Association to suspicion of illegal intercepting of telephone conversation between the accused and his defence counsel, issued on 23th of February after consideration by board of directors of the Czech Bar Association on 14th of February 2017, available at: http://cak.cz/scripts/detail.php?id=17081 in the section Actual information.

[3] Verdict no. III. ÚS 62/95 of 30th of November 1995, published in the Collection of Verdicts of the Constitutional Court of the Czech Republic, volume 4, year 1995 under no. 78 on page 243.

[4] See also: MANDÁK, Václav. Interception and recording of telecommunications of an attorney. *Bulletin of advocacy.* 1995, no. 3, p. 21-27. ISSN 1210-6348; VANTUCH, Pavel. Illegal interception and recording of telecommunications of an attorney. *Bulletin of advocacy.* 2008, no. 3, p. 15-25. ISSN 1210-6348; JEŽEK, Jiří. Regarding the interception and recording of telecommunications of an attorney. *Bulletin of advocacy*. 2008, no. 9, p. 32-35; VLK, Václav. Once more on interception and recording of telecommunications of an attorney. *Bulletin of advocacy.* 2009, no. 5, p. 23-25.

determined by the law."). Protection of the private domain of an individual is also guaranteed by the Charter on other places (e.g. Articles 10[5], 12[6] of the Charter).

Both quoted articles (Articles 7 section 1 and Article 13 of the Charter) allow the breach of this confidentiality in cases when a statue allows it, under the provisions of Article 4 section 2 ("*Limits of the fundamental rights and freedoms may only be adjusted by statute.*"), with correction by Article 4 section 4 ("*When using the provisions regarding the limits of the fundamental rights and freedoms, their purpose and meaning must be saved. Such limits must not be misused for other purposes than the ones they have been set for.*")

This means that the limitations of personal privacy can be only set exceptionally and only when it is necessary and that the goal of the public interest cannot be achieved in any other way. If any of these conditions are not being met, the interference is unconstitutional. After all, the Constitutional Court of the Czech Republic has once voided the provision of § 88a CPC[7] (record of the telecommunication), after previously warning the lawmaker[8]. The provision was voided, because the lawmaker did not project the requirement of proportionality of the interference into the fundamental rights with regard to the goal pursued, because the availability of these data was regarded as usual evidence for the purpose of criminal proceedings, and even one led for any crime.[9]

---

[5] According to article 10 paragraph 2 of the Charter "*Everyone has the right for protection against unlawful interference into his private and family life*". According to Article 10 paragraph 3: *"Everyone has the right for protection against unauthorized gathering, publishing or other abuse of information regarding his person".*

[6] Article 12 of the Charter guarantees the inviolability of private domicile, stating that: *"The domicile is inviolable. It is not permitted to enter it without the consent of its resident. A search is permitted only for the purpose of a criminal process, upon written court warrant. The means of executing the search are determined by the law. Other intrusions into the inviolability of domicile may be allowed by the law only when it is necessary in democratic society for the protection of life and health of persons, protection of rights and freedoms of others, or to avert a grave threat to public security and order. If the domicile is also used for business or other economic activity, such interference may be permitted by the law in order to ensure to fulfil the tasks of public administration."*

[7] Plenum judgment file no. Pl. ÚS 24/11 of 20th of December 2011, published on the 4th of January 2012 in the collection of laws under no. 43/2012.

[8] Plenum judgment file no. Pl. ÚS 24/10 of 22nd of March 2011, published on the 31st of March 2011 in the collection of laws under no. 94/2011 (p. 54).

[9] Though § 88a CPC contains the full legislature regarding the approach of criminal authorities to information on the telecommunications service, this approach is explicitly conditioned that these information can only serve to clarify information necessary for criminal proceedings. Assessment of these conditions is within the power of a judge, who decides about ordering the disclosing of these data. Its general and uncertain determination with concurrent absence of specific legislature regarding the following use of this data, cannot be considered appropriate. The lawmaker did not project the requirement of proportionality of the interference with the basic right with regard to the purpose given, because the access to the has been determined as a usual evidence for the purpose of criminal proceedings, and one that is led for any criminal offence. Such limitation, regarding the severity of the breach into the private domain of an individual can stand only if the conditions stemming from the proportionality principle are met. That means, that the access of criminal authorities to the data about telecommunications can be accepted only if the purpose of the criminal proceedings cannot be achieved in any other way, and that the legislature contains sufficient guarantees that these data are not used for other purpose than the one law presumes, and that the limitations of the right of an individual to informational privacy is not disproportionate with regard to the meaning of specific social relationships, interests or values, that are the object of the crime, for which the criminal process is being led. Such limitations are not respected by this provision, and this shortcoming cannot be eliminated by means of judicial control. The courts may, when deciding about ordering a disclosing of such data, provide protection to the basic right to information with regard to the circumstances of specific matter, but their jurisprudence cannot replace and substitute the absence of clear and certain legislature., which is, in accordance with article 4 paragraph 2 of the Charter, the assumption of limitations of the basic rights and freedoms in general.

The said above applies generally in relation to any communication. The question we need to ask ourselves is, whether the communication between an attorney and his client is so specific, that it requires a different regime of protection.

The right to privacy must be, in this case, interpreted in the context of other rights and freedoms guaranteed by the Charter. Especially the right to legal advice constituted in article 37 section 2, or especially the right to criminal defence according to article 40 section 3.

According to article 37 section 2, everyone has the right to legal advice in proceedings before the court, other state bodies or public administration, from the beginning of the proceedings. According to article 40 section 3 first sentence, the accused has the right for sufficient time and capacity to prepare his defence and the right to defend himself by his own measures, or through a defence counsel. A respected commentary notes that: *"The 'legal advisor' must be independent of the public authority which leads the proceedings, and has to be devoted to the interest of his client (its limits are succinctly laid out in § 16 of the attorney statute)[10]. He holds a position of a secondary, "professional self". This professional alter ego therefore has to have a guarantee, that the client will disclose to him all information relevant to the issue…".*[11]

The summary of guaranteed rights is furthermore completed by the universal right to remain silent, or to refuse to make a statement on the grounds that one would endanger himself or person close to him with criminal prosecution (article 37 section 1 of the Charter) and specifically the right of the accused to remain silent without further conditions (Article 40 section 4 of the Charter).

Should the right for legal advice be effective and not just formal, it is necessary to ensure, that the information between the person in need of legal advice, and the attorney that provides it in accordance with the law, is protected absolutely. If the attorney plays the role of "professional self", then possible breach of this protection implies a bypass of the right to remain silent. In this context, I'd like to highlight three aspects:

1) The Charter links the right to legal advice with the proceedings (before state or public authorities)

2) The privilege of confidentiality serves the client, not the defence counsel.

3) There must be a justified providing of legal advice in accordance with the law.

Ad 1) The jurisprudence of the Constitutional Court of the Czech Republic is contradictory in regard to the moment, when and where the confidentiality regarding the information exchanged between the attorney and the client begins to exist. In one of its judgments, the Constitutional Court (no. II. ÚS 889/10 of 25th of November 2010) states in the article 25 that… *"it cannot be considered a constitutionally acceptable opinion, that realization of the fundamental right to legal advice should begin at the moment, when the public authority somehow formally finds out (in this case, by filing the written power of attorney to the respective police authority or court) that this right is being executed*

[10] § 16 paragraph 1 and 2 of the statue no. 85/1996, the attorney statute states: *"The attorney is obligated to protect and uphold the rights and justified interests of the client, and follow his instructions. He is not bound by the instructions however, if those are contrary to the law or to the professional statute; the attorney must enlighten his client on this matter. While practicing advocacy, the attorney is obligated to act honestly and thoroughly; he is obligated to use all legal measures and within their frame to enforce all of his clients interest he deems beneficial."*

[11] WAGNEROVÁ, Eliška a kol. *Charter of fundamental rights and freedoms: commentary.* Prague: Wolters Kluwer ČR, 2012. Wolters Kluwer commentaries. Codex, p. 774 – 777. ISBN 978-80-7357-750-6.

by someone. The time between the moment when someone contact an attorney with request for legal advice and the moment when this become obvious to the criminal authority can hardly reside in constitutional vacuum." With respect to elementary logic of the situation at hand it is reasonable to assume, that the fundamental right to legal advice also covers its preparation, consisting especially of disclosing of all known relevant information, (which can be followed by termination of providing the legal advice[12]), and the agreement on the procedural tactics, which usually precedes the dealing with judicial or criminal authorities itself. Moreover, the attorney tariff recognizes as the first act of legal advice the assumption and preparation of representation [section 11 paragraph 1 let. a)][13], and even the stable judicial practice of courts do not imply that it would include notifying some of the public authorities. This implies, that the defence counsel's duty to secrecy begins with the moment, when the (potential) client request a legal advice from him, and subsequently provides him with information related to the issue.

Though in the case listed above, the Constitutional Court believes, that the confidentiality of the relationship between an attorney and a client begins at the moment of the request for legal advice, in another decision (file no. I. ÚS 1638/14 of 12th of November 2014) it connects the confidentiality of the communication with the beginning of criminal prosecution itself: *"The provision of section 158d paragraph 1 CPC implies, that surveillance of persons and items presents acquiring information about persons and things conducted in secrecy by technical, or other resources. If the police authority finds out during the surveillance that the accused/suspect communicates with his attorney, it is its duty to destroy the record of such communication, and to not use the information received from this surveillance. This provision protects the uninterrupted communication between the accused and his defence counsel, including the information about the contents of their conversation, and related information (the place of the meeting, the means of communication, etc.). It is vital to point out, however, that this provision covers only the instances, when the criminal prosecution has commenced according to § 160 paragraph 1 CPC."* In the case described, the surveillance of persons and items was realized in the stage of screening (§ 158 paragraph 3 CPC), meaning before the beginning of criminal prosecution of a specific person, that would fill the role of the accused.

As the third example serves the judgment file no. III. ÚS 2847/14 of 3rd of January 2017, which implies that the confidentiality of communication between the attorney and the client is linked with the moment of beginning of some sort formal proceedings, which serves as the imaginary halfway point between the opinions listed above. This judgment says (Article 24): *"The decisive criterion for determining the privileged communication are, in accordance with jurisprudence, justified providing of legal advice, and the interest of the client. Its fulfilment represents the material conditions for constitutional limits of the basic rights and freedoms of attorney in the form of a surveillance. The protection of the attorney is in this case a reflection of the right to defence and right to legal advice listed above. The bearer of the rights is however the person, against which the proceeding is undertaken, and whose rights can be seriously harmed with this process."*

Ad 2) No interpretational differences arise, on the other hand, when the issue is who benefits from the confidentiality of communication. The provisions protect the client, and not the attorney. This conclusion is solidified by the late jurisprudence of the Constitutional Court, which states, for example: *"Provision listed above, (§ 158d paragraph 1 CPC, § 26 paragraph 3 of the statute no. 169/1999, the execution of the punishment, or § 16c of the statute 555/1992, of the Prison service and Justice guard), are a concretization of the constitutional right to defence according to the Article 40 paragraph 3 of the Charter, or the right to legal advice according to Article 37 paragraph 2 of the*

[12] See ČERMÁK, Karel.: *Rules of professional ethics and rules of competition of attorneys of the Czech Republic. Commentary.* Prague: Czech Bar Association, 1996, p. 26.
[13] See § 11 paragraph 1 letter a) of the Ministry of Justice bill no. 177/1996, attorney tariff.

Charter, whose essential component is the right for counsel with his defence counsel under the conditions, which do not simultaneously disclose information to the criminal authorities. In this case the communication between the defence counsel and the client is subject to maximal possible protection, in the interest of the client. This denotes the heading of the interpretation of these provisions, because their purpose is the protection of the client's interest, or fulfilling the principle of "equal arms" in criminal proceedings. These provisions however do not provide protection to this communication on behalf of the attorney, who pursues interests different from that of the client, or unrelated interests."[14] An attorney is therefore protected as any other person, which means he still enjoys constitutional rights of privacy generally, and in its individual aspects (Article 7 paragraph 1, article 10 paragraph 3, article 13 of the Charter), including the possibility of legal breach of this protection, and the right to freely practice his profession (Article 26, paragraph 1 and 2 of the Charter).[15]

Simply, it is not possible to plead the right to protect the communication in order to protect the attorney.

Ad 3) As of late, the media often presents cases, where and attorney commits a crime alongside his client. In this case neither the attorney, nor his client, who participates in the crime, are protected. The formal relationship between an attorney and a client does not itself constitute a reason to protect the secrecy of their communication. In this regard, the jurisprudence of the Constitutional Court is without contradiction, when it says: *"Eventual perpetration of crime by an attorney, regardless if directed against his client or against other subject in cooperation with the client, cannot be considered providing of legal advice, and in this case there can be no protection of such communication."*[16] That in some instances, for example if the attorney is a suspect from grave criminal activity, can this protection be breached in connection with deployment of operative measures, the Constitutional Court has agreed in the past and in other decisions.[17]

European Convention of Human Rights, in jurisprudence of the European Court of Human Rights

The European Convention of Human Rights[18] (hereinafter "the Convention") in its Article 8 contains the right to respect the family and private life.[19] The confidentiality of the communication is basically based by the European Court of Human Rights (hereinafter "the Court" or "ECHR") on this Article. But, in case when the person in question has already been accused, the Court emphasizes[20]

[14] See Constitutional Court judgment file no. III. ÚS 2847/14 of 3rd of January 2017

[15] The Article 26 paragraph 1 and 2 of the Charter states that: *"Everyone has the right to freely choose his or her profession and to prepare for this profession, including the right to do business and lead other economic activity. The law can constitute conditions and regulations for leading certain professions or activities."*

[16] See § 21 of the attorney statute and the resolution of the Constitutional Court file no. III. ÚS 3988/13 of 24th of March 2014, and further resolution file no. I. ÚS 1638/14 of 12th of November 2014.

[17] See Constitutional court judgment file no. III. ÚS 2847/14 of 3rd of January 2017.

[18] Convention for the Protection of Human Rights and Fundamental Freedoms of 4th of November 1950, published in the collection of laws under no. 209/1992.

[19] Article 8 states that: "*Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

[20] See ECHR decision S. v. Switzerland of 28th of November 1991, complaint no. 12629/87, where it is among other, stated in § 48: *"The Court considers that an accused's right to communicate with his advocate out of haring of a third person is part of the basic requirement of a fair trial in a democratic society and follows from Article 6 para. 3 (c) (art. 6-3-c) of the Convention. If a lawyer were unable to confer with his client a receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee right that are practical and effective."*

also the right to fair trial (Article 6),[21] specifically by referencing the minimal rights of the accused and the right for criminal defence [Article 6 para. 3 (c)].[22] It can be concluded, that the applicability of Article 6 is narrower, and applicability of Article 8 covers a wider range of cases. When applying article 6, the protection of the communication between the accused and the defence counsel (meaning when the criminal prosecution has already begun) is absolute. If the communication does not fall under applicability of Article 6, application of Article 8 takes place instead, including the possibility of limiting the protection under the test of legality and proportionality. The Court, as mentioned below, does privilege the communication between clients and attorneys, with the exception of cases, when the attorney himself participated in the crime.

In the Case **Michaud vs. France,**[23] the Court states in § 118: *"(…) Article 8 protects the confidentiality of all correspondence between individuals, it affords strengthened protection to MICHAUD v. FRANCE JUDGMENT 37 exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves"* In the case Niemietz vs. Germany[24] states that: *"interfering with the professional secret has impacts on the proper function of justice, and therefore on the rights guaranteed under Article 6 (…) "* In Kopp vs. Switzerland[25] then states that: *"the relationship of trust between the attorney and his client directly affects the rights of the defendant."* The arguments presented in other decisions are similar.[26]

The Court also emphasizes, that it does not see a difference between interception and recording of telecommunications and a spatial recording. The decision **R. E. vs. The United Kingdom**, where the issue at hand was a spatial recording of a meeting of an attorney and a client after the client was detained as a suspect of murdering a P.C.[27] The Court admitted, that a comprehensive review was always used in occurrences of interception and recording of telecommunications, but the decisive factor was the matter of the severity of the breach of the right to a private life, not in its technical aspect or form. Spatial recording of a consultation between an attorney and a client represent, in the opinion of the Court, an analogical situation to an interception and recording of telecommunications (§ 131). Article 8 of the Convention furthermore provides a heightened protection to the exchange of

[21] Article 6 para. 1 of the Convention states: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*."

[22] Article 6 para. 3 (c) states that: *"Everyone charged with a criminal offence has the following minimum rights (…)to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."*

[23] ECHR decision Michaud v. France of 6th of December 2012, complaint no. 12323/11.

[24] ECHR decision Niemietz vs. Germany of 16th of December 1992, compliant no. 13710/88, § 37.

[25] ECHR decision Kopp vs .Switzerland of 25th of March 1998, complaint no. 23224/94, §74.

[26] For example Pruteanu vs. Romania (30181/05) of 3rd of February 2015, § 49: "*The record on a conversation between a client and an attorney certainly breaches professional secrecy, which is the basis of their mutual trust.*" on in Foxley vs. the United Kingdom (33274/96) of 12th of October 2000: *"The relationship between an attorney and a client is basically a privileged relationship."* And their mutual correspondence is "*regarding maters of private and confidential nature*".

[27] ECHR decision R. E. vs. the United Kingdom of 27th of October 2015, complaint no. 62498/11.

information between a defence counsel and a client, because the defence counsels could hardly properly defend their clients, if they could not vouch for secrecy of their communication *(Michaud vs. France).* Spatial recording of a communication between a defence counsel and his client is considered by the Court as *"an extreme degree of breach of individual's right to respect his private life and correspondence",* that requires the same guarantees against arbitrary interventions as telephone communication (§ 131).[28] The Court reminded further, that the intervention may be considered legal only when the appropriate legislature is predictable. The demand for predictability of law in the jurisprudence of the Court in the area of interception of telecommunications more or less blends with the requirement for necessity of the intervention in democratic society. In other words, the domestic legislature must be clear enough, that the concerned persons may make their own assumption, under which circumstances and conditions the authorities may execute spatial recording (Malone vs. the United Kingdom, no. 8691/79 of 2nd of August 1984, § 67). The law must therefore fulfil a whole lot of criteria that make it predictable, for example to determine the circle of persons that can be tracked or observed, and the circle of crimes – including detailed description of their nature and severity, to limit the time of the recordings, constitute rules for the usage and destruction of the records, and more. (see Valenzuela Contreras vs. Spain, no. 27671/95 of 30th of July 1998, § 46 and 59; Weber and Saaravia vs. Germany, no. 54934/00 of 29th of June 2006, § 95).[29]

Similarly as the constitutional court of the Czech Republic, the European Court reflects the fact, that the heightened level of protection is admitted to the client, not the attorney, and that the heightened protection does not apply, when the attorney participates on the crime (See Versini-Campinchi and Crasnianski vs. France, no. 49176/11 of 16th of June 2016).[30]

The confidentiality of communication between the suspect (accused) and the defence counsel in EU law

On the 22nd of October 2013, a Directive of the European parliament and Council of the European union 2013/48/EU was accepted, regarding the right to access to a defence counsel in criminal proceedings and proceedings regarding the European Arrest Warrant, and on the right to inform a third party and right to communicate with third parties and consular offices in cases of detainment. The point 33 of the reasons of this Directive is stated that: *The confidentiality of communication between the suspect or the accused and its defence counsel is vital to ensure the effective execution of the right to criminal defence, and is a necessary part of the right to a fair trial. The member states should, without exception, respect the confidentiality of communication and meeting between the defence counsel and the suspect or accused whilst executing the right to criminal defence, which is stated in this directive.* This directive does not interfere with procedures for solving the situation, when there are objective and material circumstances suggesting that the defence counsel participated in the criminal offence with the suspect or the accused. Any criminal activity of the defence counsel cannot be considered a legitimate legal advice within the scope of this directive. From the obligation to respect the confidentiality for the member states does not result only the obligation to not to interfere with this communication, but also the obligation to ensure, that when the defence counsel and the accused are located in the premises that is under control of the state authority, that the communication takes place under such conditions that ensures and protects its confidentiality. (…)

[28] In the quoted passage, the Court states that: *"Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 right as it has required in cases concerning the interception of communications, at least insofar as those principles can be applied to the form of surveillance in question."*

[29] See the Czech annotation to the quoted decision available at: http://hudoc.echr.coe.int [cit. 2017-04-11]

[30] See also: KMEC, Jiří. European Court of Human Rights – June 2016. *Court perspectives*. 2016, no. 9, p. 303 or the expression of the Czech Bar Association international relations dept. *Bulletin of advocacy*. 2016, no. 9, p. 54

According to Article 4 of the directive: The member states respect the confidentiality of the communication between the suspect, or the accused and their defender within the frame of the right to defence determined in this directive. This communication includes meeting, correspondence, telephone conversation, and other means of communication allowed according to the domestic law.

The directive does, in the Article 2 (area of effectiveness), state, that it is to be used on the suspects or accused since the moment when the proper state authority of the member state officially inform these persons that they are suspects or accused of committing a crime, regardless if they are detained or not.

The Czech legislature and its shortcomings

In the Czech legislature, the confidentiality is breached in the provisions of § 88 CPC (interception and recording of telecommunications), § 88a (ascertainment of data on the telecommunications service), and § 158d (surveillance of persons and items).

Meanwhile § 88 is used to intercept and record a telephone communication, § 88a is applied to ascertain the geographic and traffic data. In both cases the recording takes place upon court order. Usage of these institutes is limited to a certain, though differently delimited, group of crimes. Posterior control of legality of the ordered recording is, upon a file from the person concerned, entrusted to the Supreme Court of the Czech Republic (§ 88 paragraph 8 and 9, § 88a paragraph 2 a 3, § 314l through 314n of the Criminal Procedure Code).

The provision § 88 paragraph 1 in fine states, that the undertaking of the interception and recording of telecommunications between a defence counsel and an accused is unacceptable. Should the police authority find out during the recording itself, that the accused is communicating with his defence counsel, the police is obligated to immediately destroy the record and not to use the information intercepted. Protocol of destruction of the record is a part of the criminal file. Similar provision regarding the ascertainment of data about telephone traffic according to § 88a CPC is however absent.

In the case of surveillance of persons and items in accordance with §158d CPC, which can consist in so called spatial recording or in tracking and recording an e-mail communication, are the legal requirements different. Firstly, only when this tracking or observation should interfere with the inviolability of the domicile, into postal secret or with the documents kept in secrecy with the use of technical means, it can only be carried out with a previous court order. Specific requirements are laid out by the law only in such a way, that the request for observation must be justified by suspicion of specific criminal activity, and also supplied by information about the persons and items that are to be monitored, if known. Within the authorization for surveillance, the time for which the surveillance takes place must be given, and it shall not exceed six months. This time can be subsequently prolonged by the same authority who authorized it for the first time, but again for the maximum duration of another six months.

In the other cases of surveillace, during which an audio, video, or other record is to be taken, can be carried out upon written authorization of the public prosecutor. If the records are not taken, there is no authorization necessary, and it is within the authority of the assigned police body.

Surveillance of persons and items according to the § 158d CPC is not limited to a certain group of crimes, it can be performed during investigation of any crime.

Shortcomings of the legislature regarding the surveillance of persons and items can be found at least in the following matters:

1) Allowance of surveillance does not require the proportionality of the interference with the constitutionally guaranteed rights of the monitored target. Demarcation of what kind of criminal offence can be cause for surveillance is fully absent.

2) If the authorization is given by the court, there are no specific conditions of the interference with the constitutionally guaranteed rights of the monitored target, similarly as it is with interception and record of telecommunications.

3) Authorization for surveillance can be repeatedly issued on the time period of 6 months, but for example interception and record of telecommunications (§88 CPC) can be authorized for maximum of 4 months.

4) Posterior review of legality of surveillance is absent.

Similarly as with interception and record of telecommunications (§88 CPC), in the case of surveillance the general rule is, that if the police authority finds out during the interception and record of telecommunications that the accused is communicating with his defence counsel, the police is obligated to immediately destroy the record and not to use in any way the intercepted information.

The problem with both provisions however lies with determining the moment, when the protection of confidentiality between the accused and the defence counsel begins. As listed above, one of the decision of the Constitutional Court links this moment with beginning of criminal prosecution of certain person.[31] This conclusion relies on one of the doctrinal interpretations of the commentaries to the Criminal Procedure Code.[32] This opinion can, however, not be agreed with. It causes practical difficulties. Surveillance is usually carried out before the criminal prosecution itself begins, because it is one of the means of intelligence (see § 158b through § 158f CPC). Sticking to the term "accused" would also expel from this protection the confidential communication between the defence counsel and the suspect in the cases of the summary preliminary hearing, because that it is being conducted against a suspect, not an accused. Objections can also exist within the scope of human rights. This provision contradicts the Article 37 paragraph 2 of the Charter [everyone has the right to legal advice (…) from the beginning of the proceedings]. The concept of criminal proceedings is wider that the concept of criminal prosecution.[33] Besides, it can be argued, that such an interpretation cannot get by along the interpretation of the European Court of Human Rights in its jurisprudence with relation to the Article 8. European Court of Human Rights also states, that an increased protection is to be given to the communication between client and his attorney.

[31] Resolution file no. I. ÚS 1638/14 of 12th of November 2014

[32] See Šámal, P. and col. Criminal procedure code. § 157 through 314s. Commentary. 7. Issue. Prague: C. H. Beck, 2013, p. 2005.

[33] See § 12 paragraph 10 of the CPC: "*The criminal proceeding means a procedure under this Act and the Act on International Judicial Cooperation in Criminal Matters, the criminal prosecution stages of the proceedings from the initial criminal prosecution to the full force and effect of the judgment or the decision of another law enforcement authority and the preliminary hearing means a section of proceedings under this Act from the drawing up of the record on the commencement of the criminal proceedings or the performance of urgent and non-recurring acts which immediately precede it, and unless these procedures are performed, from the commencement of the prosecution to the submission of the indictment, the petition for approval of an agreement on guilt and punishment, the referral of the case to another body, the termination of the criminal prosecution or until the decision or the occurrence of other facts the effect of which is to terminate the criminal prosecution prior to submission of the indictment, or until another decision terminating the preliminary hearing, including the clarification and review of facts indicating that a criminal offence had been committed, and the investigation thereof.*"

In the end, one has to mention usual objection of the Special activities unit of the Czech Republic police, which is the only one authorized to perform interception and recording. This unit does usually, through its representatives, deter the objections against recording communication between clients and attorneys, arguing that the recording is carried out by an automatic device, without human factor interfering, and can therefore not guarantee, that such a communication will not be recorded and subsequently put in the criminal file, with the record being destroyed later. Regarding this is necessary to say, that the destruction of the records does not prevent the interference with the right to privileged communication and does not by itself justify the use of more comfortable, but not as considerate means. It has not been found, nor proven, that the same legitimate result can be achieved by a different (yet technically more complicated) procedure, which is also more considerate towards the basic rights.

Conclusion

The confidentiality of the communication between the accused and the defence counsel is the foundation of effective criminal defence and an important component of the right to a fair trial. The controversial moment is, at what time this conversation becomes protected by law. In the Czech Republic, the opinion that this moment is the beginning of criminal prosecution, and the previous communication between a “suspect” and an attorney does not enjoy this sort of protection, begun to appear as of late in the judicial practice of courts, including the constitutional Court. It can be assumed, that this tapering of the protection is too restrictive and in breach of the constitutionally guaranteed right to legal advice and the right for protection of privacy, and respecting of the private life, where the jurisprudence of the ECHR presumes a heightened protection of confidentiality of the communication between attorneys and their clients. Under the presumption, of course, that it is an actual providing of legal advice compliant with the law, and not a case when the attorney himself is also participating on the criminal activity. It is also necessary to point out, that the heightened protection is in the interest of the client, and not the attorney himself.

The Czech criminal procedure code does allow the breach of confidentiality not only in the form of interception and recording of telecommunications (§ 88 CPC) but also by surveillance of persons and items (§ 158d CPC). Spatial recording and e-mail tracking also takes place under the provision of § 158d CPC. It can be considered that the legislature of § 158d is generally insufficient (it is not limited to a certain group of crimes, review of legality is absent, there are no further requirements regarding the interference with constitutional rights). The more should this communication be protected, if it is conducted between a “suspect” and an attorney.