

Ladies and Gentlemen, Dear Colleagues,

Let me please introduce myself. My name is Filip Seifert, I am a lawyer and a founding member and a member of the Presidium of the Union of Defence Counsels of the Czech Republic. My legal practice is focused primarily on the defence in criminal cases. Previously, I worked as an assistant to several Ministers of Justice, I completed the preparatory service for judges, and then I passed the judicial examination. Since 2005, I have only pursued a lawyer's profession.

My contribution follows directly the great speech by Mr. Gřivna. The purpose of my contribution is to provide some information about the legislation, the case-law, and the practice concerning Police searches at lawyers, interference in confidentiality, as well as some other ways of breaking the confidentiality.

Undoubtedly, the obligation of confidentiality is essential to the provision of legal assistance. The profession of lawyer is based on the confidential relationship between the lawyer and the client and on the client's trust in the confidentiality of the lawyer. The confidentiality is a privilege of the client, not of the lawyer. This privilege cannot be abused. This privilege cannot especially be abused in order to prevent the crime detection. This privilege cannot protect a lawyer, let alone a lawyer who is an accomplice or accessory in any criminal activity. I express my unambiguous consent with that.

However, the confidentiality between the lawyer and the client guarantees that the client's sensitive information will not be disclosed and used against the client. And also that is why the client seeks the services of a lawyer. The lawyer is often the only person who can help the client. The confidentiality of information between the client and the lawyer was honoured and respected as one of fundamental rights. Recently, however, breaking the confidentiality in a number of ways in order to secure the evidence and gain the necessary information is on the rise. This is perhaps related to the trend in the Czech Republic when lawyers are increasingly being prosecuted for complicity or accessoryship.

One of the main ways of breaking the trust between a lawyer and a client is Police searches at lawyer's premises, i.e. in the areas used to carry out a lawyer's profession.

According to the Criminal Procedure Code, it is also possible to search also lawyer's premises. Since 2006, such searches have been subject to special regulations, with the obligatory participation of a representative of the Czech Bar Association as the relationship between the client and the lawyer might be broken in by the state authorities under those circumstances.

During a house search or search of other premises where the lawyer practices law, if there can be found documents which contain facts subject to the lawyer's obligation of confidentiality, the authority conducting the operation, in most cases the Police, is obliged to request the cooperation of the Czech Bar Association consisting in the participation of a representative.

In practice, persons are appointed by the Czech Bar Association who are to provide the Police with the cooperation. These persons are notified by the Police in advance that such search at lawyer's premises will be carried out, however, without giving specific identification in order to prevent any leakage of information.

The authority conducting such search is only entitled to inspect the content of respective documents only in the presence and with the consent of the representative of the Czech Bar Association. In my opinion, a lawyer on his/her own cannot give his/her consent to the Police to familiarise with the data and documents related to the exercise of lawyer's profession, although it happened in the early days of the effect of this legislation. However, if a representative of the Czech Bar Association refuses to grant such consent, which happens in most cases, the data and documents must be secured so that no

one could inspect the content of such documents. The data and documents thus secured are then forwarded to the Czech Bar Association.

However, if the Police keep insisting on the release of data and documents, the judge of the court who has ordered the search at the lawyer's premises will move the superior court to replace the consent of the representative of the Czech Bar Association.

The judge will grant the motion if the judge comes to the conclusion that the data or document does not contain any facts of which the concerned lawyer is obliged to maintain confidentiality and the relevant data and documents will be released to the Police for inspection. The Constitutional Court mentioned in this respect that it is important that a general court carefully consider for each document separately whether the concerned lawyer is obliged to maintain the confidentiality of the content of such document.

Further, the Constitutional Court noted in this respect that the reasonable diligence in familiarising with the content of all the documents obtained in the lawyer's office to be released to public authorities for the purposes of the production of evidence in criminal proceedings serves mainly to protect the rights of those clients of the lawyer who have nothing in common with the respective criminal case. This diligence takes time, technical capabilities, and a certain overall approach of the judge who decides on the matter. Any generalisation is totally unacceptable.

For example, I know a case where in order to detect the data on the secured mobile phones the police authority had to engage an expert, while it took only seventeen minutes for the court to familiarise with and evaluate the data and all other documents, to evaluate all proposals and objections of participants, and to come to its own conclusion. The Constitutional Court has found it unacceptable.

If the court finds that the data or document does not contain any facts of which the concerned lawyer is obliged to maintain confidentiality, the court will dismiss the motion and the Czech Bar Association will return the data and documents to the lawyer. In practice, however, it happens that the court issues any document to the Police even though it contains facts of which the lawyer is obliged to maintain confidentiality because it is connected with the investigated criminal activity.

This regulation applies primarily to those cases where the law enforcement authorities carrying out a search at a law firm could obtain confidential information relevant to the preparation of the defence of its client who is the suspect or accused, and interfere with the right of defence, and thus weaken or completely break the confidentiality obligation of the lawyer, and hence the equality of arms in criminal proceedings. At the same time, the legislature provides the protection of the rights of third parties against whom the lawyer carries out professional activities unrelated to the ongoing criminal proceedings.

This concludes the part concerning the system of searches at lawyers' premises. The system is not optimal, however, and raises many questions and brings a number of problems in practice.

The defence counsels do not want to hinder the detection of criminal activity, of course. But the confidentiality of information disclosed by the client to the lawyer and the efficient performance of the defence must be maintained. However, this institution must not be abused.

There have been disputed cases and differing interpretations in practice when the Police searched the residence or vehicle of a lawyer, claiming that such search does not need the participation of a representative of the Czech Bar Association and such search mode, as the search did not concern a place where the law is practised. Because it is not the seat of a lawyer entered in the register. The lawyers objected to that because after all we perform our lawyer's profession at our homes and in our

cars, where we are at the moment, and, in particular, where the data and documents connected with the lawyer's profession are kept. It was therefore necessary that the Supreme Court interpreted the concept of "*another area in which the lawyer practices law*" in order to determine for sure where this outlined special mode applies.

Well, the Supreme Court determined that this concept should be interpreted as any area that is associated with the lawyer's profession and in which, therefore, the information about clients, whether in written, electronic or other form, can be found. In addition to the seat of lawyer registered in the list of lawyers, it is a branch office of the law firm, a lawyer's office at the registered office of a company providing legal services, a lawyer's vehicle or places intended for storing or archiving lawyer's files. Further, the Supreme Court has determined that this approach will apply to other places related to the lawyer's profession, where information about clients concerned by the lawyer's obligation of confidentiality can be kept, processed, and used. These can include various electronic data storage sites, whether it is a lawyer's website, lawyer's own data storage sites not found at locations of normal course of lawyer's profession or storage sites operated by a different person allowing remote access via the Internet network (e.g. different types of so-called hosting, cloud, and servers). Finally, the Supreme Court determined that the residence of a lawyer where the lawyer's profession is carried out is not that "another area", but the special mode applies to it, as far as a house search is concerned.

Another problem associated with this special mode of searches is the identification of data and documents for a motion to the court to replace the consent of the representative of the Czech Bar Association. The motion must be certain. On the other hand, the Police and public prosecutors have argued that they often do not know in advance what data and what documents they are looking for, as this may only be determined after evaluating the secured data and documents, that means not before they inspect them, and therefore the requirement for accurate identification might frustrate the purpose of search and thus also of criminal proceedings and is often impossible. As for this, the Supreme Court is of the opinion that the requirement for marking documents and for the certainty of the motion is essentially fulfilled by that the judge is presented with an electronic data carrier containing an electronic form of only those documents which are to be reviewed by a judge. The fulfilment of the requirement for identification may also consist in the fact that the motion contains, even with the more general definition of documents (for example, by referring to the data carrier or designated folders or boxes containing a large number of generally described documents relating to the case) the sufficient list of such documents and detailed description of the facts of the case. However, this description must imply the suspicion of committing a criminal offence, including an explanation of how the premises or persons to be searched are associated with the criminal activity, and how the evaluation of the results of the criminal proceedings, the facts justifying the search warrant, as well as the results of the search show that the seized items correspond with the reasons for the search warrant. It must also be indicated what specific circumstances are to be established based on the seized documents and what they are to prove in relation to the criminal activity and whether the documents generally relate to other persons than those who have a position of the accused in the criminal proceedings.

Another limit is constituted by the opinion of the Constitutional Court, which completely rules out the possibility of providing any protection of communication and other information related to the commission of criminal offences by a lawyer, both to the detriment of the client or to the detriment of others in complicity with the client, because the criminal activity of a lawyer cannot be considered the provision of legal services.

Further, the Constitutional Court ruled out the protection of confidentiality in order to prevent the offenders of crimes from abusing the mandatory confidentiality of a lawyer by committing, with the lawyer's knowledge, criminal offences purposefully and using the premises of the lawyer's office as cover, supposing that it provides them due to confidentiality with adequate protection against law

enforcement authorities in criminal proceedings, and keep these documents or records on electronic data media or even commit criminal activities directly from the lawyer's office premises.

Another way of breaking the confidentiality starting from 1 January 2016 is a new legal obligation imposed upon lawyers as tax payers to submit VAT control reports. The control reports supplement monthly tax returns. A control report is a report on all invoiced amounts and suppliers and customers of goods or services. Such control report contains the same identification of the entity for whom the lawyer issues an invoice, i.e. the client identification. For the public authority, it is thus easily detectable who is represented by a lawyer, which constitutes interference in the confidentiality and confidential relationship between the lawyer and the client. However, it should be noted that the Act on Lawyer's Profession does not honour this confidentiality because it sets out that the lawyer's obligation of confidentiality shall not affect the lawyer's obligations as a tax payer established by special regulations applicable to the administration of taxes and fees.

However, the state goes even further, proposing an amendment to the tax code according to which the lawyer should be required to disclose to any tax administrator the client's data, including what the lawyer has learned of the client's property and business activities, for the past five years. The mentioned data could be included in the information acquired in connection with the defence and may be important for the defence or for the evidence to the detriment of the client. This is true not only in cases of accusation of tax evasion or money laundering or similar activities but essentially for the criminal prosecution in any economic crimes and possibly other criminal offences. The public authorities can therefore provide information by which the client actually criminally incriminates oneself and which the client entrusted to the lawyer for the defence purposes. The Czech Bar Association and the Union of Defence Counsels of the Czech Republic objected to that for criminal cases.

Another interference in the confidentiality can be seen in the next legislative bill on sworn experts, when the expert shall be obliged to confirm, amend or explain personally a written expert opinion in more detail at the request of a public authority, irrespective of the party ordering the opinion. Thus, even if the party ordering the opinion is a lawyer who does not want his or her expert to defend an expert opinion in court. While, in such case, the expert could not rely on the obligation of confidentiality against the public authority before which the proceedings are conducted and in which the expert opinion is to be used as evidence. This is also complemented by the obligation of experts to register all expert opinions in the list. This creates a situation where e.g. the defence counsel based on the instruction and information from the client orders, within the strategy of the defence, an expert opinion that will have a negative result for the client, the public authority learns of such expert opinion and uses the negative expert opinion against the lawyer's client in the proceedings and the expert will be obliged to continue in the expert activities against the client, on the basis of information obtained from the client's lawyer. This would be the case of not only interference in the lawyer's confidentiality but especially of breaking the principle of non-self-incrimination. There is a risk that lawyers will not order expert opinions when there is an even minor risk that they would be to the detriment of the client, which very significantly reduces the defence of the rights of clients.

Interference in the confidentiality and attempts to break it in all relevant areas are on the rise, given the efforts to ensure the evidence in criminal proceedings or to obtain information. We have tried to demonstrate for you the current situation of ways of interference in the confidentiality, especially in criminal proceedings.

From a practical point of view, it becomes increasingly difficult for us, defence counsels, to give assurances to the clients that their disclosed information, including the information about their criminal activity, is not disclosed to the Police and subsequently used against the clients. This complicates or limits to a great extent the effective defence and introduces a significant uncertainty into the confidential relationship between the lawyer and the client. The lawyer should not be the

person who provides assistance to the clients in an atmosphere of fear of the disclosure of communication. The lawyer is thus exposed to the risk that the insufficient protection of the client's data and information will cause any damage to the client, even in the form of evidence in a criminal prosecution. Then the client will not engage the lawyer and the client is not guaranteed the right to be able to defend its rights. The lawyer is also not a person who should constantly invent and invest in new means of the protected communication and data storage.

Yes, the institution of lawyer's secrecy, hence the provision of legal services, shall not be misused to commit criminal activities because that would result in giving unacceptable and purposeful precedence to the mentioned value over the values of fundamental rights and freedoms.

However, the law enforcement authorities must respect the uniqueness of the relationship between the lawyer and the client with maintaining the full confidentiality of the disclosed information used to defend the rights of the client and must let the lawyers do their work. In the absence of evidence, it is not possible to ask the lawyers of suspects for such evidence.

Finally, let me express concerns of defence counsels in the Czech Republic about the increasing breaking of the confidentiality between the clients and their lawyers. Also for this reason we established the Union of Defence Counsels of the Czech Republic so that we could point out to the increasingly repressive procedures taken by state authorities in the field of criminal law.

Thank you for the opportunity to speak at this conference, let me wish you a pleasant stay in the Czech Republic and express my great desire for future cooperation with the Union of Defence Counsels of the Czech Republic.