Prosecutorial investigation

regional criminal procedure legislation and experiences in application

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Contents

This monograph by a group of authors under the title *Prosecutorial Investigation – regional criminal procedure legislation and experiences in application*, which is issued by the OSCE Mission to Serbia, addresses one of the most current issues relating to the process of the reform of criminal procedure laws, not only of the countries in the region (Serbia, BiH, Croatia, Macedonia, Slovenia, and Montenegro), but in a much wider context. The abandonment of the judicial and the adoption of the prosecutorial concept of investigation as one of the main characteristics of the said reform process taking place in the countries in the region for over ten years supports the above statement about such a degree of topicality of the matter at hand. Special attention is given precisely to the issue of the concept of investigation analysed from the aspect of the ten-year-long process of the criminal procedure reform as a whole carried out in the countries in the region. The concept of investigation has been one of the most topical issues in the course of reform measures. Both theorists and practitioners have almost reached a consensus that the efficiency of not only investigation, but also of the entire criminal proceedings as one of the key reform goals for all of the countries concerned depends to a great extent on how this issue will be resolved. Precisely owing to such an approach, one of the crucial traits of the said reform process in the countries in the region has been the abandonment of the judicial concept of investigation and legislation of the new prosecutorial concept. Slovenia, which has still kept the judicial concept of investigation, is the exception to the rule, but the investigation in that country incorporates a number of elements from the prosecutorial concept of investigation. As regards the above characteristics of the process of reform of criminal procedure laws of the countries in the region, one should nevertheless keep in mind the fact that the prosecutorial concept of investigation does not exclusively serve the function that is expected of it, *i.e.* improves the efficiency of criminal proceedings. A number of issues related to the prosecutorial concept of investigation have been raised and the achievement of its goals depends on the manner in which they are resolved. Among particularly important issues of such nature are those related to: authorities that should conduct the investigation (should it be only the public prosecutor or some other entities as well?); powers of active participants in the investigation or in other words, what is the extent of powers that should be given to each individual participant in the investigation? Then, there is yet another issue: do prosecutors who conduct investigations have sufficient professional knowledge in the field of criminalistics which is the most relevant one when such activities are concerned? Likewise, how should the rights and freedoms of defendants be protected in the course of the investigation etc?

In general, the efficiency of investigation is one of the most topical issues within the scope of the above, but not limited to it, since it is well known and undisputable that an efficiently carried out investigation is one of very significant factors that influence the efficiency of criminal

proceedings taken as a whole. Nevertheless, when this aspect of criminal investigation is concerned, it is also an indisputable fact both in theory and in practice that the prosecutorial concept of investigation can serve its function as expected only if it has been defined under the law based on principles characteristic of it. Otherwise, it cannot fulfil such a function. In view of that, the following key issue arises: how can the prosecutorial concept of investigation be provided for in the law in order to promote the accomplishment of its expected objective, namely the efficiency and full respect for the rights and freedoms of defendants and other participants in investigative proceedings guaranteed under international instruments and national laws? An objective thus formulated may be attained only if the prosecutorial concept of investigation is defined under the law, while ensuring the full adherence to a number of principles including the following ones: the public prosecutor as the only authority that has the power to initiate investigative proceedings; reasonable suspicion as the substantive condition for initiating investigations; specifying conditions under which the police may act as an active participant in the investigation and the type of investigative actions they are allowed to undertake in such capacity; providing for specific mechanisms that will ensure adequate cooperation between public prosecutors and the police in the investigation; providing in an accurate and precise manner for evidentiary actions that may be undertaken by the court as an active authority as well as for conditions under which they may undertake those actions; specifying instruments for active and effective conduct of investigations as well as for the manner in which public prosecutors should proceed upon the conclusion of investigations and consequences of failing to conform to thus laid down rules; protection of fundamental rights of injured parties which follow from the criminal offence being investigated; providing for mechanisms for ensuring the collection of both incriminatory and exculpatory evidence for persons against whom investigations are conducted.

Considering the plethora of open issues, it is clear that the task of developing provisions for the prosecutorial concept of investigation in the law is not easy at all. This is even more so given the fact that another question needs to be taken into account in the process of providing for their definitions in the law. Specifically, neither the principles underlying criminal procedure nor the *ratio legis* of its precise regulation may be annulled for the purpose of achieving the desired degree of efficiency; this particularly applies to new statutory solutions, in particular to the radical ones that call for more profound theoretical explanations and professional interpretations. If we add to this another unquestionable fact, namely that a norm itself does not suffice and that it also must be adequately implemented with careful preparation and execution as its prerequisite, *i.e.* the fact that the lawmaker's criminal policy and the policy of entities implementing the corresponding norms of criminal law (its practical implementation) must be consistent with each other, then the above statement becomes even more valid. Only if the said two aspects of criminal policy are mutually compatible may we refer to it as a means of successful combat against crime both in general and from the aspect of investigative phase of the proceedings, which otherwise cannot be the case. In view of the above, the publication of a book which offers a critical, scientific and professionally reasoned overview of the subject matter in question, as is the case with this publication, is more than justified.

As regards its content, five sets of issues are the focus of analysis given in this monograph. Firstly, there are the reasons of criminal policy which lie behind the abandoning of judicial and transitioning to the prosecutorial concept of investigation. Secondly, the principles underpinning the prosecutorial concept of investigation. Thirdly, the manner in which the said principles are provided for in the law. Next, the influence of the normative concept of investigation on other

institutes of criminal procedure. Finally, the fifth set of issues deals with the adequate manner of implementing the above model of investigation.

The issues addressed in this monograph have been elaborated from a number of aspects and those that particularly stand out include as follows. The majority of the above-mentioned topics are analysed from the normative aspect or from the perspective of existing criminal legislation norms of the observed countries in the region (Serbia, Montenegro, BiH, Macedonia, Slovenia and Croatia), relevant international legal standards, and pertinent comparative criminal procedure laws and the degree to which they conform to each other. Next, there is the aspect of practical application of the analysed subject matter identifying the manners in which provisions contained in those laws could be applied in practice. Finally, various theoretical views related to the subject matter in hand have been analysed from a separate aspect, specifically their theoretical element within the concept of criminal (and not onl criminal) law. Given the method used to analyse the issues in this publication as well as the aspects from which the analysed issues are discussed, it may be concluded that the monograph may be greatly relevant when trying to assess the degree of implementation of modern tendencies in the science of criminal procedure law in the newly adopted criminal procedure codes of the countries in the region in terms of the concepts of investigation and when assessing how and in what way these can be implemented more fully in the said laws, which is one of the goals of the reform of these procedures.

In addition to the above, the monograph points to the adequate methods of application of thus regulated concept of prosecutorial investigation, which adds to its relevance. The reason behind this is that only adequately applied norms are fully justifiable from the standpoint of criminal policy. If we add to this another irrefutable fact, namely that the monograph covers the subject matter in hand from all of the above aspects in a critical, scientific, and professional way supported by relevant arguments, the above statement grows in importance. In view of the aforementioned, we are free to state that the monograph also serves the purpose of meeting the primary goals of the reforms of criminal procedure laws of the countries in the region which has been put in place since the turn of this century.

Essential explanations of the new procedural rules, the reasons arising from the criminal policy and procedural law which have led to their establishment as well as of their intended purpose may be safely relied on for their correct interpretation and application in judicial practice. Even though the subject of the discussion are existing regulations, the monograph brings forward a number of *de lege ferenda* proposals with a view to improving the text of the laws and their coherence, which the competent authorities should see as a signal for taking specific actions. Theoretical explanations of the majority of issues related to the prosecutorial concept of investigation, the interpretation of principles that should underline such a concept of investigation, and the procedural positions of authorities that apply it in practice make this monograph a piece of current literature for further theoretical studies and correct application of statutory regulations in judicial practice. Well-formulated and concrete proposals *de lege ferenda* may prove immensely helpful to legislators in the process of improving regulations that govern the prosecutorial concept of investigation and restoring a balance between the efficiency of investigation and fair proceedings that provide optimum guarantees for the protection of human rights which seems to have been disturbed when a considerable number of provisions from the analysed codes are concerned.

It can safely be concluded that the publication in hand is of considerable importance not only for understanding the reasons of criminal policy for abandoning the judicial and adopting the prosecutorial concept of investigation, but also for grasping the manner in which it has been provided for in the law so as to achieve the expected goal. And that goal is the efficiency of both that stage in the proceedings and the criminal proceedings in their entirety, including full respect for the rights and freedoms of defendants and other participants in the proceedings guaranteed under international instruments and national laws. The practical aspect of the discussed issues should be underlined in that context, pointing to the adequate manners of application of regulations governing the prosecutorial concept of investigation. Such an approach is also supported by the statement that only an adequately applied regulation may be fully justified from the perspective of criminal policy. Otherwise, it is only an ornament without any practical value. Theoretical elaborations of the analysed issues and in-depth, scientifically based examinations of a considerable number of regulations from the observed laws may serve as valid research material for more detailed theoretical studies and the confrontation of arguments concerning the nature, structural elements, and principles of elaboration of the prosecutorial model of investigation found not only in the criminal procedure laws of the countries in the region, but on a wider scale as well. Scientifically based systematisation, valid theoretical viewpoints, the comprehensive examination and critical analysis of normative provisions and jurisprudence give such a scientific and professional level to this monograph that ensures its current relevance and originality.

The interpretations of the prosecutorial concept of investigation and new rules of procedure dealt with in this monograph are both analytical and comprehensive thus making their content and meaning understandable. The critical tone of arguments concerning the majority of solutions present in the analysed laws indicates that they need to be studied further not only in theory, but also in terms of their regulation under the law which process is certainly underway even though almost all of the analysed countries (with the exception of Slovenia) have adopted new CPCs and the said concept of investigation.

Once it has been published, this monograph will without a doubt provide both useful and indispensible reference material for all those it is intended for (the academic and professional community, lawmakers and legislators). It will also provide guidelines for a desirable manner of providing for the prosecutorial concept of investigation in the current reform process and guidelines for the adequate application of thus regulated solutions. In addition, as regards its publisher – the OSCE Mission to Serbia – the publication of this book will once again give invaluable contribution not only to the quality of the reforms of criminal procedure codes of the countries in the region and the adequate application of new provisions in their reformed systems of criminal procedure, but also to the further widening and strengthening of ties among fellow professionals, namely criminal jurists (both theorists and practitioners) from the countries whose representatives have taken part in writing this monograph and the proceedings of the conference in connection with which it is published.

In Belgrade,

14 May 2014

REVIEWED BY:

Professor Stanko Bejatović, PhD

Stanko Bejatović, PhD[1]

Prosecutorial Investigation as a Characteristic of the Reforms of Criminal Procedure Legislation of the Countries in the Region
(the reasons for its legislation in view of the criminal policy, current state and future prospects)

1. General Comments on the Investigation, its Concepts and its Significance for the Criminal Proceedings

The investigation as a stage of the criminal proceedings, of their preliminary stage to be exact, represents an extremely important and at the same time very delicate part of the criminal proceedings. The fact that the main criminal proceedings are based on and that the outcome depends on the investigation to a great extent supports such a view. In addition, the investigation is especially important for the protection of human rights and freedoms, since there is somewhat greater risk of violations of the said rights at this stage of the proceedings than at the main criminal proceedings. In view of the aforementioned, it is not surprising that many scholars whose field of expertise is the criminal procedure law now deem the strategy of the criminal investigation to be their new field of scientific research dealing with "planning and application of complex measures of investigation, as well as control and prevention of crime". Certain authors have gone even further, as it appears with good reason, and advocate for the criminal investigation strategy to become an even more complex field of research and, as such, to form a separate scientific

1 Professor at the Faculty of Law, President of the Serbian Association for Criminal Law Theory and Practice and member of a number of government committees in charge of preparing draft versions of the laws related to criminal legal matter.

discipline.[2] Given the aforementioned, the investigation as a special stage of the criminal proceedings has been the cause of numerous dilemmas, disagreements and difficulties both in theory and in practice for quite some time. A number of issues have been raised. Among them especially important ones deal with: institutions that are in charge of conducting the investigation; the powers given to the active subjects of the investigation, i.e. what the scope of the said powers should be when it comes to particular subjects of the investigation. In addition, there is the following question: Are the court officers who are conducting the investigation sufficiently skilled in the field of criminal investigations and law enforcement since their knowledge is tested the most at this stage of the proceedings? Then, there is the question of how and through what means the rights and freedoms of the accused person should be protected during the investigation. Also, what system or model of investigation is the most appropriate in terms of its efficiency and the efficiency of the entire criminal proceedings, provided that this is not done at the expense of violating any international agreements and rights and freedoms guaranteed to those who are subject to the investigation by the national legislation? And so on.[3] Of all the issues, and not just the aforementioned ones, the issue of efficiency of the investigation is one of the most relevant ones in general, as it is common knowledge and an indisputable fact that an efficiently conducted investigation is one of the most relevant factors influencing the efficiency of the criminal proceedings as a whole.[4] If we add that the efficiency requirement in the criminal proceedings is understood today both in terms of their level of quality and their duration and is one of the crucial features of the criminal law as a science as well as of the modern criminal policy in general[5], then this issue gains even greater significance. In view of the aforementioned, it is not surprising that providing normative grounds for increased efficiency of the criminal proceedings is one of the priorities in the process of the reform of criminal procedure legislation in the countries of this region, which has been in progress since the breakup of the former Yugoslavia.

Bearing in mind the aforementioned importance of the investigation as a whole, it is hardly surprising that there is no escaping this topic in any conference that is remotely relevant for the current tendencies in the study of the criminal law in general[6] , i.e. there is no escaping this topic when working on any remotely serious interventions in the modern criminal procedure legislation, especially if it is a part of a civil law legal system.[7] In view of this, it is the responsibility of all those who in any way (through theory or practice) deal with this issue, and especially those who are involved in theoretical analysis and legislation of the said matter, to contribute by proposing such provisions which will serve as adequate norms for the investigation thus providing its efficiency and the efficiency of the criminal proceedings as a whole in terms of its two components (its duration and legality of particular investigative acts and investigation as a whole).[8]

2 Adelmo Manna, Enrico Infante, *Criminal Justice Systems in Europe and North America - Italy*; Heuni - Helsinki – Finland, 2000; Rolando V. del Carmen, *Criminal Procedure - law and practice* - (4th edition), San Houston State University, 1998; Joseph G. Cook, Paul Marens, *Criminal Procedure* (5th edition), Lexis Publishing, New York, 2001; *D. G. Cracknell's Statutes English Legal System (Police and Criminal Evidence Act 1984)*, London, 1992; Policija i pretkrivični i prethodni krivični postupak, VŠUP, Belgrade, 2005, pp. 99-144

3 Bejatović,S.,Tužilački koncept istrage kao jedno od obeležja savremenog krivičnog procesnog zakonodavstva u zemljama bivše SFRJ i Srbiji, Collected Papers: "Pravo u zemljama regiona" (Law in Countries of the Region), Institute for Comparative Law, Belgrade, 2010, pp. 152-174.

4 Radulović, D., The concept of investigation in criminal proceedings in the light of the new criminal procedure legislation, Collected Papers: "New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects)" , OSCE Mission to Serbia, Belgrade, 2012, pp.11-22.

5 See: "New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects)" , *op.cit*.

6 Ibid.

7 Ibid.

8 Đurđić,V., *Koncepcijska doslednost tužilačke istrage prema novom Zakoniku o krivičnom postupku*, Collected Papers: "*Primena novog Zakonika o krivičnom postupku Srbije*", Serbian Criminal Law Association, Belgrade, 2007, p. 128.

One of the crucial prerequisites necessary to fulfil such a task, which is as well a crucial prerequisite for successful participation of the subjects of the investigation in general, is adequate normative grounds for their actions. Sound legislation, along with other requirements such as expertise, motivation, technical equipment etc., guarantee professional and efficient criminal proceedings as a whole.[9] It is with this in mind that one of the main reasons of the author for writing this text, as well as of the OSCE Mission to Serbia for the organisation of the entire conference where this collection of papers will be presented, is to offer a contribution with regard to legislating the investigation concept in the reformed criminal procedure codes in the countries of the region, where these exact issues concerning the concept of the investigation and everything else directly or indirectly related to the accepted concept of the investigation are among its more significant distinctions.[10]

At the end of these brief introductory remarks, it should be added that in terms of the investigation systems, there are – depending on the criteria - generally two or three such systems. Their main difference is the type of the legal subject undertaking investigative actions; specifically, whether the said subject is a court or a body belonging to the executive and administrative branch. According to this criterion, these systems are: judicial investigation, prosecutorial and prosecutorial-police investigation. The first concept, judicial investigation, previously dominant type in civil law systems, is increasingly losing ground to the prosecutorial or prosecutorial-police concept of investigation.[11] The prosecutorial and prosecutorial-police concept of investigation is losing its common law identity and is increasingly seen as universal.[12] Indeed, even the criminal procedure legislation of the countries from which the concept of the judicial investigation hales, has been increasingly adopting a considerable number of the provisions that are typically used in a prosecutorial-police concept of the investigation. Such is the case of France, where the institution of an investigating judge was originally established, which has now significantly reduced the powers of the investigating judge by introducing liberties and detention judge who is in terms of hierarchy positioned higher than the investigating judge and has jurisdiction over arrests, detention, searches, entering into residences and seizure of items, as well as over some issues outside of the criminal proceedings.[13] This statement is further underlined by adding another fact and that is that if the investigating judge is unable to undertake all of the necessary investigating actions then the judicial police may be entrusted with this task. This is done through a letter of request which lists the specific actions that are to be taken, which usually include crime scene investigation, seizure of items, search and interrogation of the witnesses. In such a case the judicial police officer is acting at the request of the investigating judge has the same powers as the judge himself and must abide by the same procedural formalities. In this context, it is important to stress that the request must not be general in scope, nor is it allowed to transfer the issuance of an order or rendering the judgment in such a request.[14] In addition, this is going even further and it is quite certain that France, where the institution of an investigating judge first appeared, is

9 Đurđić, V., Krivičnoprocesno *zakonodavstvo kao normativna pretpostavka efikasnosti postupanja u krivičnim stvrima*, Collected Papers: "*Krivično zakonodavstvo,organiozacija pravosuđa i efikasnost postupanja u krivičnim stvarima*", Serbian Association for Criminal Law Theory and Practice, Belgrade, 2008, pp. 20-24.

10 Bejatović, S., *Reforma krivičnoprocesnog zakonodavstva Srbije i efikasnost krivičnog pravosuđa*, Collected Papers: "Reforma krivičnog pravosuđa" (Criminal Justice System Reform), Faculty of Law in Niš, Niš, 2010, pp. 1-26.

11 See: *Policija i pretkrivični i prethodni krivični postupak*, VŠUP, Belgrade, 2005, pp.103-195.

12 See: Bejatović, S.,*Tužilački koncept istrage kao jedno od obeležja savremenog krivičnog procesnog zakonodavstva u zemljama bivše SFRJ i Srbiji*, Collected Papers: "*Pravo u zemljama regiona*", Institute for Comparative Law, Belgrade, 2010, pp. 152-174.

13 Ilić ,G., *Položaj i uloga policije u pretkrivičnom i prethodnom krivičnom postupku u francuskom krivičnom procesnom pravu*, *Policija i pretkrivični i prethodni krivični postupak*, VŠUP, Belgrade, 2005.

14 See: Beziz- Ayache, A., Dictionnaire de droit penal general et procedure penale, 2e edition, Paris 2003, 29 et 30.

going to significantly change his procedural role giving way to the increased powers of the prosecutors and the police.[15] To put it simply, the concept of prosecutorial or prosecutorial-police investigation dominates modern criminal procedure law, both in comparative criminal procedure legislations and before international criminal courts.[16] This is to say that it may be concluded that this represents an emerging trend.

One of the first countries within Europe as a whole which has a civil law legal system and which has abandoned the concept of a judicial investigation and switched to a prosecutorial investigation was Germany. It has introduced the most significant change which meant abolishing the judicial investigation as a stage of the criminal proceedings and eliminating it from the investigating judge's jurisdiction by the First Criminal Procedure Reform Act passed on 9th December 1974.[17] It was in an effort to establish normative grounds which allow faster criminal proceedings which were at the time criticised both by scholars and practitioners as being below par. In other words, the investigation fell under the jurisdiction of the State Attorney and the police. Judging by the German papers in criminal law publications, this goal has been achieved.[18] It is no longer possible to come across calls for the abandonment of this concept of the investigation and for the return to the judicial investigation. It may be concluded that it is precisely due to this that a number of other criminal procedure legislations have undertaken similar interventions. Among these are the countries in this region – formerly parts of Yugoslavia, and the first one of these countries to embrace this concept of investigation was Bosnia and Herzegovina and the results of its application, after a very brief adjustment period, are satisfactory.[19] In view of the aforementioned, which supports the case for the concept of a prosecutorial or prosecutorial-police investigation as the more dominant concept of the investigation both in the European criminal procedure legislation in general and, consequently, in the criminal procedure legislation of the countries in this region,[20] the question is what reasons justify such a trend? In other words, are there any reasons which can challenge this trend, and if so, how relevant are they?

2. Prosecutorial Concept of the Investigation (the reasons for legislation in view of the criminal policy – advantages over the judicial concept of the investigation)

When it comes to the countries of this region over the last ten or so years, i.e. during the period their criminal procedure legislation has been undergoing a reform, one of the most discussed issues related to the investigation as a whole has been the issue of its concept. This is due to the fact that efficiency of the investigation, and consequently of the whole criminal proceedings, to a great extent depends on how this issue is resolved, and this is one of the key objectives of the reform as has already been mentioned. Therefore, one of the requirements that should be met whenever changes are being introduced in any criminal procedure legislation is to ensure that such changes are establishing normative grounds for further increasing efficiency of the criminal proceedings provided this is not done at the expense of violating international agreements

15 Ilić ,G., op.cit.
16 See: Škulić, M., *Međunarodni krivični sud*, Dosije, Belgrade, 2005.
17 Lutz Meyer-Gossner, *Strafprocessoerdnung*, 46 .Auflage,Verlag C.H. Beck, Munchen, 2003, p. 276.
18 Artkamper/Herrmann/Jakobs/Kruse, *Aufgabenfelder der Staatsanwaltschaft*, ZAP, Munster, 2008.
19 See: Simović, M., *O nekim iskustvima u funkcionisanju novog krivičnog procesnog zakonodavstva Bosne i Hercegovine*, Collected Papers: "*Nove tendencije u savremenoj nauci krivičnog prava i naše krivično zakonodavstvo*", Society for Criminal Law and Criminology of Serbia and Montenegro, Belgrade, 2005, pp. 611-639.
20 See: "*New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects, op.cit..*

or national legislation guaranteeing rights and freedoms of the participants of the criminal proceedings in general.[21] In view of thus formulated general rule, the right approach has been taken that during the process of reforming the criminal procedure legislation this issue should be carefully looked at in the countries in this region as well,[22] right from the very start. In other words, the right approach has been taken in setting this as one of the objectives to be met through the reformed criminal procedure legislation in the countries of the region and not just in any one particular country. When it comes to the Republic of Serbia, it may be noted that the necessity of taking into account this issue as well while working on the reform of the criminal procedure legislation[23] arose when the Criminal Procedure Code from 2001 was being drafted and when subsequent amendments and supplements were being introduced, especially those from 2009.[24] However, despite its relevance, the issue of altering the concept of the investigation was not resolved until the CPC from 2011 was passed.[25] The reactions in professional circles and the provisions in comparative criminal procedure legislation dealing with this issue which have been yielding good results over the years as well as past experiences in the judicial practice in general have all been leading to the conclusion that the change is needed in the concept of the investigation, i.e. the judicial investigation as a traditional concept of truth should be abandoned both in the criminal procedure legislation in Serbia and in the countries of the region. There are a number of reasons why it is necessary to replace the judicial concept of the investigation with the prosecutorial or prosecutorial-police investigation.

First, normative grounds for more efficient criminal proceedings are established and consequently, one of the key objectives of the reform of criminal procedure legislation as a whole is met. The achieved results through the use of prosecutorial investigation after it was introduced in the competent criminal procedure legislation suggest that this concept contributes to the efficiency of the investigation to a much greater extent than the judicial concept. This is due to a well-known and indisputable fact that an efficiently conducted investigation is one of the crucial factors for efficient criminal proceedings as a whole.[26] It is sufficient to list two examples to justify this conclusion. The first one is Germany, which switched from a judicial to a prosecutorial concept of investigation by passing the Criminal Procedure Reform Act on 9th December 1974[27] which aimed to establish normative grounds for faster criminal proceedings which at that time were criticised by both scholars and practitioners as being below par. Judging by the papers that deal with these issues, good results were very quickly seen through the application of the new concept of the investigation, so it is no longer possible to come across calls for the abandonment of this concept of the investigation and the return of the judicial investigation. The second example is that of BiH

21 Lazin, Đ., *Sudska istraga-Dileme i problemi*, Collected Papers: "*Novo krivično zakonodavstvo: Dileme i problemi u teoriji i praksi*", Institute for Criminological and Sociological Research, Belgrade, 2006, p. 350.

22 As was the case with e.g. France

23 Bejatović, S., *Aktuelna pitanja tekuće reforme krivičnog procesnog zakonodavstva Srbije*, Collected Papers: *Aktuelne tendencije u razvoju evropskog kontinetalnog prava*, Faculty of Law in Niš , Niš, 2010.

24 See: Bejatović, S., *Efikasnost postupanja u krivičnim stvarima kao prioritetan zadatak reforme krivičnog procesnog zakonodavstva*, Revija za kriminologiju i krivično pravo (Review of Criminology and Criminal Law), no. 3/2010, pp. 23-48.

25 With the exception of the CPC from 2006.

26 Radulović, D., *The concept of investigation in criminal proceedings in the light of the new criminal procedure legislation*, Collected Papers: "*New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects)*", OSCE Mission to Serbia, Belgrade, 2012, pp.11-22.

27 Claus, R., *Die Strafprocesrecht*, 22,.Auflage, Munchen, 2002.; Kleinkecht/Meyer-Gossner, *Strafprocessordnung*, 43, Auflage,Verlag C.H. Beck, Munkchen, 2004, p.476.

which was the first country in this region to adopt this concept of the investigation and the results of its application, after a very brief adjustment period, have also been satisfactory.[28]

Second, the level of activity of the public prosecutor is increased as this is the only legal subject authorised to undertake criminal prosecution with regard to a great number of criminal offences. When the concept of the investigation is judicial, the prosecutor is pretty passive and relies mainly on what the police and the investigating judge collect and submit to him, which, it must be admitted, is not in accordance with his basic function of criminal prosecution of the perpetrators of criminal offences. Similarly, the prosecutor's approach to the investigation as described above, which is primarily the result of the judicial concept, does not help the efficiency of the criminal proceedings. Furthermore, it is questionable to what extent the judicial concept of the investigation complies with the principle of legality of criminal prosecution which imposes an obligation on the public prosecutor to initiate and conduct the criminal proceedings when the legal requirements for this have been met and with the prosecutor's duty to provide evidence proving the indictment is well-founded. It seems that there is no dilemma whether the prosecutorial concept of the investigation upholds substantially better the fundamental principles which govern the functioning of the public prosecutor in the fight against crime and, as such, it helps the prosecutor proceed more efficiently in the said fight in general.

Third, accountability for an inefficient investigation is regulated more adequately. One of the characteristics of the judicial concept of the investigation is, undoubtedly, that the responsibility for how efficient the investigation is may be shifted, almost with impunity, between the public prosecutor and the investigating judge or the police in circles, which can have quite an impact when it comes to meeting its objective successfully. Consequently, this provides yet another argument in favour of the prosecutorial concept of the investigation.

Fourth, the achieved results through the application of the prosecutorial concept of the investigation. The results achieved in the countries which have introduced such changes to their criminal procedure legislations in order to increase the efficiency of criminal proceedings as a whole completely justify such changes to the legislation.[29] This is illustrated by the already mentioned results such changes have brought about in Germany and BiH.

Fifth, the office-based approach to work by the investigating judge as the main active subject in the judicial concept of the investigation. One of the important arguments against the judicial concept of the investigation is that this type of investigation is mainly office-based. The investigating judge as the main active subject of this type of investigation is primarily involved in the collection of testimonial evidence, while the remaining evidence is provided through the previous activities of the police. Therefore, it may be concluded that the police has a significant role in the judicial investigation as well. The investigating judge quite often accepts the evidence collected by the police in the preliminary investigation. Similarly, the police are quite often entrusted with

28 Simović, M., *O nekim iskustvima u funkcionisanju novog krivičnog procesnog zakonodavstva Bosne i Hercegovine*, Collected Papers: "*Nove tendencije u savremenoj nauci krivičnog prava i naše krivično zakonodavstvo*", Udruženje za krivično pravo i kriminologiju Srbije i Crne Gore, Belgrade, 2005, pp. 611-639; Sijerčić-Čolić, H., *Aktuelna pitanja krivičnog postupka u BiH*, Collected papers: "*Aktuelna pitanja krivičnog zakonodasvstva",* Serbian Association for Criminal Theory and Practice, Belgrade, 2012, pp. 367-379; Dodik, B., *Prosecutorial investigation – the experiences of Bosnia and Herzegovina*, Colleceted Papers:"*New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects)*", OSCE Mission to Serbia; Belgrade, 2012, pp. 152-168.

29 This is the case with e.g. German criminal procedure legislation (See: Lowe-Rosenberg, *Die Strafprocessordnung und das Gerihtsverfasunggesetz, Groskomentar*, 23. Auflage, Zweiter Band , Berlin ,1988, par.160-169.

undertaking certain investigative actions.[30] Seeing this fact as an argument in favour of the prosecutorial or prosecutorial-police concept of the investigation is dismissed by claiming "it is not the same when someone has a significant role in some process or when they decide on something. As long as the police does not decide independently whether certain evidence should be presented during the investigation, as this is decided by the investigating judge, the impartiality of the investigation is intact and it makes no difference whatsoever and it bears no relevance whether the investigating judge usually accepts all of the evidence served by the police. What is important is that he does not have to do so."[31] Such a counter-argument cannot be justified. This is because in the prosecutorial and i.e. the prosecutorial-police concept of the investigation the police is not the solely exclusive active subject undertaking investigative actions. On the contrary, this is primarily done by the public prosecutor. Secondly, in terms of undertaking the investigative actions, their main characteristics must be legality and efficiency and this is achieved through the provision of instruments used for this purpose. Thirdly, in view of the aim of the investigation, it is certain that the public prosecutor as the one who is primarily in charge of managing the investigation activities is the most competent to decide which investigative actions should be undertaken in order to achieve that aim. Consequently, provided that all of these requirements are met, the impartiality of the investigation conducted by the public prosecutor and the police may not be called into question. Especially if the issue of the review of the charging document filed after such an investigation is adequately dealt with.

Sixth, limiting the possibility of unnecessary repetition of evidence by switching to the prosecutorial concept of the investigation. Prosecutorial concept of the investigation avoids unnecessary repetition when presenting the evidence. For instance, from the point of view of the legislation which recognises the judicial concept of the investigation until the alleged offender (suspect – defendant) is heard, the evidence may be repeated up to three times (during the preliminary investigation by the police, during the investigation and at the main hearing)[32]. The arguments which dispute this and go in favour of the judicial concept of the investigation do not bear any relevance when resolving this issue as a whole. Specifically, pointing out that "it is not detrimental to the defendant to be heard again by the court"[33] is completely irrelevant. In terms of choosing one over the other concept of the investigation, the deciding factor should be whether such multiple repetition is necessary or not and not whether it is detrimental or not to the defendant .

Seventh, the legal nature of the investigation. According to its legal character, the investigation is not judicial but prosecutorial and police activity. This is in accordance with the aim of the investigation, which is to collect the material the public prosecutor needs in order to file a charging document, which is supposed to be done in accordance with the aforementioned principles by the public prosecutor independently or together with the police and not by the court.[34]

30 This is the case with the searches of residences and persons and temporary seizures of items pursuant to Art. 81 of the previous CPC of the Republic of Serbia.

31 Lazin, Đ., *Sudska istraga – dileme i problemi, Novo krivično zakonodavstvo: Dileme i problemi u teoriji i praksi*, Institute for Criminological and Sociological Research, Belgrade, 2006., p.356.

32 Bejatović, S., *Izmene i dopune ZKP i pojednostavljene forme postupanja u krivičnim stvarima*, Revija za kriminologiju i krivično pravo, no. 2/2009, pp. 21-40.

33 Lazin, Đ., *Sudska istraga – Dileme i problemi in Novo krivično zakonodavstvo: Dileme i problemi u teoriji i praksi*, Institute for Criminological and Sociological Research, Belgrade, 2006, p.357.

34 S. Brkić, C., *Predlozi izmenama i dopunama ZKP*, Collected Papers: "*Analysis of the Criminal Procedure Code in Serbia: Compliance with the Provisions of the European Convention on Human Rights and Recommendations*", Council of Europe, HRCAD (2004)1, May , p. 25,.

Eighth, the fundamental principles of the criminal procedure law are more fully observed. In addition to the aforementioned, there is another argument for the prosecutorial concept of the investigation and that is that the prosecutorial investigation allows better observance of most fundamental principles governing criminal procedure law. This primarily refers to the principle of direct examination since with such a concept of the investigation almost all of the evidence must be presented at the main hearing. It is extremely rare that the evidence from the prosecutorial investigation is allowed to be read at the main hearing, which is not the case with the judicial type of investigation. Namely, in certain cases statements made by the witnesses and experts during the investigation may be read at the main hearing if it is a judicial concept of the investigation. Considering how important this principle is when determining the truth in criminal proceedings in general, this argument undoubtedly must be taken into account when choosing one concept of the investigation over the other.[35]

Ninth, compliance of the criminal procedure legislation of individual countries with modern comparative criminal procedure legislation and international criminal law. One of the main characteristics of the investigation, i.e. of the pre-trial or preparatory criminal proceedings in general in modern comparative criminal procedure legislation is the increased role of the public prosecutor and the police, i.e. the use of the police under the supervision and management of the public prosecutor and a decline in the importance of the judge as the subject undertaking investigative actions. Indeed, even the countries seen as the place of birth of the judicial investigation, as has already been pointed out, are increasingly abandoning it. To put it simply, the prosecutorial, i.e. the prosecutorial-police, concept of the investigation dominates the modern criminal procedure law both in national criminal procedure legislations and in international criminal courts.[36] In other words, it may be concluded that this concept, as such, is an emerging trend. Indeed, those few countries which have not switched to this concept of the investigation yet, are seriously at work ensuring that the prerequisites for making this transition are put in place. This means primarily ensuring that the prosecutor's office and the police are adequately qualified and technically equipped for practical implementation of this concept of investigation as practically the only remaining prerequisite to be met before making this switch in these criminal procedure legislations. Therefore, it may be stated that it is only a matter of time when these countries will make this switch to the prosecutorial or prosecutorial-police investigation. Naturally, with regard to the previous arguments, it must be stressed that the fact that this is a global trend, does not in any way impose a commitment on any particular country.[37] From a legal standpoint, this is true. However, it is also true that whenever criminal procedure legislation of a particular country is being drafted, it should also be remembered that this legislation needs to be harmonised with the legislative provisions in contemporary comparative criminal procedure legislations, provided that such comparative provision are not contrary the country's legal system and generally accepted rules according to which this particular country functions. This is definitely not an issue when it comes to prosecutorial or prosecutorial-police concept of the investigation. Furthermore, some authors point out with regard to this argument, the fact that there is no international legal document which would make it legally binding for a country to introduce a certain type of investigation into its legislation. This is also completely true, as is the view that the issue of the concept of

35 On other arguments in favour of the prosecutorial concept of the investigation - *Radulović,D., Koncepcija istrage u krivičnom postupku u svetlu novog krivičnog procesnog zakonodavstva*, Revija za kriminologiju i krivično pravo, no. 3/2012.

36 See: Škulić, M., *Međunarodni krivični sud*, Dosije, Belgrade, 2005.

37 Lazin, Đ., *Sudska istraga – Dileme i problemi, Novo krivično zakonodavstvo: Dileme i problemi u teoriji i praksi*, Institute for Criminological and Sociological Research, Belgrade, 2006, p. 350.

the investigation is left to each country individually to resolve in accordance with its needs and capabilities as it deems appropriate. However, it is also true that the international criminal law, viewed in general, as has already been mentioned, is the proponent of the prosecutorial, or prosecutorial-police, concept of the investigation. This fact, along with the aforementioned fact concerning the situation in the modern comparative criminal procedure legislation regarding this issue, although it is not binding, should be at least taken into account when considering this issue as well. In addition to these, there two more facts that support such a position. The first one is related to the increasing importance and role of the international criminal law, which quite often even takes precedence over national legislation.[38] The second one is related to ever increasing harmonization of national criminal procedure legislations, i.e. the absence of any differences between particular national legislations regardless of the fact whether they belong to a civil or common law system.[39] Therefore, complaining against the prosecutorial or prosecutorial -police concept of the investigation because it is a provision of the common law system has no justification.[40] Quite the contrary.

In addition to the aforementioned, the arguments against the prosecutorial or prosecutorial -police investigation should also be taken into account when deciding whether to change the concept of the investigation. These arguments must be taken into consideration because the decision on this issue must be based not on mere wishes and impressions but on arguments, and arguments are arrived at only after simultaneous analysis of both pros and cons regarding this concept of investigation. However, as far as the reasons against the prosecutorial or prosecutorial-police concept of investigation is concerned, we hold that these reasons only at first glance call into question whether such an idea is justified. The following arguments of all the arguments against the prosecutorial or prosecutorial-police concept of the investigation merit our attention.

First, an encroachment on civil rights and liberties guaranteed by international agreements and national legislation (the risk of abuse of power). According to some authors, one of the key arguments against the prosecutorial, or prosecutorial and police, concept of the investigation, i.e. against the concept in which the police appears as an active subject of the investigation is that this poses "an attack on civil rights and liberties guaranteed by international agreements and local legislation by providing for the law enforcement officers to be an active subject of the investigation, i.e. that this provides the basis for increased repressiveness of the police". To support this argument, its proponents cite examples from the operation "Sablja" (Sabre) undertaken during the state of emergency which was declared in the Republic of Serbia on 12th March 2003. Moreover, it is pointed out that "it is always dangerous in unstable states, like the ones undergoing a transition period, to entrust the public prosecutor and the police with the investigation, since they are not sufficiently impartial and their relations with the executive power are too close."[41] Such an objection cannot be upheld for several reasons. First of all, in the prosecutorial or prosecutorial- policee investigation the issues related to the civil rights and liberties are decided neither

38 Stojanović, Z., *Pojednostavljenjene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Collected Papers: "*Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije" (Simplified Forms of Procedure in Criminal Matters and Alternative Sanctions)*, Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009, pp. 11-29.

39 Bejatović, S., *Pojednostavljene forme postupanja u krivičnim stvarima i njihov doprinos efikasnosti krivičnog postupka,* Collected Papers: "*Pojednostavljene forme postupanja u krivičnim stvarima i alternativne sankcije*" (Simplified Forms of Procedure in Criminal Matters and Alternative Sanctions), Serbian Association for Criminal Law Theory and Practice, Belgrade, 2009, pp. 58-83.

40 Lazin, Đ., *Sudska istraga – dileme i problemi, Novo krivično zakonodavstvo: dileme i problemi u teoriji i praksi*, Institute for Criminological and Sociological Research, Belgrade, 2006., p.360.

41 Lazin, Đ., *Sudska istraga – dileme i problemi, Novo krivično zakonodavstvo: dileme i problemi u teoriji i praksi*, Institut za kriminološka i sociološka istraživanja, Belgrade, 2006, p.358.

by the public prosecutor nor the police, but by the court. In addition, the instruments for efficient legal protection of the guaranteed rights and liberties of the defendant and other subjects in this concept of the investigation may be found in quite a number of current provisions in existing criminal procedure codes which contain this type of the investigation. For instance, German StPO[42] puts the investigation as the preparatory stage of the criminal proceedings under the jurisdiction of a State Attorney who may transfer certain investigative actions, and sometimes all of them, to the police, which is usually the case in practice, but neither of the two have the right to decide issues concerning human rights and freedoms. Imposing enforcement measures and allowing restrictions on human rights and freedoms (e.g. seizure of objects, detention etc.) is under sole jurisdiction of the court. Similar provisions for this issue have been made in other criminal procedure legislations whether with this or some other concept of the investigation. Secondly, in the context of this objection it should be noted that human rights are today an international matter and no state authority can violate these rights causing irreversible damage and even less likely showing no restraint. Today, when the decisions made by the authorities of any country may be subject to review before the European Court of Human Rights, it is certain that its competent authorities are going to treat the issues of human rights and freedoms with greater care and level of seriousness than if such review was not available when deciding on these issues. Accordingly, the act of ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the country in question is of particular importance, which is today, when it comes to the countries in this region, a requirement that has been fulfilled.[43] By ratifying this, the said country agrees to subject the decisions of its authorities to the review of the European Court of Human Rights, which means that the risk of violation of individual civil rights during the pre-trial proceedings is not solely dependent on the type of state authority which is deciding on this issue. Under the "circumstances of external (international) control, all local state authorities must be approximately equally careful and attentive to the citizens and their rights".[44] Thirdly, while condemning all abuses and especially the abuses during the operation "Sablja" in Serbia, it should be stressed that abuse of power by certain state authorities cannot be used as an argument against something that would undoubtedly contribute to the efficiency of the criminal proceedings. Of course, abuses must be taken into account, primarily through the provision of instruments for their prevention, and there are quite a few of those. Similarly, unsubstantiated allegations that the public prosecutor's office is not impartial and is too closely connected with the executive authority are also unjustifiable. When deciding whether to conduct an investigation, the prosecutor is in danger of making a mistake in assessing whether the act in question constitutes a criminal offence and whether criminal proceedings should be conducted just as much as when filing some of the charging documents (e.g. a direct indictment without the consent of the court), and in such cases, quite naturally, his impartiality is not questioned in advance. In any case, any authority may be accused of not being impartial. It is up to the society to provide instruments which ensure their impartiality, and if this is done, there is no valid reason to doubt in advance whether some authority, including the public prosecutor's office, is going to be impartial.

42 BGBL.S.253 and BGBL IS 475.

43 Ratified by Serbia in 2003 (*Official Gazette –International Agreements*, no. 9/ 2003).

44 Grubač, M., *Kritika Predloga "Novog" Zakonika o krivičnom postupku, Novo krivično zakonodavstvo: Dileme i problemi u teoriji i praksi*, Institute for Criminological and Sociological Research, Belgrade, 2006, p. 340.

Second, accumulation of several functions in the hands of the prosecutor. One of the objections raised against the prosecutorial concept of the investigation is that the accumulation of the functions of the public prosecutor (the functions of criminal prosecution and investigation) may influence his impartiality. This objection which at first glance may be valid can be dealt with in two ways already provided for in the legislations which recognise this concept of investigation. The first is strengthening the defendant's right to defence. For instance, German StPO[45] introduced for this purpose the right of the defence attorney to be present at the interrogation of the defendant by the State Attorney (Paragraph 163a item 3 with reference to Paragraph 168 item 1 StPO). Or, the reports on the interrogation of witnesses and experts by the State Attorney and the police without the presence of a defence attorney cannot be read out at the main hearing due to the principle of directness (Paragraph 251, items 1 and 2 StPO). Secondly, in the course of the investigation, State Attorney and, consequently, the police must consider both incriminating and exculpatory circumstances as well as securing the evidence where there is a risk it could be lost, i.e. that it will not be available for the court criminal proceedings.

Third, human and technical resources of the police and the public prosecutor's office. One of the more serious and at the moment it would seem in certain number of countries quite valid key objections to the prosecutorial or prosecutorial and police concept of the investigation is the lack of adequate personnel primarily within the police and inadequate material and technical equipment of both the police and public prosecutor's office in order to successfully implement this concept of the investigation. This objection may be valid, but it is not impossible to resolve it. The solution to this problem, when it arises, is to allow a longer period of time from the day of entry into force and the start of the application of the provisions regarding the new concept of the investigation, and during this period measures should be taken in order to meet these two very important – crucial prerequisites for successful implementation of the prosecutorial concept of the investigation.[46]

Fourth, ill-prepared authorities in practice. One of the objections against the prosecutorial investigation as the new concept in quite a few countries is that the police and prosecutor's office are not ready for such a huge change. The arguments proving that they are unprepared to successfully implement such a concept in practice are primarily that the institutional organisation within the police and the public prosecutor's office is inadequate and that the appropriate instruments which ensure the necessary independence of the public prosecutor's office are not in place, which mainly refers to the procedure and the requirements when electing and relieving of duties public prosecutors and their deputies. If this objection has merit, it can be redressed. The solution to this problem, in those countries where it is identified, is to allow a longer period of time to elapse between the day it enters into force and the day the provisions on the new concept of the investigation enter application, and in the meantime take measures to meet this requirement which allows successful implementation of the prosecutorial concept of the investigation.

45 StPO is the Criminal Procedure Code of SR Germany (Strafprocessordnung).

46 Accordingly, for instance, in Croatian Criminal Procedure Code which has come into force on 1 January 2009, it was stipulated that the provisions on the prosecutorial concept of the investigation werenot to be applied until 1 September 2011.

3. The Concept of the Investigation and Regional Criminal Procedure Legislations

Due to the aforementioned reasons which undoubtedly support the prosecutorial concept of the investigation, as well as the views held by professional circles in the last ten or so years which mainly support the said concept, a considerable number of criminal procedure legislations within civil law legal systems are opting to abandon the judicial concept of the investigation in favour of the prosecutorial concept. It may be noted that the criminal procedure legislations of the countries which were established after the breakup of Yugoslavia have mostly joined this trend. It may be already declared that the most important change in almost all of the criminal procedure codes of these countries is the switch from the judicial to the prosecutorial concept of the investigation. Just to illustrate this fact, suffice to say that the criminal procedure codes of BiH[47], Croatia, Montenegro, Macedonia and Serbia[48] have already legislated this type of investigation. However, as it is usually the case when it comes to this issue, there are different approaches to legislating this concept of investigation in each national legislation in these countries. The necessity to abandon the judicial concept of investigation in favour of the prosecutorial one from the point of view of criminal policy is almost the only thing that is universally recognised. The differences arise with regard to a host of other issues, in particular those related to: the authorities that should be in charge of conducting the investigation (should it be just the public prosecutor, or the public prosecutor and the police, or both the defendant and his attorney); next, the powers of active subjects of the investigation, i.e. what should be the scope of their powers if both the public prosecutor and the police have this role? Then there is the issue of the value of certain investigative actions for the evidentiary process. Also, there is the status of the injured party at this stage of the proceedings. Finally, there is the question whether to legislate the investigation as a single stage of the proceedings or not. Moreover, there is the question of the instruments that should ensure that the investigation is efficiently conducted without losing sight of its aim[49]. A few of the provisions found in the codes of the countries of this region (ex-Yugoslavia region) which have already regulated this concept are listed below in confirmation of the previous statement. Their main characteristics, similarities and differencies are the following:

First, mandatory or optional investigation. According to the Criminal Procedure Code of the Republic of Croatia[50] the investigation must be conducted "if there are reasonable grounds for suspicion that the defendant has committed a criminal offence which is punishable under law by fifteen years or a long term prison sentence, as well as if there are reasonable grounds for suspicion that the defendant has committed an unlawful act while in a state of diminished capacity". With regard to the criminal offences which are punishable under law by five year imprisonment or higher sentence, the investigation is usually conducted unless a direct indictment is filed.[51] Other laws do not contain such a provision, which may lead to a conclusion that the investigation is a general stage in some types of the criminal proceedings. Consequently, according to the Criminal Code of the Republic of Serbia, the investigation is a general stage of ordinary criminal proceedings unless the requirements for filing a direct indictment are met.[52] CPC

47 See: Group of authors, *Komentari Zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini*, Sarajevo, 2005.
48 Drago Radulović, *Komentar Zakonika o krivičnom postupku Crne Gore*, Podgorica, 2009, p. 335.
49 More on this: Vojislav Đurđić, *Koncepcijska doslednost tužilačke istrage prema novom Zakoniku o krivičnom postupku*, Collected Papers: "*Primena novog Zakonika o krivičnom postupku Srbije*", Serbian Criminal Law Association, Belgrade, 2007,,p. 129.
50 *Official Gazette of the Republic of Croatia*, no. 152/08, 76/09, 80/11, 91/12 – the Decision and Ruling of the Constitutional Court of the Republic of Croatia, 143/12, 56/13 and 145/13.
51 Art. 216, Par. 1 and 2 of Serbian CPC.
52 See Art. 331, Par. 5 of the Serbian CPC.

of Montenegro is similar but the provisions on summary criminal proceedings are applied to criminal offences which are punishable under law by a fine or a term in prison of up to five years. Criminal Procedure Codes in BiH stipulate different police procedures depending on the fact whether there are reasonable grounds for suspicion that a criminal offence has been committed which is punishable under law by a term in prison of up to five years or more. If the criminal offence is punishable under law by a term in prison of up to five years, the police shall undertake necessary actions independently and notify the public prosecutor thereof within seven days from the moment they learn there are grounds for suspicion a criminal offence has been committed.[53]

Second, the public prosecutor as the sole decision-maker on the initiation of the investigation. The investigation is under the sole jurisdiction of the public prosecutor[54] and it may be said that he is its only active participant. In this context, the public prosecutor is the one who is deciding on whether to initiate the investigation, which he does if there is a required degree of suspicion (the grounds or reasonable suspicion in terms of the structure of the investigation proceedings as a whole – as well as the fact if there is an inquiry or not) that a criminal offence has been committed that merits an investigation. In addition, some of the analysed codes stipulate the time within which the decision on whether to initiate the investigation or not is to be rendered. This is the case with the CPC of Serbia which stipulates that the public prosecutor shall order the investigation prior to or immediately after the first evidentiary action is undertaken by either the police or the public prosecutor during the preliminary investigation proceedings and no later than 30 days from the day the public prosecutor has been notified of the first evidentiary action the police have undertaken.[55]

Third, the degree of suspicion as the material requirement for the initiation of the investigation. One of the requirements which has to be met for the investigation to be initiated is the degree of suspicion that a criminal offence has been committed. However, while such a position in principal is quite right, the issue of specifying the degree of suspicion as a material requirement for allowing the investigation to be conducted is provided for differently. In certain legislations (e.g. in Serbian legislation) if there are grounds for suspicion as a minimal degree of probability a particular criminal event has occurred, it is sufficient material requirement for an investigation to be initiated.[56] On the other hand, according to the provisions of other here analysed legislations of the countries in this region, which are perfectly justifiable, reasonable grounds for suspicion that a criminal offence has been committed are a mandatory material requirement for the investigation to be initiated, which is also generally accepted.[57]

Fourth, the possibility of initiating the investigation when the perpetrator of a crime is unknown. One of the specific features of a certain number of analysed criminal procedure codes of the countries in the region (which is the case with the Serbian CPC and the Criminal Procedure

53 Simović, M.,*Krivični postupci u Bosni i Hercegovini*, Second Revised and Supplemented Edition, Sarajevo, 2008, p. 224; *Simović,M., Main Characteristics of the Criminal Investigation System in the Legislation of Bosnia and Herzegovina and its Impact on the Simplification of Criminal Proceedings*, Collected Papers : "Simplified Forms of Procedure in Criminal Matters – Regional Criminal Procedure Legislations and the Experiences in Application", OSCE Mission to Serbia, Belgrade, 2013, pp.114-13.

54 Art. 38, Par. 2 item 4 of the Criminal Procedure Code of Croatia and Art. 216 of the Criminal Procedure Code of Republika Srpska.

55 Art. 296, Par. 2 of the Serbian CPC.

56 Art. 295, Par. 1 Item 1of the Serbian CPC.

57 On the reasons justifying such a provision see: Bejatović,S., *Kaznena politika zakonodavca i reforma krivičnog procesnog zakonodavstva Srbije* , Collected papers: *"Kaznena politika (Zakon i praksa)"*, Serbian Association for Criminal Law Theory and Practice, Belgrade, 2013, pp. 5-148.

Codes of BiH[58]) is the possibility of initiating an investigation when the perpetrator of the criminal offence is unknown. Such a provision is very questionable. Especially given the fact that criminal proceedings are considered to be initiated when "order to conduct the investigation is issued".[59]

Fifth, should the public prosecutor's decision to initiate the investigation be subject to review or not? One of the specific features of the criminal procedure codes of the countries in the region which have switched to the prosecutorial concept of the investigation is that the provisions dealing with the issue of the possibility of the review of the public prosecutor's decision to initiate the investigation drastically differ. The relevance of this issue is particularly based on the fact that the initiation of the investigation as a rule means the initiation of the criminal proceedings.[60] Specifically, there are two approaches to dealing with this very important issue. According to the first one, which regrettably seems to be the prevailing one, the review of the public prosecutor's decision to initiate the investigation may not be requested by the defendant, so the court is not allowed to review the said decision. A typical example of this is the Serbian CPC. According to the said Code, the order to conduct the investigation is served on the suspect and his defence attorney, if he has one, but without any possibility to initiate any type of proceedings for the review whether such a decision by the public prosecutor is appropriate.[61] On the other hand, according to the provision opted for by the Croatian legislator, which seems quite justified, the decision on conducting the investigation is served on the defendant within eight days from the moment the said decision is rendered at the latest and against the said decision an appeal may be filed with the investigating judge within eight days from the day of the receipt of the said decision. The appeal is submitted to the public prosecutor who shall file it together with the case file with the investigating judge forthwith.

Investigating judge may render various decisions with regard to the filed appeal and one of them is to uphold the appeal and suspend the decision ordering an investigation either in full or just certain items of the decision if the judge finds that for instance there are no reasonable grounds for suspicion that the defendant has committed the cited criminal offence. The judge must decide on such an appeal within eight days from the day the appeal and the case file are received. If the court fails to decide on the defendant's appeal, the State Attorney is authorised to proceed with the investigation.[62]

Fifth, the possibility of entrusting other subjects with the investigative actions. One of the perfectly justifiable characteristics of the prosecutorial concept of the investigation is that the public prosecutor as its main active subject may entrust delegate certain investigative actions but not the whole investigation to other subjects. Consequently, according to the provisions made by, for instance, Croatian legislator, and this is similar in other codes which are being analysed here,[63] the State Attorney may order evidentiary actions to be undertaken by an investigator. In such a case,

58 Sijerčić-Čolić, H., *Aktuelna pitanja krivičnog postupka u BiH (ustavnopravni , legislativni i praktični aspekt)*, Collected Papers: "*Aktuelna pitanja krivičnog zakonodavstva (Normativni i praktični aspekt)*",)", Serbian Association for Criminal Law Theory and Practice, Belgrade, 2012., pp. 288-315.

59 See: Bejatović,S., *Kaznena politika zakonodavca i reforma krivičnog procesnog zakonodavstva Srbije* , Collected papers: "*Kaznena politika (Zakon i praksa)*", Serbian Association for Criminal Law Theory and Practice, Belgrade, 2013, pp. 5-148.

60 Škulić, M. – Ilić, G. *Reforma u stilu "Jedan korak napred-dva koraka nazad"* , the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2012, pp. 47-50.

61 Art. 297 of the Serbian CPC.

62 See Art. 218 of the Croatian CPC.

63 See e.g. Art. 299 of the Serbian CPC and Art. 277 of the CPC of the Republic of Montenegro.

he assigns the investigator, with regard to the subject matter of the investigation and special regulations, lists the actions that are to be undertaken, and he may issue other orders as well which the investigator must abide by unless the Code stipulates otherwise. If this is done, the investigator must act at the order of the State Attorney. In addition, if there is a risk of a delay in the investigation, the investigator shall, if necessary, undertake other evidentiary actions which are related to it or which result from it. If this is the case, then the investigator shall notify the State Attorney thereof prior to undertaking such actions. However, if this was not possible prior to undertaking these actions, then the State Attorney must be notified immediately after the fact.[64] Alternatively, according to the provisions of Montenegrin legislator, the scope of activities of the police during the investigation (in a broader sense of the term) does not end with the search which is the most common activity of the police, it is also possible for the police to take on the role of the subject undertaking investigative actions.[65] Similarly, according to Art. 299, para. 4 of the CPC of Serbia "the Public Prosecutor may entrust the police with performing certain evidentiary actions".

Sixth, prosecutor's consultants and associates as the subject of the investigation. Pursuant to the State Attorney's decision when complex cases are being investigated, in addition to the investigators, prosecutor's consultants and associates are included as well. In such cases, they may prepare certain evidentiary actions, take depositions and receive proposals and undertake certain evidentiary actions entrusted to them by the State Attorney independently. The report on such an action shall be verified within forty-eight hours from the time it has been undertaken at the latest. Furthermore, in order to clarify certain technical or other expert points raised with regard to obtaining the evidence or when undertaking evidentiary actions, the State Attorney may request an appropriate professional institution or an expert to supply adequate explanations and the State Attorney shall write a report on this matter.[66]

Seventh, the investigating judge as an irreplaceable legal subject of the investigation. One of the exceptionally important subjects of the investigation is the investigating judge.[67] He performs three functions in these proceedings. These are: deciding on issues related to the freedoms and rights of the persons subject to the investigation. For instance, if looked at from the point of view of the Croatian legislator, and this is similarly dealt with in other laws of this type as well, at the elaborated request of the State Attorney, the investigating judge decides on pre-trial detention and other measures which are necessary to ensure efficient criminal proceedings and the protection of individuals.[68] Next, the said judge decides on whether the investigation should be conducted at the request of the injured party. Specifically, if he State Attorney has dismissed a criminal charge or has suspended the investigation, the injured party which has assumed criminal prosecution may file a motion to conduct an investigation with the investigating judge or to hold an evidentiary hearing. The investigating judge decides on the motion filed by the injured party as the prosecutor in a ruling. If the motion is not granted, the motion to initiate an investigation filed by the injured party is denied in a ruling. If the said motion filed by the injured party as the prosecutor is granted, the investigation is conducted by an investigator at the order issued by the judge. The injured party as the prosecutor may be present during the actions undertaken in the

64 Articles 219 and 220 of the CPC of the Republic of Croatia.
65 Radulović, D., *Krivično procesno pravo*, Podgorica, 2009, p. 269.
66 Art. 222 of the Criminal Procedure Code of the Republic of Croatia.
67 Different terms are used in different legislations for this authority but its competencies, in principle, remains pretty much identical (See, for instance, Art. 223 of the Criminal Procedure Code of Republika Srpska).
68 E.g. pursuant to Art 278, Par. 1 of the CPC of the Republic of Montenegro "the order to search the residence and other facilities and persons, as well as the order for temporary seizure of items are issued at the request of the State Attorney by the investigating judge."

investigation and may file motions with the investigating judge requesting the investigator to be ordered to undertake certain actions. If the judge does not grant the motion to undertake certain actions filed by the injured party as the prosecutor, the injured party shall be notified thereof by the judge. When the investigative judge decides that the investigation has been completed, he notifies the injured party as the prosecutor thereof. Such a notification shall inform the injured party of the place where the case file and other items are being kept and the time when these may be viewed, as well as of the right to file charges within eight days and advise the investigating judge thereof. If the injured party does not file charges as the prosecutor within the stipulated time, it shall be considered that the said party is desisting from criminal prosecution, which shall result in the suspension of the investigation by the investigating judge's ruling.[69] Alternatively, according to the provisions of the Serbian legislator, the pre-trial judge may order certain evidentiary actions in favour of the defence.[70]

Eighth, the possibility of undertaking evidentiary actions. One of the characteristics of the investigation peculiar to the prosecutorial concept of the investigation is also the possibility of undertaking evidentiary actions during the said investigation. Admittedly, there are different variations of this option in practice. For instance, in the Croatian Criminal Procedure Code this is accomplished by holding an evidentiary hearing. The evidentiary hearing is held before the investigating judge at the request of the State Attorney, the injured party as the prosecutor or the defendant. The evidentiary hearing shall be held if: it is necessary to depose a witness pursuant to Articles 292 and 293 of the said Code;[71] if the witness shall not be available at the main hearing; if the witness is exposed to an influence which puts their statement into question or some other evidence shall not be available to be presented at a later stage. If the investigating judge grants the motion to hold an evidentiary hearing, an order shall be issued scheduling the time and place for holding the evidentiary hearing within forty-eight hours; the State Attorney, the defendant and defence attorney, the injured party and others are summoned unless it is otherwise stipulated by the Code; seizure of items is ordered and actions to be undertaken are set. If the said motion on the evidentiary hearing is not granted, the investigating judge shall deny the motion by a ruling within forty-eight hours. The party filing the motion may file an appeal against such a ruling within twenty-four hours and it is decided on by a panel within forty-eight hours. The State Attorney must attend the evidentiary hearing if he is the one requesting it. The evidentiary hearing may be attended by the suspect, the injured party as the prosecutor, the defence attorney and the injured party unless it is otherwise stipulated for the actions in question. The evidentiary hearing may not be held without a defence attorney present if the defence is mandatory. The persons who are involved in the evidentiary hearing may file a motion with the investigating judge to ask the witness or expert witness certain questions in order to clarify certain issues. If the judge consents to it, they may ask questions directly as well. If the suspect is present at the evidentiary hearing, the investigating judge must establish before the hearing starts if the suspect has been advised in writing of the rights he is entitled to pursuant to Art. 239, para. 1. If the suspect has not received these instructions, then the investigating judge shall advise him of his rights. It should be added also that if the investigating judge is deciding a certain issue and finds there are grounds for terminating or suspending the investigation, a ruling ordering a termination or suspension of the investigation shall be rendered. In addition, pursuant to Art. 269 of the CPC of the Republic of

69 Art. 225 of the Criminal Procedure Code of the Republic of Croatia.
70 See Art. 302 of the Serbian CPC.
71 This refers to special categories of witnesses (children, minors and witnesses who are unable to attend the trial due to old age, illness or some other valid reasons).

Montenegro, if there is a risk that someone shall not be available at the main hearing as a witness due to old age, illness or other relevant reason, the State Attorney shall file a motion with the investigating judge to hear such a witness following the procedure prescribed for hearing a witness as an evidentiary action. Also, the only legal subject authorised to decide on (order) the search of a residence and other facilities and persons, as well as seizure of items, or to conduct an exhumation is the investigating judge.[72] Serbian CPC also allows the possibility of involving the court when undertaking some evidentiary actions in certain actions. However, according to Serbian CPC, the involvement of a pre-trial judge during the investigation differs from the two previously mentioned legislations inasmuch that he is not the one undertaking the evidentiary action but only orders the public prosecutor to undertake certain actions.[73] According to such a provision, it may be concluded that the public prosecutor who is leading not only the preliminary investigation but the whole investigation is ordered by someone else (the court) to undertake evidentiary actions which are in favour of the defence.[74] Such a provision is extremely questionable.[75]

Ninth, the aim and the scope of the investigation. The aim of conducting an investigation is to collect evidence and data necessary for the decision on whether the indictment should be filed or the proceedings suspended, as well as collecting evidence which are at risk of not being available to be repeated at the main hearing or which are going to be difficult to be presented. Consequently, according to the provisions the Croatian legislator has made, and this is similar in other legislations as well, the State Attorney or the investigating judge completes the investigation when the legally prescribed actions have been performed and the state of facts sufficiently established in order to either issue the indictment or suspend the proceedings. Investigation order, decisions, reports on actions undertaken during the investigation and all of the other files which may be used as evidence at the main hearing are included in the investigation file before it is concluded. The conclusion of the investigation is entered in the register of criminal charges.

Tenth, the instruments ensuring the efficiency of the investigation. The law provides for the instruments ensuring the efficiency of the investigation, and consequently the whole criminal proceedings. For instance, according to the Croatian legislator, the State Attorney must complete the investigation within six months. If the investigation is not completed within six months,

72 Art, 278 of the Criminal Procedure Code of the Republic of Montenegro.

73 Art. 302, Par. 1-3 of the Serbian CPC.

74 According to the provisions of the legislation in BiH the evidence is secured by the court "when it is in the interest of justice that the witness is heard in order to use his statement at the main hearing because there is a risk the witness shall not be available to the judge during the trial." In such a case the pre-trial judge may order at the request of the parties to the proceedings and the defence attorney such a statement to be taken from a witness at a special hearing conducted in accordance with the provisions related to the direct and cross examination and additional questioning of the witness pursuant to Art. 277 of the Code. In such a case, prior to using thus obtained witness statement, the party, or the defence attorney, requesting the statement to be considered as evidence at the main hearing must prove that despite all the efforts to secure the presence of the witness at the main hearing, the witness has remained unavailable. The statement may not be used if the witness is present at the main hearing. Next, if the parties or the defence attorney believe that certain evidence may disappear, i.e. that it would be impossible to present such evidence at the main hearing, they will file a motion with the pre-trial judge to undertake necessary actions in order to secure such evidence. If the pre-trial judge grants the motion to undertake evidentiary actions, the parties to the proceedings and the defence attorney shall be notified thereof. However, if the pre-trial judge denies the motion, a ruling shall be passed against which an appeal may be filed with the judicial panel which may also grant the filed motion thus enabling the evidence to be secured for the main hearing. See: Sijerčić-Čolić,H., *Aktuelna pitanja krivičnog postupka u BiH*, Collected Papers: *"Aktuelna pitanja krivičnog zakonodasvstva"*, Serbian Association for Criminal Law Theory and Practice, Belgrade, 2012, pp. 367-379; Dodik, B., *Prosecutorial Investigation – the Experiences of Bosnia and Herzegovina*, Collected Papers:"New Trends in Serbian Criminal Procedure Law and Regional Perspectives (Normative and Practical Aspects)", OSCE Mission to Serbia; Belgrade, 2012, pp.152-168

75 Škulić, M. – Ilić, G., *Reforma u stilu "Jedan korak napred-dva koraka nazad"* , the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2012, pp. 47-50; - Bejatović,S., *Kaznena politika zakonodavca i reforma krivičnog procesnog zakonodavstva Srbije* , Collected papers: *"Kaznena politika (Zakon i praksa)"*, Serbian Association for Criminal Law Theory and Practice, Belgrade, 2013, pp. 5-148

he must notify the higher State Attorney thereof specifying the reasons for this, and the higher State Attorney is required to undertake measures ensuring that the investigation is completed. In complex cases, the higher State Attorney may at the elaborated request of the State Attorney allow a time extension of no more than another six months, and in extremely complex and difficult cases, the State Attorney General may allow a time extension of no more than another twelve months at the elaborated request of the State Attorney.[76] Furthermore, the defendant and the injured party may file a complaint during the investigation with the higher State Attorney because of the delay of the proceedings and other irregularities in the course of the investigation, upon which the higher State Attorney shall look into these allegations and if it was requested, notify the person who has filed the complaint of the undertaken actions. Next, upon the completion of the investigation or the inquiry, the State Attorney must issue the indictment or suspend the investigation, i.e. dismiss the criminal charges, within fifteen days from the day of entering the conclusion of the investigation or the inquiry into the register of criminal charges. In complex cases this time limit is thirty days, but the higher State Attorney may allow a time extension for the issuance of the indictment of no more than another fifteen days, and in more complex cases, thirty days if the State Attorney files a motion requesting it.[77]

Eleventh, mandatory hearing of the person who is subject to investigation. The suspect must be heard before the investigation is concluded. His hearing is conducted according to the legal provisions on the interrogation of the defendant and is being interrogated by the State Attorney or at his order by the investigator, in the State Attorney's or investigator's chambers.[78] Other legislations contain similar provisions. For instance, according to Art. 225 of the Criminal Procedure Code of Republika Srpska, the prosecutor must interrogate the suspect before the investigation is concluded if he has not been interrogated earlier.

Twelfth, collection of evidence in favour of the defence. Considering what the aim of the investigation is, it is clear that it may not be met without the collection of evidence both in favour of the prosecution and the defence. Consequently, the general approach of the legislations which recognise such a concept of the investigation is that the prosecutor, as the main participant of the investigation, must collect both types of evidence, admittedly just inasmuch it is necessary for the scope of the set aim of the investigation. Regardless of the described general approach, instruments are provided through which the defendant himself may influence the collection of evidence in his favour, i.e. there is a provision allowing the defendant and the defence attorney to collect the evidence and the material in favour of the defence. For instance, according to the provisions made by the Serbian legislator, the suspect and his defence attorney may independently collect the evidence and the material in favour of the defence. In order to exercise this power, the suspect and his defence attorney are entitled to: interview the person who is able to provide some information (with the consent of such a person); enter private facilities or facilities which are not open to public, the residence or facilities connected with the residence (with the consent of the occupant) and to take items and documents and obtain information from a physical or legal entity with the consent of the said entity.[79] Three questions arise related to such a provision. First of all, has the Serbian Criminal Procedure Code introduced by allowing this a parallel investigation

76 On a similar provision for this issue in the Serbian CPC see Art. 310.
77 Articles 229 and 230 of the Criminal Procedure Code of the Republic of Croatia (and similar instruments exist in other Codes which are analysed here).
78 Art. 233 of the Criminal Procedure Code of the Republic of Croatia.
79 Art. 301 of the Serbian CPC.

rather than the prosecutorial model of the investigation? Does this mean the position of a person who is subject to the investigation depends on his financial status, i.e. does this mean that the persons subject to investigation do not have equal standing based on financial resources they have at their disposal? Then there is the question of whether the evidence the suspect and the defence attorney collect fulfils the purpose of the investigation pursuant to Art. 295, para.. 2 of the Code and consequently is in accordance with the fundamental reason for switching from the judicial to the prosecutorial concept of the investigation (which is to improve efficiency). Prosecutorial concept of the investigation must provide mechanisms for securing the collection of the evidence which are both in favour of the person subject to investigation and the prosecution in the manner which is in accordance with its aim and ensuring its efficiency. Is this the case here? The author of this article does not believe so. In contrast to such a provision, according to the provisions of the Croatian legislator, it is an entirely different situation when it comes to the role of the defendant and his defence attorney in terms of securing the evidence which is in favour of the defence. According to the said provisions, the defendant upon the receipt of the decision on the conduct of the investigation may file a motion with the State Attorney requesting certain evidentiary actions to be undertaken. If the State Attorney grants the motion filed by the defendant, he shall undertake an appropriate evidentiary action, but the motion to undertake an evidentiary action may not be filed when the defendant has already received a notification that the investigation has been completed. Alternatively, if the State Attorney denies the motion filed by the defendant, he submits it to the investigating judge within eight days and notifies the defendant thereof in writing. If the court grants the evidentiary action to be undertaken, the State Attorney shall be ordered to do so, and if the motion is not granted, the defendant shall be notified thereof. (Art. 234, paras.. 1 and 2 of the Croatian CPC).[80]

Thirteenth, special approach to the vacatio legis. Considering the scope of the change which the prosecutorial concept of the investigation would introduce and the intent of the legislator to ensure all of the prerequisites for its successful implementation are in place before its application starts in practice, the legislator mainly stipulates that such changes should be applied when certain time has elapsed from the time the law has entered into force. Therefore, for instance, Croatian legislator stipulated that the application of the new concept of the investigation would start on 1 September 2011 even though the law itself came into force on 1 January 2009.[81] Also, pursuant to Art. 517 of the Criminal Procedure Code of the Republic of Montenegro, the said Code shall enter into application only after a year has elapsed from the moment the Code has entered into force, primarily due to the aforementioned change.[82] Then there is the CPC of Serbia which best illustrates the issue when it comes to specific nature of the reforms of the criminal procedure legislation in the countries of the region. The Code has been amended four times before it entered full application and the main reason for this was the new concept of the investigation.[83]

80 With regard to this issue, the CPC of the Republic of Montenegro contains just one provision. According to it "the defendant, the defence attorney, the injured party and the authorised person may file motions during the investigation with the State Attorney requesting certain actions to be undertaken." Art. 281 of the CPC of the Republic of Montenegro (See: Radulović, D., *Krivično procesno pravo*, Podgorica, 2009, p. 334).

81 Art. 575 of Criminal Procedure Code of the Republic of Croatia.

82 Radulović, D., *Krivično procesno pravo*, the second revised and supplemented edition, Podgorica, 2009, p. 273.

83 Bejatović,S.,*Koncept istrage i novi ZKP*, Collected Papers: "*Nova rešenja u kaznenom zakondavstvu Srbije i njihova praktična primena*", Serbian Association for Criminal Law Theory and Parctice, Belgrade, 2013, pp. 131-144.

4. The Preferred Model for Legislating Prosecutorial Concept of the Investigation and its Future Prospects (as seen by the author)

In view of all of the aforementioned, which favours the prosecutorial concept of the investigation over the judicial one on the one hand, and, on the other, identifies a number of dilemmas in terms of legislating prosecutorial concept of the investigation, i.e. in terms of considerable differences in the way this is regulated in the legislations of the countries in the region, the following question is raised: what is the appropriate way to legislate the prosecutorial concept of the investigation in order to achieve the set aim of the said concept - the efficient fight against crime while observing international treaties and national legislation which guarantee rights and freedoms of the defendant and other participants of the investigative proceedings? We are of the opinion that this may be achieved only if the prosecutorial concept of the investigation is legislated fully in accordance with the following principles. *First,* the only legal subject authorised to initiate the investigation should be the public prosecutor, in addition to prescribing the requirements necessary for the investigation to be initiated (this refers to the degree of suspicion that a criminal offence has been committed primarily which is not to be mistaken for the degree of suspicion necessary when undertaking actions which precede the investigation). *Second*, in addition to the public prosecutor, the police should be an active subject of the investigation, but the circumstances under which the police should act in this capacity should be clearly stipulated, as well as the types of investigative actions the police is allowed to undertake as an active subject of the investigation. *Third*, specific mechanisms should be provided for ensuring adequate cooperation of the public prosecutor and the police during the investigation. *Fourth*, one of the main characteristics of the prosecutorial concept of the investigation is that it should be clearly and precisely stipulated when, under what conditions and with regard to what evidentiary actions is the court (investigating judge, pre-trial judge) allowed to act as an active subject undertaking such actions. With regard to the prosecutorial concept of the investigation, the basic (main) function of the court must be deciding on the issues related to the freedoms and rights of the defendant and other subjects of the investigation. Undertaking certain investigative actions by the court should be allowed only under special circumstances, only when it is reasonable to assume that repeating such an action is not going to be possible at the main hearing or it would entail great difficulties; in addition, it would be necessary that the said action is relevant for the proper resolution of the criminal matter in terms of the court decision regarding it.[84] Plainly speaking, the evidentiary actions undertaken by the court in these proceedings must not serve the purpose of fulfiling the basic task of the investigation. *Fifth*, clear differentiation between the powers and competences of active subjects of the investigation eliminating any possibility of willful and arbitrary conduct of any of them. *Sixth*, in terms of undertaking investigative actions, their basic characteristics must be efficiency and legality of such actions which is ensured through the provision of appropriate instruments. *Seventh*, prescribing precise criteria ensuring the investigation is being conducted efficiently, as well as the procedure for public prosecutor to follow after the conclusion of the investigation and the repercussions for not complying with the stipulated norms. *Eighth*, stipulating the status of the injured party which allows him to exercise his basic rights in relation to the criminal offence which is being investigated. *Ninth,* providing the mechanisms which can secure the collection of evidence in favour and against the defendant. *Tenth*, the harmonization of other provisions of the Code with the changed concept of the investigation. The transition from the

84 See, for instance, the provisions of German StPO; Bejatović,S., *Položaj i uloga policije u pretkrivičnom i prethodnom krivičnom postupku u nemačkom krivičnom procesnom zakonodavstvu, Policija pretkrivični i prethodni krivični postupak*, VŠUP, Belgrade, 2005, pp., 265-290.

judicial to the prosecutorial concept of the investigation requires a change in a host of other institutes and provisions in the Criminal Procedure Code in general (this is the case with e.g. review of the indictment issued after such investigation has been conducted, the issue of evidentiary initiative and the role of the court in the presentation of evidence, the principle *in dubio pro reo* etc.).[85] In view of the fact that only the prosecutorial concept of the investigation is legislated in accordance with the aforementioned principles enabling the set aim of the investigation to be achieved, and that only if prosecutorial investigation is regulated in such a way, the switch from the judicial to the prosecutorial concept is justified in terms of criminal policy, it is necessary to undertake measures ensuring the prosecutorial concept of the investigation is legislated properly when it comes to the analysed criminal procedure codes of the countries in the region. The collection of papers, of which this paper is a part, and the conference where it is going to be presented should offer an incentive towards this goal.

5. Conclusion

According to the aforementioned, which undoubtedly is an argument for the prosecutorial concept of investigation, it is an indisputable fact that it is this concept that enables efficient criminal proceedings and is in accordance with the currently prevailing views in the field of criminal law when it comes to this issue. This is to say that such a concept is increasingly becoming the prevailing concept of the investigation (in all its variations) in current criminal procedure legislations in general, regardless of the system it is a part of. In view of this, it may be concluded that the decision made in almost all of the national legislations in the countries of the former Yugoslavia to switch from the judicial to the prosecutorial investigation in the course of the reforms was right. Such provisions in the criminal procedure legislations of the countries in the region not only establish normative grounds for more efficient criminal proceedings in terms of its duration and quality, but are bringing the said legislations into line with other European, and not just European, criminal procedure legislations and current tendencies in the field of criminal law theory in general regarding this issue. However, in contrast to this general view, it would be quite wrong to conclude that prosecutorial concept of the investigation without an exception serves as a method of meeting the proclaimed objectives of the reform (primarily, the establishment of normative grounds for more efficient criminal proceedings). On the contrary. In order to ensure the prosecutorial investigation produces the desired results, it has to be regulated according to the principles characteristic of this concept of investigation (primarily according to the principle of strict and clear differentiation between the powers and competences of the active subjects of the investigation – the public prosecutor, police and the investigative judge) thus eliminating the possibility of any one of them acting willfully and arbitrary in addition to other principles. Moreover, it is necessary to take into account other prerequisites for the successful implementation of the said concept. Also, in terms of undertaking investigative actions, the basic characteristics of such actions must be efficiency and legality which is ensured through the provision of appropriate instruments. Furthermore, there are the issues of prescribing precise criteria ensuring the investigation is being conducted efficiently, as well as the procedure for public prosecutor to follow after the conclusion of the investigation and the repercussions for not complying with the stipulated norms. Next, it is necessary to take into account two more things. First, as already

85 More on this: Škulić, M. – Ilić, G., *Reforma u stilu "Jedan korak napred-dva koraka nazad"* , the Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2012.

mentioned, the change of the concept of the investigation requires accordingly a change in many other provisions in a criminal procedure code in general (such as rules on the review of the indictment and role the court in presentation of evidence – to name just a few of the key ones - etc.) With regard to this, the main question arises: Is the newly introduced prosecutorial concept of the investigation in the criminal procedure legislations of the countries of the region regulated in accordance with the said principles? Not everyone agrees on what the answer to this question is, just as the approach to legislation of most of these issues related to the new concept of the investigation is not the same in all of the criminal procedure legislations in the region. Despite all this, it seems that three general conclusions can be reached after the analysis of the said issue. The first one refers to the CPC of the Republic of Serbia from 2011 where it may be concluded that the majority of its provisions are not in accordance with the intended model of regulating the prosecutorial concept of the investigation. The second one refers to the CPC of the Republic of Croatia where it may be noted that significant progress has been made in regulating the new concept of the investigation in its last amendment which has remedied the negative effects marking the original legislation of the said concept of investigation which coincided to a great extent with the Serbian legislator's provisions. Third, as far as other analysed legislations are concerned, there are considerable differences in how this concept of investigation has been legislated and significant, but not full, compliance with the generally accepted principles of legislating the prosecutorial concept of the investigation.

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Principles of the Prosecutorial Investigation as Grounds for its Normative Elaboration
(with a particular view of the Serbian CPC)

1. Introduction

As the 21st century started, Serbia started its intensive reform of the criminal procedure legislation. One of its negative features has been the change of its Criminal Procedure Code (CPC) almost every year.[2] Namely, the Criminal Procedure Code was passed in 2001 and then amended in 2002, 2004, 2005, 2006, 2007, 2009 and 2010.[3] Later, in 2006, another CPC was passed which was applied only in part (only a few articles of the law – some rules for witness protection, adjournment and recess of the main hearing and breaks during the main hearing)[4] and then in 2011, the current Criminal Procedure Code was passed and then amended twice, in 2012 and 2013, even before its application started. Another Bill of Law on the Amendments and Supplements to the Criminal Procedure Code is before the National Assembly awaiting to be passed.[5] This all in itself confirms how exceptionally relevant this issue is but also demonstrates the legislator's inability to find provisions which would serve the main purpose of the reform.[6] However, the Republic of Serbia is not the only one introducing significant changes into the criminal procedure. During the last decade of the 20th century 25 other European countries have changed their criminal procedure laws.

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2 *Official Gazette of the FRY* no. 70/2001.
3 See: *Bejatović,S., Forms of Simplified Procedure – a Key Characteristic of Criminal Procedure Reforms in the Region*, Collected Papers: "Simplified Forms of Procedure in Criminal Matters - Regional Criminal Procedure Legislations and Experiences in their Application", OSCE Mission to Serbia, Belgrade 2013.
4 *Škulić,M., Komentar Zakonika o krivičnom postupku*, JP "Sl.glasnik", Belgrade, 2007.
5 *Bejatović,S., Koncept istrage i novi ZKP*, Collected Papers: *Nova rešenja u kaznenom zakondavstvu Srbije i njihova praktična primena*, Serbian Association for Criminal Law Theory and Practice, Belgrade, 2013.
6 *Ibid.*

The aforementioned situation with the reforms of criminal procedure legislation was generally influenced by several factors. First of all, the study of criminal procedure law is becoming increasingly universal and it is increasingly influencing the legislative provisions in national legislation regardless of the national or other specific characteristics. That is why today the differences between criminal procedure legislations of individual countries, i.e. particular institutes of criminal procedure, regardless of the systems they are a part of (be it common law or civil law), are disappearing. They are becoming more and more universal and, as such, are being incorporated in most of the national criminal procedure legislations. Therefore, even the countries whose criminal procedure is a part of a European type of civil law system are gradually introducing certain institutes which have been up to now typical of adversarial (accusatory) criminal procedures. Second, the criminal procedure legislation is becoming increasingly universal also due to the fact that modern types of crime, such as organised crime, cross borders easily and are acquiring an increasingly international character, which is why it is inevitable that the operations of combating such crime need to be coordinated, synchronised and jointly organised, not only on a regional level but on a global level as well. Thirdly, the influence of scientific knowledge from other fields is also increasing, especially medical and technical knowledge, which is influencing the study of criminal law i.e. the criminal procedure legislation and its application, as well as the influence of international criminal law on the national legislations.

2. The Main Characteristics of Civil Law and Common Law Criminal Procedure Models

According to the usual classifications, great modern legal systems or, as they are also called, "great legal families" are: European – civil law - legal system whose origin may be traced back to the tradition of Roman law (French, German systems etc), Anglo-Saxon legal system i.e. common law system (UK, US systems, etc.) and also Islamic legal system (sharia), in Islamic countries. In addition, there are also the legal systems used in India (Hindu law) and in the Far East (China and Japan) and African legal systems.

Civil law and common law systems are relevant for the criminal procedure legislation of the Republic of Serbia. It is not an easy task to define all of the similarities and differences which can be attributed to these two legal systems. In the civil law system,[7] the court is very active when it comes to presenting evidence and establishing the truth and based on that the court passes the decision. With regard to this, the court is under an obligation to manage both the investigation and the main hearing while actively participating in the proceedings and it is actively involved in the evidentiary proceedings – it may propose and present evidence *ex officio* and not just at the request of the parties to the proceedings. The culpability and criminal sanctions are also decided by the court on the evidence which can provide the basis for the said court decision. According to the common law system, i.e. the adversarial model, the criminal proceedings are a dispute between two opposing parties and the presentation of evidence is in its entirety left to the parties to the proceedings, while the court's role in the proceedings is just to pass the decision. The role of the court is reduced to being the arbiter of the court proceedings and any kind of more aggressive involvement of the judge in the presentation of the evidence is against the rules of the procedure

7 Škulić, M., *Relation between the Principle of Truth and Simplified Forms of Criminal Proceedings*, Collected Papers "Simplified Forms of Procedure in Criminal Matters – Regional Criminal Procedure Legislations and the Experiences in their Application", *op.cit.*

and provides the grounds for setting aside the decision. The responsibility for making the right decision does not lie with the court but with the jury which consists of lay members.

The line between the civil law and common law (adversarial) models is becoming increasingly blurred as the efficient provisions used in one system are often introduced into the other legal system. Many countries which belong to the civil law tradition have accepted and to a certain extent adopted the institutes of the criminal procedure which used to belong to the common law system. Such is the case with Serbia which due to a case overload and relatively long duration of the criminal proceedings has attempted to find a solution to these problems through adversarial (accusatory) institutes of criminal procedure. All in all, the concept of the new Criminal Procedure Code, with all of its shortcomings that cannot be denied,[8] is the expression of new needs, including the need to face our reality – quite evident inefficiency of the criminal proceedings which, generally speaking, may last too long at times and incur unnecessary costs.[9]

3. The Concept of the Prosecutorial Investigation

One of the most discussed issues over the last few years, both here and in the rest of the world, is the issue of the concept of the investigation since the issue of the efficiency of the investigation and, consequently, of the entire criminal proceedings depends to a great extent on how the issue of the said concept is dealt with.[10] Considering that the outcome of the main criminal proceedings to a great extent depends on the standard of quality and results of the investigation as well, it is indisputable that one of the fundamental prerequisites required to meet the objective of the investigation is establishing normative grounds, providing a normative setting, both by the legislator and the practitioners. The criminal proceedings are supposed to be rendered more efficient by creating normative grounds through the interventions in this field, while upholding the rights and freedoms guaranteed by the Constitution and international agreements to the participants of the criminal proceedings and civil rights and liberties in general. Namely, the investigation is particularly important for the protection of human rights and freedoms since it is during this stage of the criminal proceedings that the possibility of their infringement is somewhat greater than during the main criminal proceedings.

There were several reasons why the concept of the investigation had to be changed, why it was necessary to switch from the judicial to the prosecutorial investigation or prosecutorial and police investigation. Among these, the most important one was the establishment of normative grounds for more efficient criminal proceedings which was one of the key objectives of the reform as a whole. To reiterate – efficiently conducted investigation is one of the crucial factors of the efficiency of the criminal proceedings as a whole. Next, the basic function of the public prosecutor, which is to prosecute the criminal offenders, is thus served more fully. Namely, the prosecutor is quite passive in the judicial type of the investigation and relies mostly on what the law enforcement authorities obtain and submit. The principle of legality of criminal prosecution

8 Škulić,M.-Ilić;G., *Reforma u stilu "Jedan korak napred –dva koraka nazad"*, Serbian Association of Public Prosecutors and Deputy Prosecutors, Belgrade, 2012; *Đurđić,V., Koncepcijska doslednost tužilačke istrage prema novom ZKP*, Collected Papers: „Primena novog ZKP Srbije", Serbian Association for Criminal Law Theory and Practice, *Beograd, 2009.*

9 Bejatović, S., *Forms of Simplified Procedure – a Key Characteristic of Criminal Procedure Reforms in the Region*, *op.cit*.

10 Radulović, D., *The Concept of Investigation in Criminal Proceedings in the Light of the New Criminal Procedure Legislation,* Collected Papers*:* "New Trends in Serbian Criminal Procedure Law and Regional Perspectives", OSCE Mission to Serbia, Belgrade, 2012; Radulović, D., *Komentar Zakonika o krivičnom postupku Crne Gore*, Podgorica, 2009.

imposes an obligation on the public prosecutor to initiate and conduct the criminal proceedings when legal requirements for this have been met and an obligation to provide the evidence proving the charges specified in the charging document are well-founded. Therefore, the prosecutorial concept of the investigation is much more in accordance with the fundamental principles which govern the functions of the public prosecutor in terms of combating crime. Furthermore, placing the investigation under the jurisdiction of the prosecutor solves the issue of blame being shifted from the public prosecutor to the investigating judge and law enforcement authorities and *vice versa,* when the investigation is not efficient which practically never caused any repercussions for either of the authorities involved. In addition, by doing this, the local criminal procedure legislation has been harmonised with the existing criminal procedure legislations in the modern world and with international criminal law in general. This is due to the fact that the prosecutorial investigation, i.e. prosecutorial and police type of investigation, has become dominant in the modern criminal procedure laws both as a part of the national criminal procedure legislations and before the international criminal courts.[11] No one can dispute the results of the prosecutorial concept of the investigation achieved in terms of the acceleration of the proceedings as long as it is adequately legislated and applied. Moreover, the prosecutorial investigation model eliminates the criticism that the main active participant in the judicial investigation, the investigating judge, is primarily involved in collecting testimonial evidence while other (material) evidence is obtained through the prior activities of the law enforcement authorities, i.e. that the investigation is predominantly office-based. The public prosecutor as the main initiator of activities during the investigation is the most competent for deciding which investigative actions should be undertaken in order to meet the objective of the investigation since the objective of the investigation is to collect the material necessary for the charging document to be filed by the public prosecutor. In addition to all of the aforementioned, it should be remembered that the prosecutorial investigation enables one of the fundamental principles of the criminal procedure law to be fully observed, and that is the principle of direct examination. The possibility of reading the evidence obtained during the prosecutorial investigation at the main hearing is extremely rarely allowed which is not true for the judicial investigation model, in which the possibility to read the statements made by the witnesses and expert witnesses during the investigation is quite broadly defined and consequently it is more commonly used.[12] The only valid reasons against the introduction of the prosecutorial concept of the investigation into the criminal procedure code, not just of the Republic of Serbia but numerous other countries as well, seem to be those concerning the insufficiency of human resources and inadequate technical equipment, the capacity of the police and the public prosecutor's office, as well as ill-prepared authorities in practice, all of which does pose a problem but one that can be solved.

In view of the aforementioned, it may be concluded that switching from the judicial to the prosecutorial investigation model, as long as it is adequately legislated, provides:

1) normative grounds for more efficient criminal proceedings,
2) increased level of activity of the public prosecutor,

11 Bejatović,S., *Tužilački koncept istrage kao jedno od obeležja savremenog krivičnog procesnog zakonodavstva u zemljama bivše SFRJ i u Srbiji*, Collected Papers: „Pravo zemalja u regionu", Institute for Comparative Law, Belgrade, 2010.

12 Ilić,G., *Polažaj javnog tužioca prema novom ZKP-u, Collected Papers:* "Aktuelna pitanja krivičnog zakonidavstva (Normativni i praktični aspekt)", Serbian Association for Criminal Law Theory and Practice, Belgrade, 2012; Čvorović, D., *Policija kao subjekat tužilačkog koncepta istrage prema Radnoj verziji Zakonika o krivičnom postupku od 2010. godine*, Collected Papers : "Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekt", Belgrade, 2011.

3) adequate approach to regulating accountability for the inefficiency of the investigation,
4) compliance of the criminal procedure legislation of a particular state with the other existing modern criminal procedure legislations and international criminal law,
5) a non-office-based type of investigation,
6) the possibility of reducing the unnecessary repetition of evidentiary actions, and
7) full adherence to the fundamental principles of criminal procedure, primarily the principle of direct examination.[13]

Bosnia and Herzegovina was the first country of this region to introduce the prosecutorial investigation model.[14] Croatia followed suit on 15 December 2008 when its new Criminal Procedure Code was passed, entrusting the public prosecutor (State Attorney) with the investigation while on the other hand keeping to a certain extent the role of the investigating judge as well. Montenegro passed a new Criminal Procedure Code[15] in 2009, which entered into force for application before all of the courts on 1 September 201, according to which the investigation was entrusted to the state prosecutor. In the Serbian law, the prosecutorial investigation was first introduced in the Criminal Procedure Code passed in 2006, but a vast majority of its provisions including the ones regarding the prosecutorial investigation never entered into force.[16]

Prosecutorial investigation started its implementation on 15 January 2012 according to the Criminal Procedure Code in the criminal proceedings involving criminal offences related to organised crime and war crimes before specialised departments of the courts, i.e. the criminal offences which are assigned to the public prosecutor's office with special jurisdiction by a special law. Since 1 October 2013 the Code has entered full application before all of the courts .

4. The Concept of the Investigation and the New Criminal Procedure Code of Serbia

Serbian current law has introduced an investigation which somehow combines the prosecutorial investigation and the investigation conducted by the parties to the proceedings, in which the evidence may be collected by not only the prosecutor but the accused as well. They are entitled to this because the parties to the proceedings have "equal standing" (they are entitled to the equality of arms) according to the letter of the law. As the parties to the proceedings in all actuality cannot have equal standing since the prosecutor has the entire state apparatus behind him, it leaves us with the question whether the introduction of such a "hybrid" form of investigation was really necessary.

The investigation according to the earlier concept used to be conducted by the investigating judge at the request of the public prosecutor based on the decision ordering the investigation

13 See: Bejatović, S., *Tužilački koncept istrage kao jedno od obeležja savremenog krivičnog procesnog zakonodavstva u zemljama bivše SFRJ i Srbiji,op.cit*; Dodik, B., *Prosecutorial investigation – the experiences of Bosnia and Herzegovina*, Collected Papers: New Trends in Serbian Criminal Procedure Law and Regional Perspectives,*op.cit*; Simović,M., *Main Characteristics of the Criminal Investigation System in the Legislation of Bosnia and Herzegovina and its Impact on the Simplification of Criminal Proceedings*, Collected Papers : Simplified Forms of Procedure in Criminal Matters – Regional Criminal Procedure Legislations and the Experiences in their Application, op.cit; Sijerčić-Čolić,H., Specifični instituti u razvoju novog krivičnog postupka u BiH, Revija za kriminologiju i krivično pravo (Review of Criminology and Criminal Law), no.1/2010; Sijerčić-Čolić, H., *Aktuelna pitanja krivičnog postupka u BiH*, Collected Papers: "Aktuelna pitanja krivičnog zakonodasvstva", *op.cit*..

14 Criminal Procedure Code of BiH (*Official Gazette of BiH*) no. 26/2004 and 63/2004.

15 *Official Gazette of the Republic of Montenegro*, no. 57/09.

16 Škulić,M., *Komentar Zakonika o krivičnom postupku*, JP "Sl.glasnik", Belgrade, 2006.

to be conducted with regard to a specific individual when there are grounds for suspicion that a criminal offence had been committed. The defendant could appeal the decision ordering an investigation to be conducted.

According to the prosecutorial model of investigation, the investigation is under the jurisdiction of the public prosecutor, it is initiated by an order, involving a specific individual, when there are grounds for suspicion that a criminal offence has been committed by the said individual or involving an unknown offender when there are grounds for suspicion that a criminal offence has been committed. An appeal against the investigation order is not allowed. In terms of the investigation, main characteristics peculiar to the new Serbian CPC are:

1) The investigation is under the jurisdiction of the public prosecutor who initiates it by a formal order.
2) The decision ordering the investigation cannot be appealed.
3) Substantive requirement for the investigation to be initiated are grounds for suspicion that a specific person has committed a criminal offence or grounds for suspicion that a criminal offence has been committed.
4) The investigation may be conducted even if the offender is unknown
5) The role of the court during the investigation, i.e. the role of the judge for preliminary proceedings is quite restricted.
6) Certain actions which pertain to the evidence which are in favour of the defence may be conducted both by the defendant and his defence attorney as long as they inform the public prosecutor thereof.

If we look at this point by point, the main characteristics of the listed features of the CPC with regard the new concept of the investigation are reflected in the following.

1. *The investigation is initiated by an order issued by the competent public prosecutor*. The order is issued prior to or immediately after the first evidentiary action is undertaken by the public prosecutor or the police during the preliminary proceedings and no later than within 30 days from the day the public prosecutor is notified of the first evidentiary action the police has undertaken. The investigation order must contain the personal data of the suspect if he is known, the description of the act which provides the legal elements which constitute a criminal offence, the legal qualification of the criminal offence and the circumstances which provide the grounds for suspicion (Art. 296 of the Serbian CPC).

Such a provision is criticised because it allows the police to "coerce" the public prosecutor to start the investigation by undertaking some evidentiary action (e.g. by searching the residence), regardless of what the prosecutor might think about it,[17] which in turn puts into question the independence of the public prosecutor's office as the state authority which is guaranteed by the Constitution and consequently affects the public prosecutor and his deputies in exercising their powers. Thus, the police is allowed to influence the work of the public prosecutor's office which does not comply with the provision of Art. 5, para. 2 of the Law on Public Prosecutor's Office

17 Ilić, G., *Position of the Public Prosecutor according to the New Serbian Criminal Procedure Code, Collected Papers:* "New Trends in Serbian Criminal Procedure Law and Regional Perspectives", *op.cit*, pp 63-68

which stipulates that "influencing the work of the public prosecutor's office in any way and involvement in the cases by the executive and legislative authorities" is prohibited.[18]

The order is served on the suspect and his defence attorney, if he has one, along with the notice on the first evidentiary action during which they may be present, and notice that the investigation has been initiated is also served on the injured party advising him of his rights pursuant to Art. 50, para. 1 of the CPC (Art. 297 of the CPC).

2. *An appeal against the decision on the initiation of the investigation is not allowed*. It may be concluded from the aforementioned provisions and from the very nature of the order as a decision that the suspect and his defence attorney do not have the right to a legal remedy against the decision on the initiation of the investigation.

Such a legal provision has been repeatedly criticised by the scholars and experts in this field. For instance, it was pointed out that this eliminates any type of judicial review of the prosecutor's decision to initiate the investigation which is a direct violation of Article 32 of the Constitution which proclaims the right to a fair trial guaranteeing, *inter alia*, that everyone is entitled to a court hearing on whether the suspicion which caused the initiation of the proceedings was well-founded.

In view of the whole concept of the law, we hold that the autonomy of the prosecutor during the investigation would not be endangered if the suspect and his defence attorney were to be allowed to file an appeal against the order to initiate the investigation, which would be filed with the judge for preliminary proceedings only on the following grounds:

1) the act subject to investigation does not constitute a criminal offence which is prosecuted *ex officio* and the requirements for the use of security measures have not been met, and
2) the statute of limitation for criminal prosecution has expired or the said offence is subject to amnesty or pardon or there are other circumstances which permanently exclude criminal prosecution.

If the suspect and the defence attorney were to be allowed to file an appeal stating that there are no grounds for suspicion that the suspect has committed a criminal offence which he has been accused of, this would allow the judge for preliminary proceedings to pass a ruling stating that there is no need for an investigation to be conducted which would go directly against the concept of this Criminal Procedure Code. In addition, the investigation order is passed prior to or immediately after the first evidentiary action is undertaken by the public prosecutor or the police during the pre-investigation proceedings and no later than within 30 days from the day when the public prosecutor was notified of the first evidentiary action undertaken by the police, consequently, the establishment of such grounds for an appeal would mean that the investigation practically would not have even been initiated, i.e. the prosecutor would not have collected appropriate evidence by that time, and just a single evidentiary action would have been undertaken, based on which the court would be asked to decide whether there were grounds for suspicion that the suspect had committed a criminal offence, for which there would not be sufficient material.

18 Škulić.M, Ilić,G., *Reforma u stilu jedan korak napred – dva koraka nazad", op.cit.*

3. *The lowest degree of suspicion is sufficient for the investigation to be initiated – grounds for suspicion*. The investigation used to be initiated if there was a reasonable suspicion that the criminal offence has been committed by a certain individual whereas now the investigation is to be conducted based on the same degree of suspicion required for the police actions during the pre- investigation proceedings. This provision has also been met with criticism since initiating and conducting criminal proceedings must not be based on assumption but on actual and specific data.[19]

Namely, the degree of suspicion is usually determined based on the degree of probability and they are: general suspicion, grounds for suspicion, reasonable suspicion and reasonable grounds for suspicion (justifiable suspicion according to the new CPC). Grounds for suspicion remain at the level of indications, grounds to suspect, so it is highly questionable whether the initiation of criminal proceedings should be allowed based on indications given the implications of the criminal proceedings.

4. *The investigation may be initiated and conducted even with regard to an unknown offender*. Previous Criminal Procedure Code allowed only certain investigative actions to be undertaken against an unknown offender (Art. 239). Now, the investigation may be initiated even when the perpetrator is unknown if there are grounds for suspicion that a criminal offence has been committed. Such a provision has been opted for by the legislators in BiH and Croatia as well, and has been met with a lot of criticism there, which was the case in Serbia as well. It is questionable whether this provision can even be justified and at the same time it is a direct violation of a considerable number of widely accepted provisions in criminal substantive and procedure legislation. For instance, it does not comply with Article 14, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia which explicitly prescribes that there is no criminal offence without culpability. How is it possible to determine guilt of an unknown offender if guilt pursuant to Art. 22 of the CC exists "if the perpetrator at the time of the commission of the criminal offence was of sane mind and was acting with intent and was aware or should or could have been aware that his action was prohibited"? Furthermore, there is an issue of how this provision stands in relation to Art. 286, para. 1 of the CPC, which regulates the police procedures during the pre- investigation proceedings, i.e. the duty of the police to undertake necessary measures in order to locate the perpetrator of the criminal offence in question.

5. *The role of the court during the investigation, i.e. the role of the judge for preliminary proceedings, is quite restricted*. The judge for preliminary proceedings cannot directly undertake an evidentiary action in favour of the defence during the investigation but only if the public prosecutor denies the request by the suspect and his defence attorney for an evidentiary action to be undertaken or if the said request is not decided on within eight days from the day it was submitted, a motion can then be filed with the judge for preliminary proceedings and if the motion is granted, the judge for preliminary proceedings shall order the public prosecutor to undertake the evidentiary action in favour of the defence and shall set a deadline for complying with the order (Art. 302 of the CPC).

It would have been much more purposeful to provide for the judge for preliminary proceedings to undertake the proposed evidentiary action and inform the public prosecutor thereof.

19 Simović, M., *Značenje "osnovane sumnje" iz četvrtog amandmana na Ustav SAD*, Collected Papers: "Krivično zakonodavstvo Srbije i standardi EU", Belgrade, 2010.

Moreover, it is not logical that the public prosecutor is allowed to entrust the police with certain evidentiary actions (Art. 299, para.4 of the CPC) but he is not allowed to entrust the judge for preliminary proceedings with such actions in cases where it is probable that it is going to be impossible to repeat them at the main hearing. In most existing legislations (in Montenegro and BiH, among others), the court is allowed to undertake certain actions during the prosecutorial investigation (so-called urgent judicial actions), precisely in order to render the proceedings more rational.

The role of the judge for preliminary proceedings during the investigation is reduced just to a limited number of actions – the decision on certain procedural measures of enforcement (the most important ones being powers related to the measures for securing the presence of the defendant during the proceedings – detention in the first place, and also, a ban to leave temporary residence, a ban to leave abode, a ban to approach, meet or communicate with certain individuals and bail), rendering the decisions which fall under sole jurisdiction of the court, i.e. undertaking certain evidentiary actions (issuing the order to search the residence, other premises and persons, awarding the status of a protected witness and the examination of such a witness, temporary suspension of a suspicious transaction, issuing orders for secret monitoring of communication, for secret surveillance and recording, for the conclusion of simulated transactions, for computer-assisted data search, and to use an undercover investigator).

6. *Elements of a "parallel investigation"*.[20] The suspect and the defence attorney may independently collect evidence and material in favour of the defence (Art. 301 of the CPC). The suspect and the defence attorney may for the purpose of exercising these powers:

1) interview an individual who can provide information useful for the defence and take written statements and notices from such individuals, with their consent,
2) enter private premises or premises closed for general public, the residence or premises connected to the residence with the consent of the occupant, and
3) obtain items or documents from a physical or legal entity and information available to them and with their consent as long as a receipt is issued listing the seized items and documents.

Organisation of the prosecutorial investigation in the countries which belong to the European civil law legal tradition does not entail the possibility of conducting a parallel investigation by the suspect and the defence attorney, instead, the public prosecutor and the police are under an obligation to collect all of the relevant facts in favour of the defendant during the investigation in addition to collecting the evidence against the defendant. Legal provision adopted by the Serbian CPC undermines the concept of the prosecutorial investigation and elements of an investigation conducted by the parties to the proceedings are introduced. The public prosecutor may be in danger then of disregarding his duty pursuant to Art. 6, para. 4 of the CPC which is to impartially clarify the suspicion regarding the criminal offence subject to official actions and to equally closely examine the facts which incriminate the defendant and the facts which are in favour of

20 The expression "parallel investigation" is used as a theoretical concept when certain laws (in Europe, for instance, in Italy, after the amendments and supplements to the Italian CPC passed in 2000) allow the defence to collect evidence in its favour during the investigation conducted by the public prosecutor.

the defendant, causing the prosecutor to increasingly fulfil the role of a typical party to the proceedings, i.e. solely the prosecution's representative.

Italian experiences suggest that in such a situation private detectives are more frequently hired, who then lead a parallel investigation and collect the evidence for the defence which, judging from the aspect of our legal tradition, shall cause a problem by creating negative social effects, i.e. the exercise of this right would be more successful if the defendant could have at his disposal sufficient financial means while many defendants would not be able to afford to cover the costs of their own investigation.

With the introduction of the elements of a "parallel investigation", the position of the defence attorney in the criminal proceedings is changed since undertaking some of the investigative actions could result in his actual inability to be involved in a greater number of cases as it has been customary up to now.

Article 303 para. 3 of the CPC prescribes the obligation/ duty of the suspect who has been already questioned and his defence attorney to notify the public prosecutor that evidence and material in favour of the defence has been obtained and to allow the prosecutor access to examine the documentation and items which may be used as evidence before the conclusion of the investigation. Such a provision imposes special obligations on the defence, which did not exist previously (although the rights "granted" under Art. 301 belonged to them even before, admittedly, they were not explicitly formulated by the law), however, no repercussions are prescribed if the said obligation is not met, so it would seem that this is an "empty" norm. In addition, one of the reasons for detention is "risk of collusion", i.e. the risk that the defendant would destroy, hide or falsify the evidence or traces of the criminal offence or that special circumstances indicate the defendant would obstruct the proceedings by influencing the witnesses, accomplices or harbourers. Therefore, the defendant is formally entitled to collect evidence in his favour but the risk of evidentiary obstruction due to the actions of the defendant is reason for detention.

Conclusion

Although it is necessary to introduce certain elements from one criminal procedure system into the other, in order to improve the efficiency of the criminal proceedings, national legal tradition should be preserved to a certain extent as well. The main reason for this is not the preservation of national identity in this segment but the fact that grafting elements from another criminal procedure model without harmonising it with social, cultural, political and general normative setting may cause a host of problems in practice, render participants of the proceedings unable to adapt and consequently result in criminal proceedings which are inefficient and unfair.

Efficiency of criminal justice system must not be achieved at the expense of the legality of the provisions for the criminal matter in question and by infringing the freedoms and rights guaranteed to the participants of the criminal proceedings. A balance needs to be found between legally resolving a criminal case, on the one hand, and the proceedings which are concluded as quickly as possible and which incur minimal costs, on the other. In view of the aforementioned, the prosecutorial investigation model is undoubtedly the one that contributes to the efficiency of the proceedings more and in different variations it is being introduced into an ever increasing number

of legislations and it may be said that this model is the dominant model of investigation in today's criminal procedure legislation. Therefore, it is our opinion that the introduction of the prosecutorial investigation model into Serbian criminal procedure legislation was a justifiable choice. However, the question is whether its normative elaboration is below par. It seems that the fundamental principles governing this model of investigation were not taken into account when this issue was regulated by the new CPC of the RS. Most of the widely accepted principles on which the prosecutorial investigation model should be based have not been adhered to during its normative elaboration by the new Criminal Procedure Code. In view of this fact, it may be said that the new CPC has actually introduced a model of the investigation, which is neither prosecutorial nor party-led, with elements of the judicial investigation, giving rise to the question whether such a model actually helps the efficiency of the proceedings or potentially increases their inefficiency instead.

Miodrag N. Simović, PhD[1]

Prosecutorial Investigation Model in the Criminal Procedure Legislation of Bosnia and Herzegovina: Current Situation and Problems

1. Introduction

The investigation includes the activities undertaken by the prosecutor or authorised officer in accordance with the law including collecting and safekeeping of information and evidence (Art. 20, item i) of the Criminal Procedure Code of BiH).[2] Managing the investigation is bound to be connected to planning the course of the investigation. Several factors determine how the prosecutor is going to plan the investigation. First of all, this depends on the nature and seriousness of the criminal offence but also on the prosecutor himself.

Theoretically speaking, the cooperation of the authorised officers and prosecutors is necessary and important for the success and standard of quality of the investigation. In terms of practice, in addition to the established cooperation (supervision by the prosecutor, the possibility of entrusting authorised officers with certain investigative actions etc.) a number of contentious situations have arisen.

With regard to simpler investigations, mostly involving criminal offences punishable by a term in prison of up to five years, there is no impediment to grant broader powers to the authorised officers but the prosecutor must conduct more complex investigations in a team with the authorised officers. Consequently, the prosecutor and the authorised officers must establish a relationship of mutual respect and appreciation. Next, in the course of the investigation, the prosecutor

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2 Hereinafter: if the law is not cited after the indicated article, it is referred to the Criminal Procedure Code of BiH.

and authorised officers have to be in constant communication, exchanging the collected information and evidence. Of course, the final decision on how the investigation is to be concluded is under the sole jurisdiction of the prosecutor.

The investigation, as the stage of the criminal proceedings during which the evidence concerning the criminal offence and the offender is obtained and the indictment is prepared, is actually an essential part of the criminal proceedings. That is why defining the relationship between the prosecutor and the authorised officers, as the participants of the investigation, is of crucial importance if the criminal proceedings are to be successfully conducted.

When the new Criminal Procedure Codes came into force in Bosnia and Herzegovina,[3] the greatest changes compared to the previous criminal procedure were actually the ones concerning the altered roles of the participants of the criminal proceedings during the investigative proceedings. Namely, by entering into force, the said Codes stipulate that the investigative proceedings are entirely under the jurisdiction of the prosecutor, who may transfer certain powers to the authorised officers in accordance with strongly emphasised accusatory nature of the criminal proceedings. In addition, the new proceedings have condensed the earlier preliminary investigation and the investigation into a unified investigation conducted, managed and supervised by the prosecutor who is the original holder of investigating powers. This merger, among other things, enables the prosecutor to form multidisciplinary investigative teams which consist of various institutions and agencies for law enforcement (the police, various inspection authorities, State Investigation and Protection Agency,[4] BiH Border Police,[5] tax administration etc.), allowing him to see the big picture in terms of the investigation and its results both in particular segments and as a whole by delegating the tasks appropriately and coordinating the operation.[6] In addition to the modified role of the prosecutor, the powers of the authorised officers during the investigation have also changed and the evidence obtained by the said officers is treated as valid evidence provided that it has been obtained legally.

3 Criminal Procedure Code of Bosnia and Herzegovina (*Official gazette no.* 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13) - hereinafter: the Code; Criminal Procedure Code of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH no.* 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 64/07, 9/09, 12/10 and 8/13); Criminal Procedure Code of Republika Srpska (*Official Gazette of Republika Srpska no.* 53/12) and Criminal Procedure Code of Brčko District of BiH (*Official Gazette of Brčko District of BiH" no.* 33/13). Since the legal provisions are almost identical, this paper shall refer to the provisions of the Criminal Procedure Code of BiH.

4 SIPA - State Investigation and Protection Agency was established in 2002 when the Law on the State Investigation and Protection Agency was passed, which defined the said agency as an independent institution of BiH responsible for the collection and processing of information relevant for the implementation of international laws and Criminal Codes of BiH as well as the protection of VIPs, embassies and consulates and the facilities where the institutions of Bosnia and Herzegovina are located, as well as the diplomatic missions. When Law on the State Investigation and Protection Agency (*Official Gazette of BiH no.* 27/04, 63/04, 35/05, 49/09 and 40/12) was passed in 2004, Information and Protection Agency was transformed into the State Investigation and Protection Agency, granting it the powers the police has, thus becoming the first police agency which has jurisdiction over the entire territory of BiH. This law defines SIPA as an administrative organisation of the Ministry of Security of BiH which is independent in its operations, with jurisdiction over prevention, detection and investigation of criminal offences which are under the jurisdiction of the Court of BiH, the protection of endangered witnesses and witnesses who are being threatened and other operations which are within the scope of its activities as stipulated by this law. SIPA operations involving the apprehension of persons suspected of committing war crimes, successfully conducted investigations of criminal offences of money laundering, organised crime, terrorism, human trafficking and other criminal offences, as well as providing support and protection for the witnesses, formation of a Special Support Unit – all are just some of the facts which confirm the success SIPA has had ever since it was established till now. Quoted from the web site: http://www.sipa.gov.ba/en/, accessed on 19 March 2014.

5 Previously: State Border Service of BiH which was established pursuant to Law on State Border Service of BiH (*Official Gazette of BiH no.* 50/ 04, 27/07 and 59/09.

6 Tegeltija et al., *Istražni postupak*, Sarajevo: High Judicial and Prosecutorial Council of BiH, p.1.

Considerable problems have arisen within the organisation of prosecutorial and police structures.[7] With regard to this, the European Commission's Bosnia and Herzegovina 2013 Progress Report states that "overall, some progress was made in the area of policing. The police reform bodies are all operational. Unclear and overlapping competences are, however, preventing the effective use of resources. Coordination and cooperation among agencies remains mainly informal."[8] With regard to the prosecutor's offices and organised crime as the most complex form of crime, the Progress Report states that "prosecutors and judges specialised in organised crime cases are unevenly allocated, particularly at entity level. Better instructions were introduced on professional cooperation between prosecutors and law enforcement agencies. However, the implementation of the system of prosecutor-led investigations remains an issue. Weaknesses in the systematic gathering, analysis and use of intelligence by law enforcement agencies hampers strategic targeting of organised crime groups and activities. There is no systematic exchange of intelligence among the law enforcement agencies for joint operational planning." [9]

Practically, both the coordination and subordination within the structure of the police and the prosecutor's offices is hard to put in place. Mutual cooperation is reduced to individual enthusiasm, professionalism and interpersonal relationships between the prosecutors and authorised officers. There has been progress in this respect with the Instructions on the Procedure and Cooperation of Authorised Officers – Police Officers and Prosecutors Regarding the Evidentiary Actions during the Investigations[10], which shall be discussed in more details below.[11]

2. The Prosecutor

The right of the competent prosecutor to undertake criminal prosecution regardless of the injured party's opinion (even if the injured party objects to criminal prosecution of the offender) is based on the so called principle of officiality. According to the said principle, the prosecutor is the only legal subject who can initiate the criminal prosecution.

In the new criminal procedure legislation of BiH, the prosecutor has two roles. The first one is the role of the state authority responsible for the detection and prosecution of perpetrators of criminal offences. The other role of the prosecutor is to function as a party to the proceedings with

7 The situation was improved with regard to this when the Directorate for Coordination of Police Bodies of BiH was established according to the Law on the Directorate for Coordination of Police Bodies of BiH and on the Agencies for Police Structure Support in BiH (*Official Gazette of BiH no* 36/08). With regard to agencies, these are the Forensic Examination and Expertise Agency, Personnel Education and Professional Development Agency and Police Support Agency. The bodies established by the said law are administrative organisations within the Ministry of Security of BiH which are independent in their operations, established for the purpose of performing the operations within their competencies, which are managed by directors and financed from the budgetary funds of the institutions of BiH. Operations which are under the jurisdiction of the Directorate are, among other things: communication, cooperation and coordination among the police bodies of BiH with the appropriate authorities of BiH regarding the issues related to international police operations or which have international relevance or are in mutual interest; the application of best European and other international practices related to the issues regarding the police in BiH; standardisation of the work related to the police issues in BiH; daily consolidation of relevant security information for BiH and information relevant to the operations which are under the jurisdiction of police bodies of BiH; collection, surveillance, analysis and use of data relevant to the security of BiH.

8 The European Commission's Bosnia and Herzegovina 2013 Progress Report, p. 56 in the BiH languages version. Available at http://komorabih.ba/wp-content/uploads/2013/11/izvjestaj_napredak.pdf (in the BiH languages) and at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ba_rapport_2013.pdf (in English), accessed on 9 Feb 2014.

9 *Ibid*, p. 57.

10 Quoted from the web site http://www.hjpc.ba/pr/preleases/1/?cid=5757,2,1 accessed on 15 Feb 2014.

11 Hereinafter: the Instructions.

approximately the same powers as the opposing party (the suspect, i.e. the accused), which is in accordance with the legal provisions on the equality or arms in the criminal proceedings.

In order to meet the prerequisites for initiating and conducting criminal proceedings, it is necessary to obtain the information and the evidence on the existence of a criminal offence and the offender, which are collected by the prosecutor through his activities in accordance with the rights and duties concerning the detection of criminal offences and prosecution of offenders. Acting according to the principle of legality, the prosecutor has the power to assess whether to initiate the criminal prosecution, except in cases provided for under special laws. The prosecutor is the authority competent to apply and implement the request for international legal assistance in criminal matters, in accordance with the law, multilateral and bilateral agreements and conventions ratified by BiH including extradition orders or orders for transfer of wanted individuals by foreign courts or authorities in the territory of BiH or other states, i.e. international courts and tribunals.

The position and function of the prosecutor in BiH as stipulated by the law is in accordance with the Recommendation R 19 (2000) by the Committee of Ministers of the Council of Europe. The said document, namely, recommends that the states should base their legislation and practices with regard to the role of the prosecutor's office in criminal justice system on certain principles. It is especially emphasised that in performing his function of criminal prosecution, the prosecutor's office must observe the individual's rights and consider the need for an efficient criminal justice system.[12]

2.1. The Prosecutor's Rights and Duties

The rights and duties of the prosecutor are regulated under Chapter VI (Article 35). The basic right and duty of the prosecutor is the detection and prosecution of the perpetrators of criminal offences. The prosecutor has the right and duty to undertake all of the necessary measures immediately upon learning that there are grounds for suspicion that a criminal offence has been committed for the purpose of detection and investigation, location of the suspect, management and supervision of the investigation, as well as for the purpose of managing the activities of the authorised officers related to the location of the suspect and obtaining the statements and evidence. He can also grant someone immunity in accordance with the law; request information to be supplied by the state authorities, companies, legal and physical entities; issue summons and orders and file motions for the summons and orders to be issued in accordance with the law; order the authorised officers to comply with the order issued by the court; issue and represent the indictment; file motions for the issuance of criminal orders (Article 334); file legal remedies and perform other activities stipulated by the law. On the other hand, all of the authorities conducting the investigation must inform the prosecutor about every undertaken action and comply with each request made by the prosecutor.

12 The contribution of the Prosecutor's Office of BiH to the improvement of cooperation at the international and regional levels is especially evident in the international South-East Europe's Prosecutors' Advisory Group– SEEPAG, Southeast European Cooperative Initiative– SECI, in the project for regional cooperation according to the Memorandum on Cooperation of West Balkans' Prosecutors as a part of CARDS programme as well as the programme for cooperation of European prosecutors (CPGE), also through the network for cooperation of the criminal justice systems in European Union EUROJUST. Quoted from the web site http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=5&id=9&jezik=b, accessed on 5 Mar 2014.

The prosecutor becomes in charge of supervising the work of authorised officers from the moment he learns that there are grounds for suspicion that a criminal offence has been committed. The prosecutor is not able to manage and direct the work of the authorised officers prior to receiving the information that there are grounds for suspicion that a criminal offence has been committed. In such a way, justice is served and fairness of the criminal proceedings is ensured and it is also ensured that the authorised officers observe the legal provisions regarding the protection of rights of suspects or detainees and persons who are subject to examination and search.

Management and supervision by the prosecutor represent two forms of prosecutorial activities during the investigative proceedings with regard to the authorised officers. Management implies a more active role of the prosecutor involving direct and active participation in planning and execution of certain investigative actions, while supervision is more passive, the prosecutor allows the authorised officers to take initiative and dictate the dynamics of the investigation while supervising their work ensuring that it is legal and efficient. Managing the investigation, first of all, implies devising and adjusting the strategy and tactics of the investigation when the prosecutor may decide that certain actions should be done directly by him and others may be entrusted to an authorised person.[13]

Management and supervision of the investigation starts with planning the investigation and lasts until its conclusion. This implies an active role of the prosecutor during the investigation from the moment the grounds for suspicion that a criminal offence has been committed are established.

With regard to rights and duties of the prosecutor to issue summons and orders and file motions for summons and orders to be issued, all of the summons served on the suspect until the indictment is issued are sent by the prosecutor. With regard to this, there are several possibilities. The first is related to the summons concerning the suspect's questioning. The prosecutor and the authorised officers have the right to question the suspect during the investigation. The second possibility is to summon someone to testify, which can be done by both the prosecutor and the court.

When it comes to orders which are issued by the prosecutor independently, several situations may be differentiated. Therefore, the prosecutor may: issue an order for temporary seizure of deliveries if there is a risk of delay, provided this order is confirmed by the judge for preliminary proceedings; in urgent situations, order the bank or some other legal entity which performs financial transactions to supply the data on bank deposits and other financial transactions and operations of the person in question, as well as of the persons for whom there is reason to believe that they are involved in the said financial transactions or the suspect's dealings;[14] order the witnesses to be brought in if they do not respond to the summons which were properly served without giving a reason for their failure to appear; if there is a need for an expert witness opinion, he has the right to issue a written order; order the books to be balanced based on the elaborated written report by the expert witness who was ordered to audit the financial records.[15] Furthermore, it is an exclusive right of the prosecutor to order an investigation to be conducted. The prosecutor is authorised to order an autopsy if the cause of death was a criminal offence or if

13 Sijerčić-Čolić H. *Krivično procesno pravo, Volume 1,* Sarajevo, Faculty of Law, 2005, p. 85.
14 Such an order must be confirmed by the judge for preliminary proceedings within 72 hours.
15 The order specifies the payment which is to be effected by the legal entity or a sole trader as advance payment for covering the costs of balancing the books.

the said death is related to the commission of a criminal offence. The prosecutor is the only one authorised to suspend the investigation by an order.

A distinction should be made between the actions of authorised officers related to the detection of criminal offences in accordance with the law and the procedural role of the prosecutor related to the detection of criminal offences. The prosecutor undertakes the necessary measures regarding the detection of criminal offences solely based on the existence of grounds for suspicion that a criminal offence has been committed. Collection and discovery of information and evidence which amount to grounds for suspicion that an offence has been committed fall primarily under the competence of the authorised officers.

2.2. Receiving Information on the Commission of a Criminal Offence

When authorised officers, while performing certain operational activities which are a part of their regular activities, learn of the existence of grounds for suspicion that a criminal offence has been committed, they have a duty to inform the prosecutor thereof and under the prosecutor's supervision they shall undertake necessary measures as stipulated by law. It is common in practice that the criminal charge is submitted directly to the prosecutor. In a considerable number of cases, the criminal charges do not provide grounds for suspicion that a criminal offence has been committed, nor do they identify the potential perpetrator of the reported criminal offence, so the prosecutor forwards such criminal charges to an appropriate organisational unit of the authorised officer so that the staff there would undertake certain activities in order to establish the existence of the grounds for suspicion that the reported criminal offence has actually been committed, as well as to ascertain the identity of a potential offender.

Reports submitted by the authorised officers after the statements have been taken and the evidence collected under the supervision of the prosecutor usually provide in enclosure all of the evidence which confirm the grounds for suspicion that the reported person has actually committed a criminal offence as well as the report on the examination of the reported person as a suspect[16]. In such a case, the investigation order is just formally issued.

It can be encountered in practice that the authorised officers receive a verbal criminal charge which is than included in a report, such a charge is then immediately submitted to the prosecutor without confirming if it is well-founded first. Such a procedure wastes considerable time as the prosecutor is most commonly unable to issue an investigation order based on such criminal charges since he cannot establish whether there are grounds for suspicion that a criminal offence has been committed. Upon receiving verbal charges, the authorised officers should undertake appropriate measures in order to confirm the charges are well-founded and after that if they establish that there are grounds for suspicion that a criminal offence has been committed – prosecutor should be notified. In addition to the aforementioned, authorised officers must collect the information and submit to the prosecutor immediately the amended report if they learn of some new facts, evidence or clues of a criminal offence after the report has already been submitted.

16 The report is submitted along with: (a) items, (b) sketches, (c) photographs, photographic documentation, (d) obtained reports, (e) documentation on the undertaken measures and actions, (f) official notes, (g) statements and other material which may be useful during the proceedings, including all of the facts and evidence which are in favour of the suspect.

Authorised officers often undertake independently most of the necessary measures and actions even after the notification of the prosecutor, and not just the urgent ones. This is particularly the case when unknown offenders are being investigated and the discovery stage of the investigation is practically left to the authorised officers.

Since the communication between the prosecutors and authorised officers during the investigation was defined in general up to that time, on 27 September 2013 an Agreement on the Adoption and Implementation of the Instructions on the Procedure and Cooperation of Authorised Officers – Police Officers and Prosecutors Regarding the Evidentiary Actions during the Investigations was signed. The Agreement was signed by the chief prosecutors of the Prosecutor's Office of BiH, Federal Prosecutor's Office of the Federation of BiH, Republic Prosecutor's Office of Republika Srpska and the Prosecutor's Office of the Brčko District of BiH, and on behalf of the police authorities in Bosnia and Herzegovina – by the Minister of Security of BiH, Minister of Interior of the Federation of BiH, Minister of Interior of Republika Srpska and Chief of Police of the Brčko District of BiH. As it may be seen from the list of the subscribers, this agreement applies to the whole structure of the prosecutor's offices and law enforcement agencies. The Instructions regulate further the communication between the prosecutors and the authorised officers and their superiors thus meeting the requirements for the authorised officers and the prosecutors to function as a good team, in a proactive, well-coordinated and efficient manner.

The Instructions stipulate that the authorised officers shall immediately inform the prosecutor who is on duty about the events which have caused grave consequences, i.e. endangered lives and public health or property on a large scale and (or) may disturb the public and indicate that there are grounds to suspect a criminal offence has been committed. Prior to notifying the prosecutor on duty, the authorised officers shall notify their immediate supervisor of the said event. With regard to this, the authorised officer and the prosecutor on duty shall register these notifications in official records of the prosecutor's office and the police. Moreover, if the prosecutor who is on duty learns of the said event directly, he shall immediately notify the authorised officer thereof and order the necessary actions to be undertaken. With regard to the cases involving a criminal offence punishable by a term in prison of more than five years, the Instructions stipulate that the authorised officer should immediately inform the prosecutor, without previously notifying his superior.[17]

3. The Court

The court used be an active participant in the investigation which exercised its powers through the activities of the investigating judge, but the new Criminal Procedure Code has transformed it into a some sort of a supervisor of the evidentiary actions and special investigative actions which restrict fundamental human rights and freedoms of the suspects or other persons to a greater or

17 On the premises of the Republic Prosecutor's Office of Republika Srpska, on 17 December 2013, the Chief Republic Prosecutor of Republika Srpska and the Minister of Interior of Republika Srpska signed the Guidelines on the Police and Prosecutor's Office Procedures when Dealing with the Media and Informing the Public. The Guidelines stipulate that the Ministry of Interior of Republika Srpska shall supply the information to the media on criminal offences which are punishable under law by a term in prison of up to five years and competent prosecutor's offices on the offences for which a more severe sentence may be received. Quoted based on the web site http://rt-rs.pravosudje.ba/, accessed on 1 March 2014.

lesser extent. The court is supposed to reduce such restrictions to a minimum, assessing whether they are justifiable in the light of each particular investigation.

In terms of functions, judge for preliminary proceedings is responsible for rendering such decisions at the stage of the investigation and may issue at the elaborated request by the prosecutor: an order to search the residence, premises and persons (Art. 51-64), an order for seizure of items and property (Articles 65-74), exhumation order (Art. 222), an order to conduct special investigative actions (Articles 116-122), an order to bring in or penalise the witness for failure to appear after being summoned or refusal to testify (Art. 81, paragraphs 5, 6 and 7), an order to bring in the suspect (Art. 125), a ruling on the bans in order to secure the presence of the suspect and successfully conduct the criminal proceedings (Art. 126-130) and a ruling ordering or extending the detention (Articles 131-136). The only case when the court may present any evidence at the investigation stage is judicial preservation of evidence, i.e. the situation when there is a risk that certain evidence is not going to be available to be presented at the main hearing (Art. 223).[18]

The court no longer has any immediate powers with regard to the decision whether there are grounds to conduct the investigation. Indirectly, the court may decide on whether there are grounds to conduct the investigation when the need arises to undertake investigative measures and evidentiary actions which require a court order. In these situations, a general requirement for these actions, i.e. measures, is whether there are grounds for suspicion which the court shall determine (when deciding whether the prosecutor's motion to order special investigative actions is justified), i.e. reasonable suspicion (when deciding whether the prosecutor's motion for ordering or extending the detention is justified). However, such a decision shall not have any effect on the actual existence of the investigation, the initiation, the course and conclusion of which is solely decided by the prosecutor.

4. Authorised Officers

An authorised officer is the person who has appropriate powers within the police authorities in Bosnia and Herzegovina, including the State Investigation and Protection Agency, State Border Service, judicial and financial police, as well as customs authorities, tax administration and military police authorities in Bosnia and Herzegovina (Art. 20, para. 1, item g). These officers have considerable powers and responsibilities and an indispensable role during the investigation.[19] Although the prosecutor conducts the investigation, the majority of investigative actions are performed by the authorised officers either independently or after being ordered and authorised by the prosecutor or the judge for preliminary proceedings.[20]

In terms of the Law on Police Officers of BiH,[21] authorised officers are the officers who are directly involved in operational activities and tasks assigned by the Ministry of Security of BiH and

18 Such evidence is usually presented by questioning the witness who might not be available at the time of the trial (due to old age, illness or some other reason). However, the said questioning is conducted in accordance with the provisions of Art. 262, i.e. in accordance with the rules referring to the questioning of the witness at the main hearing.

19 Measures and actions undertaken by the authorised officers in criminal proceedings may be divided into: preliminary investigation actions or informal actions and investigative or formal actions. Both must be undertaken in accordance with the law, while observing the rights and freedoms of the persons who are subject to the said actions.

20 Čačković, D., *Radnje dokazivanja ovlašćenih službenih lica u krivičnom postupku Bosne i Hercegovine*., Pravna misao, 11–12 (2011), Sarajevo, p. 61.

21 *Official Gazette of BiH no*. 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 63/08 and 7/12.

other officers whose work, tasks and responsibilities are directly connected to the execution of the said operations and tasks. In addition to the duties and powers prescribed by the Criminal Procedure Code of BiH, police officers are granted the following powers for the purpose of preventing the commission of criminal offences and maintaining public order according to the Law on Police Officers of BiH (Art. 10): (a) confirming and establishing the identity of persons and items, (b) interviewing, (c) arresting, (d) searching for persons or items, (e) temporary restriction of freedom of movement, (f) issuing warnings and orders, (g) temporary seizure of items, (h) using vehicles and communication devices which belong to someone else, (i) inspection of persons, items and transportation vehicles, (j) recording in public places, (k) using force, (l) processing personal data and keeping records and (m) receiving the submitted charges.

The protection of civil rights and liberties is a legal obligation of all state authorities, including the prosecutor's office and police authorities. Due to the aforementioned, the protection of the citizens from unlawful activities of police officers is ensured first by the Professional Standards Unit of the said police authority, and only then, by the prosecutor's office which is organisationally and functionally a separate state authority and should act only if the elements constituting a criminal offence have been established in such actions.

All actions which can be undertaken in the criminal proceedings by authorised officers are divided into: (1) actions which they undertake independently (these could be: crime scene investigation, questioning the suspect and interviewing the witnesses, identification of persons and items); (2) actions undertaken based on a court order (searching the residence and other premises and persons, temporary seizure of items and property, special investigative actions) and (3) actions which are undertaken independently but only if certain requirements are met (search without a warrant, temporary seizure of items without a warrant and requesting necessary expert opinions). Past experience has shown that the most common errors are related to the evidentiary actions which require urgent proceedings.

The Instructions describe in more detail the term "risk of delay" in order to prevent the authorised officers to undertake actions without notifying the prosecutor. Consequently, the authorised officers must collect as much information and data before they contact the prosecutor in order to enable the prosecutor to reach a proper and legal decision. After this is done, the prosecutor needs to decide which actions should be undertaken immediately and by whom. The decision of the prosecutor which actions should be undertaken immediately because there is a risk of delay, may depend on the lapse of time, place of the commission of criminal offence, as well as on the status of the offender.

When it comes to questioning the suspect, the Instructions impose an obligation on the prosecutor to instruct the authorised officers which facts and circumstances need to be addressed when they question the suspect. With regard to the crime scene investigation, it is stipulated that a report must be written and the prosecutor notified about all of the circumstances. If the prosecutor decides not to be present during the crime scene investigation, he shall inform the authorised officers thereof and specify the reason for not being present during the crime scene investigation. The Instructions have attempted to eliminate the absence of the prosecutor which is due to personal reasons, so it stipulates that the presence of the prosecutor is desirable and if he fails to be present, the reason for this must be objectively valid. The prosecutor must be present during the crime scene investigation when it involves a criminal offence punishable by a term in prison of over ten years.

5. The Injured Party

The injured party is no longer allowed to assume criminal prosecution if the competent prosecutor decides not to proceed with the prosecution or when he desists from the already initiated prosecution, nor is it possible for the injured party to act as a private prosecutor in the criminal proceedings. According to the definition, the injured party is the person whose personal or property rights have been violated or infringed (Art. 20, item h). The rights of the said party are reduced to the following: to file charges regarding the criminal offence which has been committed (Art. 214), to submit a request for a restitution claim (Articles 194 and 195), to be informed if the investigation is not going to be conducted or is being suspended and has the right to appeal such a decision[22] (Art. 216, para. 4 and Art. 224, para. 2) as well as the right to be questioned as a witness (both during the investigation and at the main hearing).[23]

It is the injured party who is often an important source of information for the prosecutor about the criminal offence and its perpetrator, so the law even stipulates the procedure for specific categories of the injured parties when they are called as witnesses. For instance, when a minor is being questioned, and especially if the said minor is the injured party, it is necessary to proceed with caution and with the assistance of a psychologist, educator or some other type of expert (Art. 86, para. 4); when the injured party is under 16 years old, an audio or audio-visual recording must be made of the questioning (Art. 90); if a sexual offence is committed, the injured party must not be asked questions about their sex life prior to the incident in question, nor is the evidence on the past sexual experience, behaviour or sexual orientation of the injured party admissible (Art. 86, para. 5 and Art. 264). The injured party's position is treated as special if the criminal offence in question is a crime against humanity and values protected under international law since in such cases the consent of the victim cannot be used as an argument for the defence (Art. 264, para. 3).

6. Evidentiary Actions

Evidentiary actions are an investigative mechanism, i.e. the instrument which allows the evidence to be collected and preserved during the criminal proceedings.[24] They are undertaken both when the evidence which is being collected or secured is in favour of the prosecution and when it is in favour of the suspect, i.e. the defendant. When it comes to the actions which restrict certain rights of the suspect, the law stipulates a mechanism of judicial review, i.e. such actions must not be undertaken without the court's approval (order) except under special circumstances which are all specified by the law. In any case, the prosecutor is the one who is supposed to assess, by choosing a particular strategy or a plan of the investigation, which evidentiary actions are necessary in order to successfully obtain and secure the volume and standard of quality of the evidence which is going to allow the case to be efficiently presented before the court.

22 Constitutional Court of BiH has jurisdiction to decide on appeals filed against the prosecutor's response to such an objection since this act does not constitute a judgment, at least not in terms of being the decision "passed by any court in Bosnia and Herzegovina", i.e. does not constitute a decision as referred to under Art. 16, para. 1 of the Rules of the Constitutional Court (the decision of the Constitutional Court of BiH on permissibility, no. AP 589/11 of 25 June 2013).

23 This right, i.e. duty, is exercised when it is likely that the injured party may provide in his testimony some information on the criminal offence, perpetrator and other important circumstances (Art. 81, para. 1) as well as when the injured party must provide some information regarding the restitution claim (Art. 193).

24 This refers to the search of the residence, premises or persons, temporary seizure of items or property, procedure for handling suspicious objects, examination of the suspect, interviewing the witnesses, crime scene investigation and reconstruction of the incident and expert opinion and findings.

The Instructions prescribe that regarding criminal offences punishable under law by a term in prison of more than ten years, the prosecutor may immediately upon receiving information form an investigative team which he would manage personally. Immediately upon issuing an order for the investigation to be conducted, the prosecutor may plan the operation with other members of the team, detailing the activities that need to be undertaken. With regard to the actions which are entrusted to an authorised officer to be conducted independently, the prosecutor must offer an explanation specifying the purpose of the said actions, i.e. the legal qualification of the offence which is to be proven by the said actions.

7. Special Investigative Actions

Special investigative actions are particularly efficient method of combating modern forms of organised crime. Consequently, at the international congress on criminal law held in Budapest (1999), it was stressed that the special investigative actions may only be used if they are in accordance with the principles of legality, subsidiarity, proportionality and judicial supervision. The principle of subsidiarity implies that special investigative actions may be used only in cases if less severe measures would not be effective, i.e. if the said evidence cannot be obtained in any other way during the criminal proceedings.

Since they are secret and the most fundamental civil rights are being infringed by them, the law, among other things, restricts the duration of special investigative actions and introduces a strict system for obtaining approval for their use. On the other hand, special investigative actions are still largely unknown to a vast number of prosecutors but also to authorised officers as well.[25]

With regard to undertaking special investigative actions, the Instructions stipulate that a joint plan should be made prior to starting the actual activities concerning their implementation. This plan should eliminate all of the ambiguities and unknown elements as well as procedural errors.

8. Unlawful Evidence

The evidence is unlawful if it has been obtained through a violation of human rights and freedoms prescribed by the Constitution and international agreements which have been ratified by Bosnia and Herzegovina, as well as through a violation of the criminal procedure provisions explicitly stipulated by the law. With regard to this, the law prescribes that court decisions must not be based on the evidence obtained through the violation of human rights and freedoms. According to the law there are two types of unlawful evidence: legally invalid evidence, which is unlawful in itself, and the evidence which is not in itself unlawful but the way it was obtained did not adhere to certain rules of procedure.

The ban on the use of legally invalid evidence is absolute. On the one hand, this applies to all evidence which is unlawful, regardless of the fact whether they are in favour of the prosecution or

25 In Cantonal and District Prosecutor's Offices in Bosnia and Herzegovina, their application is negligible.

the suspect, i.e. the accused, and on the other hand, such evidence is inadmissible regardless of the fact whether they are truthful, reliable and credible.[26]

9. Joint Investigation Teams

Joint Investigation Teams (JIT) are the future of the fight against organised crime but also against other complex forms of crime. Such teams are established based on the agreement of competent authorities of two or more member states for a specific purpose and for a limited period of time within which the criminal investigation is to be conducted.[27] These teams, which are formed by the authorised officers, prosecutors and judges, either from the same country or from several countries, may provide a response to fast developing communication and organised criminal groups in a timely manner. Therefore, Article 19 of the UN Convention against Trans-National Organised Crime[28] stipulates that the signatory countries shall consider the conclusion of bilateral and multilateral agreements or arrangements according to which, in relation to the subject matter of the investigation, criminal prosecution or court proceedings in one or more states, competent authorities which are interested in the matter in question may form joint investigative authorities. In the absence of such agreements or arrangements, a joint investigation may be conducted based on the agreement entered into for each specific case. Signatory countries shall ensure that the sovereignty of the state in whose territory the investigation is to be conducted is fully protected.

The Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters stipulates that a mutual agreement may allow competent authorities of two or more parties to the agreement to form a joint investigation team for a special purpose and a limited period of time, which may be extended if the parties involved agree to it, in order to conduct a criminal investigation in the territory of one or more parties to the agreement which have formed the said team.[29] Similarly, Framework Decision of the Council of Europe of 13 June 2002 allows that one or more member states may with mutual consent form a joint investigation team with a precisely set objective and with a set time limit which may be extended if the parties agree to it, in order to conduct criminal investigation in one or more member states which form a team.[30] There are similar provisions in the Convention on Police Cooperation in South-East Europe.[31] Joint investigation teams may be formed when: the criminal offence in question is serious and requires a demanding investigation connected to other countries which are parties to the agreement or when a certain number of countries which are parties to the agreement are conducting an investigation regarding criminal offences, the circumstances of which require a coordinated and directed actions of all the countries involved which are parties to the agreement.[32]

26 Sijerčić- Čolić H.,*op.cit*, p. 262.
27 Petrić, S.. *Zajednički istražni timovi u Evropskoj uniji*. Zagreb, Policija i sigurnost, Year 18/ 4 (2009),p. 532.
28 Official Gazette of BiH – International Agreements no 3/02.
29 Article 20, para. 1 of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters (*Official Gazette of BiH – International Agreements no*. 10/07).
30 "Human Trafficking and Migrant Smuggling– International Cooperation Guidelines" UN Office on Drugs and Crime – Regional Programme Office for Southeast Europe, Belgrade, 2010, p.46.
31 Article 27, para. 1 of the Convention on Police Cooperation for South-East Europe (*Official Gazette of BiH – International Agreements no*. 4/07).
32 Article 27, para. 2 of the Convention on Police Cooperation for South-East Europe.

The Agreement between the Council of Ministers of BiH and the Government of the Republic of Croatia on Police Cooperation in the Fight against Cross-Border Crime stipulates that the members of the joint investigation team from all of the countries which are parties to the said agreement, apart from those who are from the country where the team's activities are taking place, are referred to as "secondary members"[33] Secondary members of the joint investigation team are authorised to be present when the investigative measures and actions are being undertaken in the country where the "operation" is taking place. However, the team leader may decide otherwise under special circumstances and in accordance with the laws of the country where the team is operating.

Most commonly, joint investigation teams are formed at the international level for the purpose of prevention, suppression and detection of human trafficking, terrorism and drug trafficking. They are usually formed within EUROPOL, i.e. member states of the European Union are the participants. Since Bosnia and Herzegovina is not a member of the European Union, its prosecutors and authorised officers are not allowed to participate in joint investigation teams formed within the European Union and its members. The prosecutors or authorised officers of Bosnia and Herzegovina may attend meetings of joint investigation teams only if this is requested by one of the members which has initiated the establishment of the said joint investigation team. In such situations, the rights and possibilities related to team members (although they do not have the status of a member) from the non-member states are clearly defined in an agreement on the establishment of a joint investigation team.

10. Duration of the Investigation

The investigation in Bosnia and Herzegovina must be completed within six months from the day an investigation order was issued at the latest. It is common in practice that the prosecutors, especially when cases are complex, undertake investigative actions even before the order is issued. This has resulted from the legal provision which does not make a distinction between investigations in terms of their difficulty and complexity in particular criminal cases prescribing the same deadline for the conclusion of all investigations.

The issue of the duration of investigations has been addressed by the Constitutional Court of BiH (as a constitutional issue) in several cases. In the most recent case (appeal no. AP 4340/10 of 15 January 2014), the appellant has addressed the Constitutional Court of BiH claiming that the investigation in the case in question had not been concluded within „reasonable time" pursuant to Article II/3e) of the Constitution of BiH and Article 6, para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[34] so the proceedings were at the time of the appeal still at the investigation stage. With regard to the cited claims made by the appellant, the Constitutional Court found that the appeal is permissable pursuant to Article 16, para. 3 of the Rules of the Constitutional Court.[35] Namely, according to Article 16, para. 3 of the the Rules of the Constitutional Court, the Constitutional Court may take into consideration an appeal even when the competent court has not yet rendered a decision regarding the merit of the

33 Article 15, para. 6 of the Agreement between the Council of Ministers of BiH and the Government of the Republic of Croatia on Police Cooperation in the Fight against Cross-Border Crime (*Official Gazette of BiH – International Agreements no*. 9/11).
34 Hereinafter: the European Convention.
35 *Official Gazette of BiH no*. 60/05, 64/08 and 51/09.

case if the appeal alleges serious violations of the rights and fundamental freedoms which are protected by the Constitution of BiH or international agreements which are to be implemented in Bosnia and Herzegovina. In addition, the Constitutional Court notes that the existing legal provisions do not offer the suspect a possibility to appeal against the duration of the investigation, i.e. to raise this issue before the ordinary court within the investigative proceedings.

The Constitutional Court of BiH holds that in this particular case the appellant is subject to „charges" as referred to under Article 6, para. 1 of the European Convention, therefore all the guarantees of the right to a fair trial including the right to a decision within reasonable time in the criminal proceedings must be available. Instead of a special justification of such a conclusion, the Constitutional Court has invoked its Decision on Permissibility and Merit no. AP 2130/09 of 28 May 2010, item 47.[36]

According to the consistent practices of the European Court of Human Rights and of the Constitutional Court of BiH, reasonable duration of the proceedings must be determined in the light of the circumstances of each particular case, while taking into account the criteria established in jurisprudence of the European Court of Human Rights, especially the complexity of cases, the conduct of the parties to the proceedings and the competent court or other public authorities and of the relevance that the legal matter in question holds for the appellant.[37] In accordance with the practice of the European Court of Human Rights, when assessing what is a reasonable period of time, the beginning of the relevant period is marked by the moment the person in question becomes aware that they are a suspect regarding a criminal offence since it is at that moment that the said person has a vested interest that the court should decide on whether such suspicion is valid. Such a determination of the relevant period is evident in cases where an arrest precedes formal charges.[38] Furthermore, the end of the relevant period of time is marked by the moment when the uncertainty in terms of the legal position of the person in question is over. With regard to this, the European Court of Human Rights applies the same criteria both in criminal and civil matters. In addition, the decision in the criminal proceedings on the indictment, i.e. the acquittal or dissmissal of the charges, must be final. Finally, a final decision on the charges may be in the form of desisting from further criminal prosecution.[39]

In view of the aforementioned, the Constitutional Court notes that the investigative proceedings lasted four years and six months, counting from the moment the District Court, at the motion of the District Prosecutor's Office, passed an order to the moment when the idictment against the appellant was issued. However, the Constitutional Court notes that from the moment the indictment was confirmed, the entire proceedings (involving two court instances) were concluded within eight months.

With regard to the complexity of the proceedings, the Constitutional Court notes, bearing in mind the nature of the criminal offence as well as the fact that the investigative proceedings were directed at a number of individuals, that the investigation was in this particular case quite extensive and complex and it included the appellant as well. With regard to the appellant's conduct,

36 Available on the official web site of the Constitutional Court: www.ustavnisud.ba.
37 See: European Court of Human Rights, *Mikulić v. Croatia*, application no. 53176/99 of 7 February 2002, Report no. 2002 - I, para. 38.
38 See: European Court of Human Rights, *Wemhoff v. Germany* , judgment no. 2122/64 of 27 June 1968, para. 19 and *Dobbertin vs. France*, judgment 13089/87 of 25 February 1993, paras. 9 and 138.
39 See: ECtHR, *Wemhoff*, para. 18.

the Constitutional Court could not conclude that the appellant's actions had delayed the proceedings. The Constitutional Court notes that the appellant has on several occasions addressed the District Prosecutor's Office, as well as the Special Prosecutor's Office urging them to conclude the investigative proceedings as soon as possible.

With regard to the conduct of the competent authorities, the Constitutional Court notes that in this particular case investigative actions were undertaken by the Prosecutor's Office of BiH, District Prosecutor's Office and the Special Prosecutor's Office. Next, the Constitutional Court notes that a number of individuals were subject to the said investigation and the appellant was included among them. The Constitutional Court notes that the Criminal Procedure Codes of BiH and Republika Srpska which were applied by the competent authorities in this particular case do not prescribe when the investigation must be concluded. However, the cited laws do prescribe that the prosecutor shall conclude the investigation when he finds that the facts have been sufficiently clarified that an indictment may be issued and if the investigation is not concluded in six months – the collegium of the prosecutor's office shall undertake the necessary measures with a view to concluding the investigation. Moreover, the Constitutional Court notes that the Criminal Procedure Codes of BiH and Republika Srpska prescribe the right of the accused to be brought before the court within reasonable time and to be tried without any delays.

In this particular case, the Constitutional Court notes that the investigation had lasted over four years. However, when considering if the aforementioned duration of the investigation meets the standards of the right to a fair trial within reasonable time, the Constitutional Court must take into account that the investigation was extremely extensive and that a number of individuals was being investigated who were suspected of having committed a criminal offence of organised crime as reffered to under Article 383 a), para. 2 of the Criminal Code of Republika Srpska[40] regarding the criminal offence of unauthorised production and trafficking of narcotics pursuant to Article 224, para. 2 of the Criminal Code of Republika Srpska. Therefore, it follows that the very nature of the said criminal offence influnced how long the investigation, which involved the appellant as well, was. Next, the Constitutional Court notes that the proceedings also included cooperation between the District Prosecutor's Office, the Prosecutor's Office of BiH and the Special Prosecutor's Office which also affected the duration of the investigation since the said prosecutor's offices were undertaking actions which were under their respective jurisdictions. Furthermore, the Constitutional Court notes that a lot of investigative actions needed to be undertaken in order to corroborate the indictment. Therefore, the Constitutional Court holds that there were valid reasons for the investigation to last four years and six months. Next, the Constitutional Court notes that the proceedings after the indictment was confirmed, involving two court instances, were concluded within eight months. Therefore, although the investigation lasted for over four years, still, viewed as a whole, the Constitutional Court finds that the proceedings were concluded within reasonable time, and that the appellant's right to a trial within reasonable time pursuant to Article II/3e) of the Constitution of BiH and Article 6, para. 1 of the European Convention in this particular case has not been violated.

The absence of provisions regarding the suspension and widening the investigation has caused problems in practice. According to the current legal provisions, the criminal proceedings (in all of its stages) may be suspended only if the suspect, i.e. the accused, develops a mental illness (Articles 207 and 388).

40 *Official Gazette of Republika Srpska no.* 49/03, 108/04, 37/06, 70/06, 73/10 and 1/12.

11. Conclusion

This paper covers a complex set of actions and activities regarding the criminal investigation in Bosnia and Herzegovina, which involves a great number of participants, the prosecutor and the authorised officers being the most important ones. The reform of the criminal procedure legislation in general, which was implemented under the influence of common law, has introduced considerable changes, never used before in this region. The prosecutor has been assigned a leading role during the investigation, whereas the authorised officers have been granted broader powers when receiving the information and notifying the prosecutor on the grounds for suspicion that a criminal offence has been committed. The role of the court has been reduced to review of the legality of certain prosecutor's and authorised officers' actions where the human rights of the suspect guaranteed by the Constitution and international treaties might be violated.

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Zlata Đurđević, PhD[1]

Main Characteristics of the Prosecutorial Investigation According to the Croatian CPC from 2008 to 2013

1. Introduction to the Croatian Reform of the Criminal Procedure Legislation

Over the last six years, since the new Criminal Procedure Code was passed,[2] Croatian criminal procedure legislation and its judicial system have been undergoing fundamental and multi-faceted reforms. This has been the most profound transformation of the Croatian criminal procedure in the last 130 years, i.e. since Croatia introduced the criminal procedure of the mixed type.[3] The structure of the preliminary proceedings according to which the State Attorney's Office undertook criminal prosecution, the investigating judge collected the evidence, while the defence participated in the investigative actions remained the foundation of the Croatian criminal procedure until the 2008 CPC. The said CPC replaced the three-party investigative proceedings, which collapsed like a house of cards, granting a monopolistic position to the State Attorney's Office. The paradigm of the preliminary criminal proceedings was transformed through the merger of the roles of the criminal prosecution and the collection of evidence which were put in the State Attorney's hands while the procedural and evidentiary rights of the defence were abolished. The main incentive for such a radical reform of the criminal procedure in Croatia came from the realm of politics and was related to the European Union accession process.

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2 The new Criminal Procedure Code was passed in December 2008 (*Official Gazette of the Republic of Croatia* 152/08) and it came into force on 1 July 2009 for criminal offences which fall under the jurisdiction of the Bureau for Combating Corruption and Organised Crime (USKOK) and as of 1 September 2011it is applicable to all criminal offences.

3 Introduced by the Criminal Procedure Act of Croatia and Slavonia passed in 1875.

The European Union has identified the inefficiency of the criminal justice system as the main obstacle for Croatia's membership in this European association.[4] This special structural problem of inefficient criminal justice system manifested itself not only through depriving the citizens of their right of access to courts due to lengthy proceedings but also through the failure to combat corruption and organised crime. The solution to this problem, in the field of criminal law, was found in the CPC reform accompanied with the reorganisation and strengthening of the authorities conducting the criminal prosecution.[5] Although the existing procedural forms and principles of the CPC/97[6] were not contrary to the *acquis communitaire,* and actually existed in other European states as well,[7] the said Code became the scapegoat in the face of the newly gathered momentum for the fight against crime even if it meant abandoning what had been a hundred-year-old tradition in the Croatian criminal procedure law, long-standing jurisprudence and relevant theory and amassed judicial experience and knowledge resulting from it. The negotiations on the accession of Croatia to the European Union were finalised in the end by closing the most difficult chapter of the negotiations, Chapter 23, entitled *Human Rights and Criminal Justice System* in June 2011, not as a result of the legislative changes but due to actual results in the fight against crime. Namely, since 1 July 2009, when the new CPC entered into force, a period of criminal prosecution of high-ranking political officials has ensued, i.e. active participants of corruption scandals, first in high politics[8] and later at the level of local government, have been discovered and prosecuted.

4 See: European Commission Reports on the Progress of Croatia from 2005 to 2010 on the web site of the Ministry of Foreign Affairs and European Integrations (www.eu-pregovori.hr) or on the web site of the European Commission on Enlargement (http://ec.europa.eu/enlargement/candidate-countries/croatia/key-documents/index_en.htm).

5 The EU policy, particularly towards states which have been the candidates for the membership in the EU over the last decade, is to encourage the introduction of the prosecutorial investigation. Therefore, the EU has provided strong financial and professional aid for the projects reforming Croatian criminal procedure. See: *Reform of Pre-Trial Criminal Proceedings in Croatia: Analysis, Comparison, Recommendations and Plan of Action* (2007-2012), CARDS 2003 Twinning Light Project HR03-IB-JH-04-TL, November 2006. The result of this project was the conclusion that judicial investigation should be completely abolished, as well as all of the investigative functions of the court and that the investigating judge (Cro. *istražni sudac*) should be replaced with the new type of investigating judge (Cro. *sudac istrage*) (p. 2, 170).

6 The CPC which was passed in 1997 (O.G. 110/97) kept the fundamental principles and the structure of the Criminal Procedure Code of the SFRY passed in 1976.

7 For instance, judicial investigation exists today in Belgium, France, Greece, Slovenia and Spain. See: National Reports of the listed states in R Vogler et al. (eds), *Criminal Procedure in Europe* (Berlin, Duncker & Humblot, 2008); B Pesquié, 'The Belgian system' in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (Cambridge, Cambridge University Press, 2002) 81 and onward; *V Dervieux*, 'The French system' in Delmas-Marty and Spencer (ibid) 218 and onward; Ivičević Karas, Elizabeta (2010), "O reformama suvremenog francuskog kaznenog postupka iz aspekta jačanja procesne uloge državnog odvjetništva", *Hrvatski ljetopis za kazneno pravo i praksu* (www.pravo.unizg.hr/hljkpp), no. 1., pp. 109-124.

8 The fight against organised crime and corruption started based on the 1997 CPC (anti-corruption investigations under the code names *Maestro, Gruntovec, Diagnosis 1 and 2, Index, Titanic*, etc.). However, criminal proceedings have been instituted against high-ranking state officials by the State Attorney's Office pursuant to the new CPC. For instance, six criminal proceedings have been instituted against the former Croatian Prime Minister, Ivo Sanader, and in three of those cases an indictment has been issued (HEP-Dioki, Planinska, TLM-HEP), whereas in three other cases judgments, which are not final yet, have been rendered (in Hypo bank and Ina-MOL cases, he has been sentenced to ten years in prison, and in Fima-media he received a sentence of nine years of imprisonment). Former Vice President of the Government Damir Polančec, has been sentenced to one year and three months in prison in the "false study" case. The criminal proceedings against former Minister of Defence, Berislav Rončević, regarding the case "Trucks" ended in an acquittal. The proceedings against the former Minister of Agriculture, Petar Čobanković, ended in a settlement with the prosecution according to which the court sentenced him to one year of community service.

Ever since the CPC/08 was passed, Croatia has continued to reform its criminal procedure legislation, which has been marked by the following phenomena:[9]

a) Legislative expansion and fragmentation. While the Criminal Procedure Code which was in force until 1997 regulated all types of criminal proceedings and criminal procedure actions, today Croatia has sixteen laws which contain provisions on criminal procedure, not counting the laws which deal with the structure of state authorities and public services.

b) Constant amendments to the law. CPC/08 has been altered fundamentally through the use of five amendments before the end of 2013.[10] The same goes for other laws, for instance, the Law on State Attorney's Office has been amended seven times,[11] the Law on Suppressing Corruption and Organised Crime five times.[12] The cause of such frequent and often extensive changes is not only harmonisation with the international standards or response to the needs of jurisprudence but also in fast-paced and non-transparent legislative procedures which result in omissions and inadequate provisions, which can only be rectified by a new amendment.

c) Short period of vacatio legis. Such comprehensive and frequent changes might be partially compensated if *vacatio legis* is of adequate length which would allow the participants in the judiciary and others involved to study and learn how to apply the new legal procedures and principles. However, for the majority of laws, the period between the promulgation of the law and its coming into force is exceptionally short.[13]

2. Two Key Characteristics of the Development of the Contemporary Croatian Criminal Procedure Law: Prosecutorial Investigation and Constitutionalisation

2.1. Prosecutorial Investigation According to the CPC/08

Basic aim of the reform of the criminal procedure during the last decade has been the introduction of the prosecutorial investigation. By doing this, Croatia has conformed with a European tendency, which has been around for several decades, towards transitioning from the judicial to the prosecutorial investigation.[14] The judicial investigation and the investigating judge have been abolished while inquiry and investigative proceedings conducted by the State Attorney have been introduced. The State Attorney has become *dominus liti*s of the preliminary proceedings responsible for deciding on whether the requirements for criminal prosecution have been met,

9 More on the said processes see in: Đurđević, Zlata (2011) "Suvremeni razvoj hrvatskoga kaznenog procesnog prava s posebnim osvrtom na novelu ZKP iz 2011.", *Hrvatski ljetopis za kazneno pravo i praks*u (www.pravo.unizg.hr/hljkpp), no. 2, pp. 311-357, 313-316.

10 Official Gazette of the Republic of Croatia no. 152/08, 76/09, 80/11, 143/12, 56/13, 145/13. Three amendments have changed somewhere between one quarter and one half of the legal provisions, so the question is raised why the new law was not passed instead of the last extensive amendment and what has still remained from the original legal provisions. V. Valković, Laura (2013) "Procesna prava obrane prema V. noveli Zakona o kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 521-554, 522.

11 *Official Gazette of the Republic of Croatia* no. 76/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13.

12 *Official Gazette of the Republic of Croatia* no. 76/09, 116/10, 145/10, 57/11, 136/12, 148/13.

13 For instance, an extensive amendment to the CPC and related laws, the Law on the State Attorney's Office, the Law on the Bureau for Combating Corruption and Organised Crime and the Law on Police Activities and Powers were passed in Croatian Assembly on 30 June 2009 and they came into force the following day on 1 July 2009. The period of *vacatio legis* for the extensive amendment in 2011 was eight days while amendment V to the CPC passed in 2013, which amended half of the legal provisions, came into force after nine days.

14 For instance, judicial investigation was abolished in Germany in 1974, in Italy in 1989, in Austria in 2008.

collection of evidence and the use of certain coercive measures. Two new active participants have been introduced in the preliminary proceedings: the new investigating judge (Cro. *sudac istrage*) and the investigator. The basic function of the new investigating judge (the so-called judge of freedoms) is deciding on coercive measures which infringe human rights more severely and only under special circumstances he may present evidence. The investigator is a police officer who can be entrusted with undertaking certain evidentiary actions by the State Attorney.[15] The State Attorney is not a party to the proceedings but a state authority conducting the proceedings, which is completely independent when using prosecutorial and investigative powers.[16] Despite the proclaimed intent of the legislator to introduce equal standing of the parties to the proceedings throughout the whole procedure,[17] criminal prosecution and the investigation according to the CPC/08 were not accusatory nor were they mixed but inquisitorial proceedings which is the result of the following characteristics:[18]

a) *Inquisitorial principle* grants the power to a state authority to collect evidence at its own initiative, without any motions filed by a party to the proceedings, in order to satisfy its own need for information so that a decision on the guilt and sanction may be rendered. The State Attorney's Office is, as a rule, the only authority which is authorised to collect evidence necessary for the indictment to be issued. The defence does not have the right to collect the evidence, instead, it may file a request with the State Attorney or the investigating judge for evidentiary actions to be undertaken. The rule dictates that the State Attorney should decide independently whether the evidence is to be presented and examines the evidence alone in his office without the presence of the defence, the court or the public.

b*) Accumulation of the functions* performed by the State Attorney who a) decides whether the requirements for criminal prosecution have been met, i.e. whether to institute and initiate the proceedings, b) conducts the proceedings by collecting the evidence and investigating and establishing the facts of the case, c) establishes the facts which go in favour of the defendant, i.e. collects with equal attention the evidence both on the defendant's guilt and innocence.

c) *The confidentiality of the criminal prosecution and the investigation*. The CPC/08 introduced in Croatian criminal procedure the confidentiality of the investigation. According to the CPC/97 the pre-investigative proceedings were confidential whereas the investigation was not public, i.e. it was closed for public but not for the parties which had the right to inform the public about the content of the investigative actions unless there were special reasons which required confidentiality. The CPC/08 introduced the confidentiality of the proceedings as a rule and under special circumstances the State Attorney could allow the public to be informed on a particular evidentiary action if there was a public interest for this or due to some other valid reasons.

15 Since the CPC/08 was passed, the investigative measures are called evidentiary actions which is not an adequate term and it is not accepted in other European states. During the preliminary proceedings the case is investigated and material is collected which might potentially be presented as evidence at the trial.

16 The so-called unilateral prosecutorial investigation. Pajčić, Matko (2010) "Pravo okrivljenika na uvid u spis predmeta tijekom prethodnog kaznenog postupka u pravnim sustavima nekih europskih zemalja i praksi Europskog suda za ljudska prava", *Hrvatski ljetopis za kazneno pravo i praksu* no. 1, pp. 25-52, 26. The State Attorney becomes the party to the proceedings when confronted with the opposing party whereas the defendant does not become the party until the court proceedings for the review of the indictment take place, during the main hearing and the proceedings regarding legal remedies.

17 The Principles for Drafting the New CPC or the CPC Platform which was adopted in 2007 at the cabinet meeting.

18 On the inquisitorial type of criminal procedure see: Vladimir, Bayer (1995) *Kazneno procesno pravo – odabrana poglavlja*, Volume I, Zagreb: Ministry of Interior of the Republic of Croatia, pp. 16-20; Krapac, Davor (2012) *Kazneno procesno pravo*, Volume 1: Institucije, Zagreb: Narodne novine, pp. 17-18.

d) *Abolishing procedural rights of the defence*. The defendant was deprived of all his evidentiary procedural rights, especially prior to the 2011 Amendment to the CPC, both with regard to the collection of the evidence and the right to defend himself from the charges i.e. the right to respond to the incriminating evidence after learning of such evidence. This revoked the defendant's status as the party to the proceedings turning him into a person who is subject to criminal prosecution and investigation rather than treating him as an active participant during the proceedings.[19]

Therefore, strengthening the power and the role of the State Attorney and the police was not balanced out by strengthening the defence, i.e. by the judicial review of the State Attorney's Office and the police. The legislator did the exact opposite, the powers of the other two main participants in the criminal proceedings, the court and the defendant, were considerably reduced. Such a concept of the preliminary proceedings certainly increased the efficiency of the criminal proceedings, which is demonstrated by the prosecution's practice, but it has substantially weakened the tendency towards the protection of human rights and it has violated the principle of equality of arms during the preliminary proceedings as demonstrated by the pending decision of the Constitutional Court of the Republic of Croatia on the constitutionality of the CPC/08.

2.2. Constitutionalisation of the Criminal Procedure Law

The second key characteristic of the development of the Croatian criminal procedure law is its constitutionalisation which has intensified over the last decade. Constitutionalisation of the criminal procedure law is the process of harmonisation of the provisions in this legal branch with the Constitution and international law on human rights through the decisions rendered by the Constitutional Court and the European Court of Human Rights (ECHR) rescinding the legal provisions which have been declared unconstitutional and setting aside the court decisions passed in the criminal proceedings. The Constitutional Court of the Republic of Croatia passed a decision on 19 July 2012[20] in which it found that numerous constitutional provisions and constitutional values had been violated in addition to the European Convention on Fundamental Rights and Freedoms.[21] From the standpoint of criminal justice system, this represents by far the most important constitutional decision which has set the constitutional framework and constitutional requirements which must be met by the Croatian legislator when regulating criminal procedure law for a long time to come.[22] In the pronouncement of the decision the Constitutional Court did not only revoke the provisions of 43 articles of the CPC but it also ordered the legislator to fulfil the positive constitutional obligations, which means that it not only established that particular legal provisions were unconstitutional but that the entire law due to structural and

19 See: here infra 2.2. c) Minimum Rights of the Defence during the Preliminary Proceedings.

20 The decision and ruling no. U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011. The proceedings for the assessment of constitutionality of the CPC/08 were initiated based on the six motions for the assessment of constitutionality filed by six petitioners five of which were lawyers and one was a natural person in the period from 2009 to 2011. The main motion, which is dealt with in 90% of the decision, was filed on 18 September 2009. It took more than three years for the Constitutional Court to decide on the constitutionality of the CPC.

21 The Constitutional Court has based its decision that the CPC/08 is unconstitutional on 18 articles of the Constitution of the Republic of Croatia and six articles of the European Convention on the Protection of Human Rights interpreted through the cited judicature of the European Court of Human Rights as the relevant law.

22 What occurred has been anticipated for a long time in the theoretical writings – comprehensive constitutionalisation of the criminal procedure law. See: Krapac, Davor (2011), "Konstitucionalizacija kaznenog procesnog prava u Republici Hrvatskoj", Special print edition from: *Okrugli stol Dvadeseta obljetnica Ustava Republike Hrvatske*, Zagreb: HAZU, pp. 169-212, 169.; Krapac, Davor (2010) *Kazneno procesno pravo*, Volume 1: Institucije, Zagreb: Narodne novine, pp. 33-45; Đurđević, Zlata (2011) *Uvod u: Zbirka zakona iz kaznenog procesnog prava*, Faculty of Law at the University of Zagreb, 2011, XVIII.

general flaws of the criminal procedure did not comply with the Constitution of the Republic of Croatia. The decision of the Constitutional Court may be summarised into five violations of constitutional principles, i.e. human rights which are guaranteed to the citizens by the Constitution during the investigative part of the criminal proceedings. These are: the principle of proportionality, the principle of judicial review, minimum rights of the defence, the right to an efficient investigation and the principle of legality.

a) The violation of the principle of proportionality when restricting basic rights of an individual during the criminal proceedings

The main objective of passing the new CPC in Croatia was to provide the state with an efficient tool for a fight against corruption and organised crime. This task of fighting against the serious forms of criminal offences was the main characteristic of the CPC/08 which dictated numerous legal provisions which excessively restricted the rights of an individual as well as the right of the defence, particularly during the preliminary proceedings. Although the state is authorised to use coercive measures during the criminal proceedings in order to restrict fundamental human rights including the minimum rights of the defence,[23] the said restrictions must be used when it is strictly necessary and the consequences suffered by the defence have to be sufficiently compensated during the proceedings.[24] In contrast to the aforementioned, during the preliminary proceedings according to the CPC/08, the restriction of the procedural rights of the defence became a rule regardless of the fact whether it is proportionate and legitimate.

Upon deciding on the issue of constitutionality of the restriction of basic rights, the Constitutional Court has drawn attention to the fact that it has become necessary to differentiate between two substantially different categories of criminal offences in any modern society. The first category includes the so-called offences which "threaten organised life in a community" and which "destroy the very fabric of society" such as terrorism, organised crime, complex economic criminal offences as well as corruption on a massive scale and with grave consequences. The second category according to the Constitutional Court's position includes "conventional" criminal offences, most of which have always existed and which will always be around as long as the human race exists. The Constitutional Court holds that the first category allows for considerably broader restrictions of the rights of the defence and other rights (item 184.3 of the Decision) and that the legislator has not taken into account the difference between these two categories of criminal offences including them both, instead, in a uniform legal provision in such a way that the intensity of restrictions of constitutional rights with regard to "conventional" criminal offences cannot be justified under constitutional law. This has led to a structural imbalance of the whole criminal proceedings. In addition to the said structural flaw, the Constitutional Court has drawn attention to particular provisions of the CPC where the legislator has disregarded the principle of proportionality.[25]

23 According to the ECHR the interests competing with the defence's interest might be: national security, protection of endangered witnesses and undercover investigators, i.e. protecting covert police methods of investigating crime (*Doorson v. Netherlands, 1996*). The rights of the defence may be restricted only for the purpose of protection of the fundamental rights of another person or public interest (*Van Mechelen v. Netherlands, 1996*).

24 *Jasper v. UK* in 2000, para. 52; *Rowe and Davis* v. UK in 2000, para. 61; Ivičević Karas, Elizabeta (2007), "Okrivljenikovo pravo da ispituje svjedoke optužbe u stadiju istrage kao važan aspekt načela jednakosti oružja stranaka u kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2., pp. 999-1018, 1002.

25 For instance: it was possible to order covert surveillance measures for minor offences while it was too broadly defined in which cases service of the investigation order or disclosure of evidence could be delayed and when the right to confidential communication between the defendant and the defence attorney could be restricted.

b) Judicial review of the criminal prosecution[26]

One of the main characteristics of the investigative proceedings according to the CPC/97 was its judicial character. The CPC/97 secured, in terms of structure and function, judicial protection of the investigative function since the investigation was initiated by a court decision and it was conducted by a judicial authority. Conversely, the CPC/08 eliminated any possibility that the defendant could request judicial review of the legality of how the criminal prosecution and the investigation were being conducted. The State Attorney was an "absolute master" of the preliminary part of the proceedings and the defendant was not allowed to challenge whether the legal requirements had been met or whether there were some legal impediments to conduct preliminary criminal proceedings before a court. The only option available to the defendant to challenge the legality of conducting the criminal prosecution and the investigation was a complaint to the higher State Attorney as an instrument of addressing a higher instance within the State Attorney's Office. The Constitutional Court has dismissed such a legal framework.

In order to understand constitutional violations related to the judicial review of actions of the State Attorney's Office, it is essential to appreciate the difference between a) the judicial review of investigative functions of the State Attorney which refers to the review of individual actions and measures which infringe fundamental human rights and freedoms and b) judicial review of prosecutorial functions of the State Attorney in order to make sure that the requirements for the initiation, continuation and suspension of the preliminary proceedings have been met. While the CPC/08 as a rule guaranteed judicial review of coercive actions and measures,[27] by denying the defendant the right to challenge the State Attorney's decision on the initiation of criminal prosecution and the investigation before the court or to request from the investigating judge the suspension of the investigation, it has completely left out the judicial review of the prosecutorial function.

The Constitutional Court has confirmed that judicial protection from illegal criminal prosecution is inherent to the spirit of the Croatian Constitution and, therefore, it has constitutionalised the right to judicial protection during the entire criminal proceedings.[28] The Court has stated that it is not enough for the investigating judge to decide on the legality of particular coercive measures and that the defendant must have the right to challenge the decision of the State Attorney on the initiation and conduct of criminal prosecution and investigation. Therefore, it has imposed an obligation on the legislator to incorporate a mechanism of effective judicial protection from the unlawful (arbitrary) criminal prosecution and investigation into the preliminary proceedings from the moment the person in question is notified of his status as a suspect (item 246.a).

26 See more in: Đurđević, Zlata (2010) "Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspect", *Hrvatski ljetopis za kazneno pravo i praksu* no. 1/2010, pp. 7-24.

27 However, in several cases the Constitutional Court has found the lack of judicial review of investigative measures to be unconstitutional. These were: physical examination ordered by the State Attorney pursuant to Art. 326 of the CPC/08 (item 154.3), failure to submit daily reports and documentation regarding technical records on special evidentiary actions to the investigating judge pursuant to Art. 337 of the CPC/08 (item 174), procedural immunity granted to witnesses pursuant to Art. 286, paragraphs 2-4 of the CPC/08 (item 146.2).

28 The Constitutional Court has underlined the fundamental value of the judicial protection in Croatian legal order in the following statement: "The entire wording of the Constitution is permeated with guarantees of judicial protection. The whole catalogue of human rights and fundamental freedoms guaranteed by the Constitution is directed at the judicial protection. The entire constitutional order is founded on the rule of law and the principle of legality, the main guardian of which is the court." (item 39.2).

c) Minimum rights of the defence during the preliminary proceedings

The Constitutional Court has established that a great number of provisions of the CPC/08 is in violation of the minimum rights of the defence referred to under Art. 6, para. 3 of the Convention as the legislator has restricted them without good reason or excessively or has not effectively ensured such rights.[29] Procedural rights of the defence are relevant even during the preliminary proceedings since fairness of the trial may be seriously impaired if omissions occur at the initial stages of the proceedings (*Kuralić v. Croatia*, 2009, item 26 of the Decision of the Constitutional Court).[30] The Constitutional Court has also determined, citing the jurisprudence of the ECHR, at what point the guarantees referred to under Art. 6 of the Convention should be activated during the preliminary proceedings. It has been determined that this should be the moment the person is charged with a criminal offence for the purposes of Art. 6 of the Convention, the moment when the person in question has received official notification that he has committed a criminal offence or when the measures and actions have been undertaken which substantially affect the said person's situation (*Foti and others v. Italia*, 1982, § 52; item 31 of the Constitutional Court's Decision).

a) The right to notification. The right of the suspect to be notified on the nature and reasons of the charges has been violated as the defendant could not always be notified that he is subject to investigative proceedings which are being conducted. He had to be questioned prior to the issuance of the indictment and did not have to be notified before that moment that proceedings are being conducted which concern him. The Constitutional Court has established a positive obligation of notification of the person in question that he has the status of a suspect from the moment he is charged.

b) The right to a defence attorney free of charge. While the CPC/97 did not limit in any way the right of a defendant who does not have sufficient financial means to have a defence attorney appointed to him (Art. 66 of the CPC/97), the CPC/08 has limited the right of such a defendant to have a defence attorney appointed to him just to cases regarding criminal offences which are punishable under law by a term in prison of five or more years (Art. 72, para. 2 of the CPC/08). The Convention under Art. 6, para. 3, item c guarantees the defendant who does not have sufficient means to hire a defence attorney that a defence attorney would be appointed to him free of charge, when this is in the interest of justice, which is the case when the criminal offence he is charged with is punishable by imprisonment.[31] Therefore, the CPC/08 has violated the Convention by setting the limit of the prescribed sanction as high as five years of imprisonment. If it is any consolation, the said provision did not get a chance to be applied in practice as the CPC/08 entered into force only with regard to the criminal offences which fell under the jurisdiction of USKOK (Bureau for Combating Corruption and Organised Crime) where the defence

29 The obligation to incorporate adequate guarantees referred to under Art. 6 of the Convention into the CPC regarding the preliminary proceedings has been imposed by the Constitutional Court after invoking the judgment in the case *Salduz v. Turkey* in which the European Court stated that investigative proceedings were of great importance for the preparation of the trial as they set the perimeters within which the offence which was being criminally prosecuted would be examined, as well as that it could not be excluded that the judgment would rely on the evidence obtained during the investigative proceedings (*Can v. Austria*, para. 27 of the Decision of the Constitutional Court).

30 The Constitutional Court has also established that procedural rights of the defence have been violated outside of the scope of minimum rights of the defence, which shall not be discussed in this paper. On this topic see: Đurđević, Zlata (2012) "Odluka Ustavnog suda RH o suglasnosti Zakona o kaznenom postupku s Ustavom", *Hrvatski ljetopis za kazneno pravo i praksu* no. 2, pp. 409-438, 428-432.

31 *Quaranta v. Switzerland in* 1991, para. *33; Benham v. UK,* 2006, para. 61.

is mandatory from the moment of first questioning. The 2011 Amendment, which means before the CPC/08 entered into force for all criminal offences, introduced the right to a defence attorney free of charge for a defendant who cannot afford one after the indictment is issued with regard to all criminal offences punishable by imprisonment (Art. 72), which complies with the standard set by the Convention, but this remains below the standard applied by the CPC/97.

c) The right of the defendant to defend himself. Among the rights of the defence which were severely restricted during the preliminary criminal proceedings by the CPC/08 was the right of the defendant to defend himself. This refers to the defendant's right to defend himself in person, i.e. to be deposed regarding the charges. This constitutional right, which is guaranteed by the Convention as well, used to be an integral part of procedural mechanisms of the CPC/97 as early as at the stage of pre-investigation proceedings. The investigating judge had to question the person who was subject to a request for an investigation prior to passing a ruling on the investigation order unless there was a risk of delay. (Art. 189, para. 1 of the CPC/97).[32] The purpose of questioning the defendant was, on the one hand, to provide the defendant with an opportunity to defend himself from the charges, while, on the other hand, it allowed the court to assess more objectively if the requirements necessary for conducting the criminal proceedings had been met. The CPC/08 restricted the suspect's rights to defend himself during the preliminary proceedings radically. The State Attorney was not under an obligation to question a suspect who was not arrested until the end of the investigation, i.e. until the indictment was issued regarding a criminal offence punishable under law by a term in prison of twelve years whereas in cases regarding minor offences not even then.[33] This means that the defendant throughout the entire preliminary proceedings did not have the opportunity to respond to the charges he was facing before the indictment was issued, i.e. until the trial.

d) The right to examine the case file. The right to examine the case file is considered to be at the core of the defence's rights during the criminal proceedings along with the right to propose and present evidence.[34] The importance of the right to examine the case file lies in the fact that it represents the main requirement for the performance of the function of the defence since it provides the information what the defendant is accused of and on what evidence the charges against him are based.[35] On the other hand, the CPC/97 secured access to the case file at a very early stage.[36] The legislator restricted drastically the right of the defence to examine the case file by the CPC/08. The defendant and the defence attorney had the right to examine the file and the items which were to be used as evidence after the defendant was questioned (Art. 184, para. 2, item 1 of the CPC/08). Since the obligation to question a suspect existed only at the end of an

32 The investigating judge could only approve the direct indictment to be issued with regard to the criminal offences punishable under law by a term in prison of eight to fifteen years if he had first questioned the person who was to be indicted (Art. 191, para. 2 of the CPC/97). Furthermore, the police could question formally the arrested person, which means that the suspect was able to present his defence within the first 24 hours from the time the police had made an arrest (Art. 177, para. 5 of the CPC/97). Admittedly, during the summary proceedings there was no need to question the defendant prior to initiating the proceedings by scheduling the main hearing, however, summary proceedings were conducted only with regard to the criminal offences punishable under law by a term in prison of up to five years.

33 Considering that according to the CPC/08 the State Attorney could deny the defence access to the case file before the defendant had been questioned, he was additionaly motivated not to question the defendant.

34 Joecks, Wolfgang (2006) *Strafprozessordnung*, Munchen: Verlag C. H. Beck, p. 334.

35 Therefore, it is considered to be in practice by far the most important aspect of allowing "adequate facilities" for the preparation of the defence. Trechsel, Stefan (2005) *Human Rights in Criminal Proceedings*, New York: Oxford University Press, p. 222.

36 The defendant used to be granted the said right when he was notified of the initiation of the proceedings (when the ruling on conducting the investigation was served), and the defence attorney even sooner if the collection of evidence against the defendant had started prior to formal proceedings, i.e. if some evidentiary action had been undertaken earlier (Art. 155, para. 5 of the CPC/97).

investigation, i.e. prior to the issuance of an indictment, it was possible to deny this right to the suspect during the whole criminal prosecution and until the end of the investigation.[37] The 2011 Amendment of the CPC granted the right to examine the case file to the suspect who is not arrested after the elapse of 30 days from the day criminal charges were filed or from the moment evidentiary actions were undertaken concerning him.

e) The right to confidential communication between the defendant and the defence attorney. The right of the defendant to communicate with his defence attorney away from the earshot of a third person is a part of basic requirements for fair proceedings in a democratic society.[38] If the attorney is not allowed to talk with his client and receive confidential instructions from him without supervision, he will not be able to perform his tasks adequately, which is why such a restriction is generally contrary to the right to effective defence guaranteed under Art. 6, para. 3.c.[39] The Constitutional Court has established that the provisions of the CPC/08 on the supervision of the conversation between the arrested person or a detainee and the defence attorney are in violation of the defendant's right to confidential communication with his defence attorney (Art. 75, paragraphs 2 and 3 and Art. 76, paragraphs 2-4), therefore, it has ordered the requirements to be prescribed for allowing such a supervision measure, specifying the procedures to be followed by the authorised persons during the supervision and legal repercussions if the deadlines for supervision are exceeded. Due to the high degree of the restriction imposed on the right of the defendant to engage in confidential (privileged) communication with his defence attorney, the said supervision measure must be strictly limited to the most serious forms of criminal offences.

d) The right to an efficient investigation in criminal cases

The right to an efficient investigation is a fundamental human right guaranteed to the victims of criminal offences by the European Convention. Anyone who is the victim of serious criminal offences such as murders, torture, rape, abductions, physical abuse is entitled to an efficient investigation conducted by the state so that the perpetrators of the said offences could be tried and sentenced.[40] The ECHR has elaborated the definition of an efficient investigation through its judicature over the last twenty years by setting the standards which define the investigation as efficient.[41] These are: a) adequate investigation for determining and sanctioning the perpetrator; b) comprehensive, detailed and careful investigation; c) independent and impartial investigator; d) prompt investigation; e) transparency; f) involvement of the victim; g) the obligation of initiating criminal prosecution when the result of the investigation requires it. The Constitutional Court has established that one of the fundamental flaws of the CPC/08 was related to the failure to meet the requirements for conducting the investigation efficiently (item 122) while the ECHR

37 According to Art. 233, para. 1 of the CPC/08, the defendant must be questioned prior to the conclusion of the investigation while according to Art. 341, para. 3 of the CPC/08 the suspect must be questioned prior to the issuance of the indictment unless the indictment requests the trial to be held *in absentia*.

38 *Rybacki v. Poland*, para. 56.

39 *Can v. Austria*, para. 57. The European Court of Human Rights has concluded that if there is supervision, the defence attorney's assistance loses its effectiveness whereas the Convention guarantees the rights which are practical and effective. *S. v. Switzerland*, para. 48.

40 Specifically, as the European Court of Human Rights has stated that the provisions of Articles 2,3,5 and 8 of the Convention impose a positive obligation of the state to conduct an efficient official investigation in cases of violent deaths, disappearance of persons, all types of abuses and other criminal offences against the person's integrity. *Assenov et al. v. Bulgaria*, judgment of 28 October 1998, para. 102. See more on this judgment in: Mowbray, Alastair (2004) *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing, pp. 59-61.

41 See in more detail on particular requests for the conduct of an efficient investigation in: Batistić Kos, Vesna (2012) *Pozitivne obveze prema Konvenciji za zaštitu ljudskih prava i temeljnih sloboda*, Zagreb: Narodne novine, pp. 107-124

has already convicted the Republic of Croatia in 14 cases for failing to conduct an efficient investigation with regard to serious criminal offences.[42] The efficient investigation failed regarding the following issues:

a) Independent and impartial investigator. ECHR has ruled against Croatia in six cases due to a lack of independent investigation (*Beganović, Dolenec, Skendžić and Krznarić*, *Đurđević, V.D., Bajić*). Independence means that there is a hierarchical or institutional independence as well as actual independence (*Skendžić and Krznarić*, § 77, *V.D.,* § 65). The said independence must be complete, under law and in practice. This means that persons involved in the events cannot be included in the collection of evidence or in the preliminary proceedings, i.e. that the investigators cannot be members of the same unit as the individuals who are being investigated. The said independence is particularly important for the establishment of public trust in the monopoly of the state to exercise its powers.[43] The CPC and the subordinate legislation should ensure that the investigation is independent of civil servants and state officials who are implicated in criminal offences. Furthermore, it is particularly necessary to consider the issue of investigating top officials of hierarchically structured authorities involved in the investigation (the police, State Attorney's Office).

b) Prompt conduct of the investigation. Inaction and delays during the conduct of the investigation, i.e. during the criminal proceedings, are the cause of the majority of the violations of the efficient investigation established by the ECHR judgments against Croatia. The investigation must be initiated promptly and conducted with reasonable expedience in order to secure the best available evidence in terms of volume and level of quality. The State Attorney's Office and the court must conduct the criminal proceedings within reasonable time and without any delays. For the purpose of achieving this goal, the Constitutional Court has set two requirements. Firstly, deadlines should be set for undertaking actions or for stages and the nature of such deadlines should be defined (if they are instructive or preclusive) and appropriate procedural and other adequate sanctions in subordinate legislation for failure to meet them should be prescribed. Secondly, an effective legal recourse should be prescribed against excessively delaying the procedure in accordance with the requirements of Art. 13 of the Convention (item 122.b and Art. 246 of the Decision of the Constitutional Court) both with regard to the irregularities in the work of the State Attorneys within the State Attorney's Office and the irregularities in the work of the judges within the court.

c) Transparency of the investigation contributes to its efficiency. Public supervision of the investigation and its results strengthens the accountability of competent authorities and establishes trust that their work is legal and efficient. Public access to the process of conducting the investigation enhances the conviction that those authorities are dedicated to the rule of law and that there is no collusion nor are illegal acts officially tolerated.[44] These requirements are a manifestation of the doctrine of so-called outward appearance of independence and impartiality of the investigation.[45] Which part of the procedure is going to be confidential and which is not going to be

42 For a more detailed summary of the cited judgments see: Krapac, Davor / Đurđević, Zlata / Ivičević Karas, Elizabeta / Bonačić, Marin / Burić, Zoran (2013) *Presude Europskog suda za ljudska prava protiv Republike Hrvatske u kaznenim predmetima*, Zagreb: Faculty of Law at the University of Zagreb.

43 See Chapter 3.3.3. *Neovisnost i nezavisnost istražitelja*, Batistić Kos, 2012, pp. 114-117.

44 *McKerr v. UK*, 9 May 2001, para. 115; *Nachova et al. v. Bulgaria*, 26 February 2004, para. 119. On the transparency of investigation see in: Batistić Kos, 2013, p. 119.

45 *Jularić v.* Croatia, para. 43; item 121 of the Decision of the Constitutional Court.

public shall depend on the determination of the moment the individual in question is "charged" (*Foti and others v. Italy, Hoozze v. the Netherlands*) i.e. from the moment preliminary investigation is concluded, that is to say when the formal investigative proceedings are initiated. However, as it has been mentioned the CPC/08 prescribed that the entire investigation and the criminal proceedings were confidential and under special circumstances the public would be allowed access to certain actions.

e) The principle of legality under criminal procedure law

The principle of legality is a universal principle of the legal order which is applicable to all legal norms, both in international, supranational law and in the local law. Under criminal procedure law, the principle of legality means that all of the interference by the state authorities with individual's rights and freedoms must be based on a legal norm which has the status of a law.[46] The principle of legality is one of the constitutional requirements which is referred to repeatedly throughout the whole decision. The Constitutional Court has established that procedural provisions are in violation of the principle of legality to such an extent that it ordered the legislator to meet the positive obligation that the legal provisions must be prescribed as defined, precise and predictable general rules which are balanced in such a way that any departure from them must constitute a clearly specified exception whose justification under constitutional law is evident, which particularly applies to criminal offences which threaten the life in an organised community and which are related to an important public interest (see: item 246 of the Decision). The purpose of the principle of legality is to avoid arbitrariness when applying the law. In addition, a number of provisions which prescribe the requirements for undertaking certain actions and measures have been declared contrary to the principle of legality.[47]

3. The Main Characteristics of the Prosecutorial Investigation after the 2013 Amendment V to the CPC

The Law on Amendments and Supplements to the Criminal Procedure Code passed in December was supposed to achieve the goals of the reform set by the Decision of the Constitutional Court of 19 July 2012 regarding the non-compliance of the Criminal Procedure Code passed in 2008 with the Constitution as well as by the platform which was established by the Guidelines of the Ministry of Justice for the reform of the CPC during 2013 passed in February 2013,[48] which have set the legal framework, a decision in principle on the model of the criminal procedure as well as

46 Krapac, Davor (2010) *Kazneno procesno pravo: Institucije*, Zagreb: Narodne novine, p. 32.

47 For instance, in the Decision, the Court has found that the requirements for the extension of special evidentiary actions (Art. 335, para. 2) have been defined through vague legal terms as "important reasons" and "the complexity of the case" leaving the judges with too broad discretionary power to interpret the restrictions of the constitutional civil rights (item 170.2). With regard to the provisions on the deadline for issuing an indictment, it was stated that there was no reasonable relationship in terms of proportion between the regular deadline and allowed time extensions which may amount to eleven times longer time period than the regular one, thus completely cancelling out the effects implied by short deadlines. It has been established that such provisions were not in compliance with the requirements for laws resulting from the rule of law, especially those regarding legal certainty, legal security and legal consistency (Article 3 of the Constitution).

48 The unabridged Guidelines of the Ministry of Justice for the Reform of the Criminal Procedure Code during 2013 have been published in: Đurđević, Zlata (2011) *Zbirka zakona iz kaznenog procesnog prava*, Faculty of Law of the University of Zagreb, 2013.

the reform guidelines as platform principles.[49] The basic provisions which have been introduced in the preliminary criminal proceedings are:[50]

3.1. Structural Reform: Uniform Criminal Procedure for all Offences

A uniform criminal procedure has been introduced for all criminal offences, thus abolishing the differentiation between the ordinary and summary proceedings.[51] The stage of the proceedings when the police and the State Attorney's Office act before the formal criminal proceedings is called the inquiry. The first formal stage of the criminal proceedings is the investigation for all criminal offences punishable under law by a term in prison of more than five years i.e. investigative actions for minor criminal offences.[52] When investigative actions are being conducted, the State Attorney's Office does not have to pass a formal decision on the initiation of the preliminary proceedings. Direct indictment, which may be issued only based on the actions which are undertaken during the inquiries, is allowed only with regard to criminal offences punishable under law by a term in prison of up to 15 years. With regard to particularly serious criminal offences as well as the ones which the Constitutional Court refers to as "the criminal offences which threaten the organised life in a community" it is allowed to restrict procedural rights of the defence during the preliminary proceedings. This provision implements the constitutional obligation and the first guideline on finding the right balance within the criminal procedure system in relation to three basic categories of criminal offences: crime which threatens the organised life in a community, conventional crime and petty crime.

3.2. Restoration of the Principle of Legality

The principle of legality has reverted to the definition that was used in Croatian criminal procedure law until the CPC/08. The State Attorney must initiate criminal proceedings if there is *a reasonable suspicion* that certain person has committed a criminal offence which is prosecuted *ex officio* and there are no legal impediments for the prosecution of the said person (Art. 2, para. 2 Platform for the Law on the Amendments and Supplements to the CPC). Two main procedural consequences which result from such a definition are that the criminal proceedings are no longer initiated when there are grounds for suspicion but a reasonable suspicion as well as that the investigation, i.e. criminal proceedings, may not be conducted against an unknown

49 The task force which was set up by the Minister of Justice in a ruling of 11 October 2012 had 16 members nominated by relevant institutions and led by professor dr Zlata Đurđević. Minister of Justice, Orsat Miljenić, disbanded the task force on 20 June 2013 so the work on drafting the legal text was taken over by the Ministry of Justice. A more detailed account of the composition, work and results of the task force see in: Đurđević, Zlata (2013) "Osvrt na rezultate rada radne skupine Ministarstva pravosuđa za usklađivanje Zakona o kaznenom postupku s Ustavom Republike Hrvatske", *Hrvatski ljetopis za kazneno pravo i praksu* (www.pravo.unizg.hr/hljkpp), 1, pp. 3 – 100.

50 See more on the Amendment V to the CPC in: Ibid. and Đurđević, Zlata (2013) "Rekonstrukcija, judicijalizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V. novelom ZKP/08: prvi dio?", *Hrvatski ljetopis za kazneno pravo i praksu*, no. 2, pp. 313 – 362.

51 According to the CPC/08 summary proceedings were conducted with regard to criminal offences which were punishable under law by a term in prison of up to twelve years except in cases which were under the jurisdiction of the County Courts whereas the ordinary proceedings were conducted before the County Courts for more serious criminal offences or those which fell under the jurisdiction of the Bureau for Combating Corruption and Organised Crime.

52 According to the CPC/08 investigation had to be conducted if criminal offences in question were punishable under law by long-term imprisonment and it was possible to conduct it only with regard to criminal offences punishable under law by a term in prison of 15 years. With regard to other criminal offences it was proceeded to the stage called criminal prosecution. It was established that the investigation was conducted only in 1% of the cases in practice.

perpetrator. Such a definition of the principle of legality also meets the constitutional requirement for determination of the charging moment[53] as well as the requirement for clear differentiation between the stage of preliminary investigative actions when the suspicion is being "clarified" whether a certain individual has committed a criminal offence in order to determine if there are any grounds for such a suspicion and the part of the proceedings when reasonable suspicion has been established.[54]

Failure to determine when the criminal proceedings were initiated was one of the main flaws of the criminal proceedings according to the Decision of the Constitutional Court.[55] It was necessary to take into account judicial review and procedural rights of the defence when deciding on the moment of initiation of the criminal proceedings. Pursuant to Art. 29, para.5 of the Constitution which prescribes that the criminal proceedings may be initiated only before the court at the request of the authorised prosecutor, the beginning of the criminal proceedings is marked by a court decision, i.e. the possibility of court decision on the requirements for the conduct of criminal proceedings. In view of the aforementioned, the criminal proceedings start (Art. 17 of the CPC): 1) when the ruling on the conduct of the investigation is final, 2) when the indictment is confirmed if there was no investigation, 3) when the main hearing is scheduled based on private prosecution, 4) when the judgment is rendered on the issuance of a criminal order.

3.3. The Restrictions on Undertaking Evidentiary Actions During the Inquiry

The purpose of separating procedural stages during the preliminary proceedings is to separate actions which may be undertaken by certain law enforcement authorities and authorities conducting the proceedings during the inquiry stage as the preliminary part of the proceedings during which the suspicion is just being "clarified" if particular individual has committed a criminal offence, in order to determine if there any grounds for such a suspicion from the part of the proceedings during which reasonable suspicion has already been established.[56] One of the fundamental structural flaws and errors of the CPC/08 was the lack of distinction between the actions which may be undertaken during the preliminary investigative actions and the investigation. From the point of view of the Constitution and the Convention, the moment of charging an individual represents that turning point when the state, on the one hand, starts undertaking coercive measures and collecting the evidence for the prosecution while the defendant must be granted procedural rights and judicial protection from unlawful prosecution from that point on.[57] Therefore, the state's power to undertake evidentiary actions before the procedural rights of the defence have been activated, i.e. to collect the evidence for the prosecution, should be limited. Under special circumstances, prior to the charging moment, evidentiary actions may be undertaken if there is a risk of delay, the perpetrator is unknown and if covert investigative measures are being undertaken. Therefore at the stage of the inquiry, the police, the State Attorney and the investigator may undertake just the following actions: a) inquiry (Art. 206.f-211 of the CPC), b) special evidentiary actions, (Art. 332 – 340 of the CPC), c) urgent evidentiary actions

53 See item 31 of the Decision of the Constitutional Court.
54 See item 40.2 of the Decision of the Constitutional Court.
55 See Guidelines 2.3. Transparency: confidentiality of preliminary investigative actions, non-public nature of the investigation, public nature of the main hearing and the institute of party agreements (*Transparentnost: tajnost preliminarnih istraživanja, nejavnost istrage, javnost rasprave i institut sporazumijevanja stranaka*), second section
56 See item 40.2 of the Decision of the Constitutional Court.
57 *Foti and others v. Italy*, judgment of 10 December 1982, item 52.

(Art. 212 of the CPC), d) evidentiary actions regarding an unknown perpetrator (Art. 214 of the CPC), e) questioning of the defendant 48 hours prior to the ruling on the conduct of the investigation (Art. 216, para. 4 of the CPC).

3.4. Judicial Protection from Unlawful Criminal Prosecution and Investigation

At the inquiry stage judicial protection of the suspect from unlawful criminal prosecution is not secured since coercive or evidentiary measures against the suspect cannot be undertaken under special circumstances at that time. At the stage of the investigation judicial review is secured just at its beginning. The defendant has the right to file an appeal against the ruling on the conduct of the investigation with the investigating judge within eight days from the day of the receipt of the ruling (Art. 218, para. 2 of the CPC). An appeal refers to all substantive and procedural requirements for conducting the investigation, therefore, it includes the confirmation if there is reasonable suspicion that the defendant has committed a criminal offence he has been accused of (Art. 218, para. 3 of the CPC). Judicial review of the criminal prosecution during investigative actions is provided through a complaint on the violation of procedural rights of the defence (Art. 239.a, para. 2 of the CPC). After the service of the notice on the conduct of evidentiary actions within three days from their execution, the defendant may file a complaint with the State Attorney not only if a particular right of his has been violated but also if legal requirements for conducting the investigative actions have not been met in accordance with the principle of legality (Art. 213, para. 1 of the CPC).[58]

3.5. Procedural Rights of the Defence during the Preliminary Proceedings

After the Amendment V, the CPC again, as a rule, guarantees minimum rights of the defence referred to under Art. 6, para. 3 of the European Convention on the Human Rights from the moment the person is charged, therefore from the moment an investigation or investigative actions begin.

a) The right to notification guarantees the suspect that he must be notified as soon as possible of the reasons of the charges and the evidence against him. This issue has been dealt with by imposing an obligation on the State Attorney to serve on the defendant a ruling on the conduct of the investigation which contains the facts and legal qualification of the criminal offence as well as the elaboration of the circumstances which have caused reasonable suspicion within eight days from the day it is passed (Art. 218 of the CPC). When investigative actions are being undertaken, the State Attorney must notify the defendant thereof within three days from the day the first evidentiary action was undertaken (Art. 213, para. 2 of the CPC) The restriction of the right to notification means that the person in question is subject to an undercover investigation so all of the minimum rights of the defence are being restricted during that time. Since this is particularly extensive restriction of basic rights of the defence, the legislator has defined the requirements for such a restriction pretty restrictively. Such restriction is allowed only for a period of a month

58 The proposed provision means abandoning the conclusion of the task force for drafting the Law on Amendments and Supplements to the CPC according to which the suspect would have the right to initiate judicial protection from unlawful investigative actions within four months from the receipt of the notice by filing a complaint on the same grounds and with the same effects as an appeal against a ruling on the conduct of investigation. See: Đurđević, 2013, "Osvrt na...", p.51.

if lives are endangered or there is a risk of physical harm or a threat to property on a large scale and with regard to a short list of serious criminal offences (Art. 218.a of the CPC).

b) The right to examine the case file. The defendant has the right to examine the file on three occasions: from the moment the investigation order is served on him, after the suspect has been questioned if the questioning has taken place before the ruling on the conduct of the investigation has been passed, within thirty days from the day an urgent evidentiary action was undertaken during the proceedings against a known perpetrator (Art. 184, paragraphs 4 and 5 of the CPC). According to the reasons and the length of the period during which the right to examine the case file has been denied there are three categories of criminal offences (Art. 184.a of the CPC). Firstly, with regard to minor criminal offences which are punishable under law by a term in prison of up to five years, the said right may be denied for a month from the time investigative actions are undertaken due to a threat to life, physical endangerment or endangerment of property on a large scale. Secondly, with regard to criminal offences for which an investigation is conducted, the denial of the said right for the period of a month may be ordered, in addition to the aforementioned reasons, if the investigation would be compromised by making the collection of important evidence impossible or difficult. With regard to particularly aggravated forms of serious criminal offences which may be subject to special evidentiary actions in the period of twelve or more months, the right to examine parts of the case file may be denied until such time the investigation is concluded if the investigation could be jeopardised in the same or some other proceedings conducted against the same or some other defendants or if the disclosure of the said parts of the case file would risk the life of other persons. The defendant who is in pre-trial detention may not be denied access to the part of a case file relevant to contesting legality of the arrest. Since denial of access to the case file practically prevents the defence of the defendant during the preliminary proceedings, the right to an appeal against the State Attorney's decision has been introduced (Art. 184.a, para. 2 of the CPC).[59]

c) The right of the defendant to defend himself. The right of the defendant to defend himself from the charges orally, i.e. to be questioned, is the only procedural right of the defence which has not been substantially changed by the Amendment V to the CPC. Even after the Amendment V to the CPC the original provision according to which the defendant had to be questioned before the conclusion of the investigation has been kept (Art. 233, para. 1 of the CPC), i.e. if the investigation has not been conducted before the indictment is issued (Art. 341, para. 4 of the CPC). Therefore, the State Attorney decides independently if he is going to question the defendant prior to passing a ruling on the conduct of the investigation or during the investigation.[60] The defendant has the right to request evidentiary actions to be undertaken, therefore, to be questioned as well, from the State Attorney and the investigating judge but they are not under an obligation to accept such a request. Only in the case of arrest, the arrested person has the right to be questioned by the State Attorney no later than within 40 hours from the moment of the arrest, i.e. 24

59 The State Attorney decides on the denial of access to the file in a ruling which does not have to include a justification, which can be appealed by the defendant within three days. An appeal is filed with the State Attorney who shall immediately forward it along with his justification to the investigating judge who shall render his decision within 48 hours. If the investigating judge upholds the appeal, the defendant shall be allowed to examine the case file and consequently the justification of the State Attorney's Office as well. If the investigating judge rejects the appeal, his decision shall be served without a justification on the defendant, and the State Attorney shall be served a justification as well.

60 However, if the State Attorney has questioned the defendant before the ruling on the conduct of the investigation has been passed, he must decide on the initiation of the investigation within 48 hours (Art. 217, para. 4 of the CPC).

hours if the criminal offence in question is punishable under law by a one-year term in prison (Art. 109, paragraphs 2 and 6 of the CPC).

d) The right to confidential communication. The Constitutional Court held that if certain requirements are met, the supervision of the communication between the defendant and the defence attorney may be allowed, which was contrary to certain obtained expert opinions during the constitutional court proceedings regarding the assessment of the compliance of the CPC with the Constitution but also with the European Union law. Namely, the EU Directive on the right of access to the defence attorney and on the right to communication after the arrest guarantees full confidentiality of the communication between the defendant and the defence attorney regardless of how serious the criminal offence is and other reasons.[61] In view of the fact that the deadline for implementation of the Directive is going to be three years from its publication, Croatian legislator has decided to retain the supervision of the communication between the defendant who has been arrested and the defence attorney but the requirements and the procedure have been harmonised with the constitutional requirements by determining and limiting the requirements for its use and by prescribing the procedure for appeals (Articles 75 and 76 of the CPC).

e) Instructions on the rights given to the suspect and the arrested person and delaying their delivery. The Directive 2012/13/EU on the right to information during the criminal proceedings of 22 May 2012[62] has been implemented through the Amendment V to the CPC. It imposes an obligation for the rights of which the suspect and the arrested person have to be advised to be expanded, it prescribes that the instructions must be given in a written form as well as the right to keep the instructions for the entire time spent under arrest. In the existing *instruction on the rights of the suspect and the defendant* instruction on the right to a translation and an interpreter is added, as well as the right to a defence attorney financed from the budgetary funds (Art. 239, para. 1 of the CPC). In accordance with the Directive a written *instruction on the rights of the arrested person* is introduced and it contains several new rights such as the right to a defence attorney who is listed as a defence attorney on duty, the right to translation and interpretation, the right to examine the case file, the right to urgent medical assistance, the right to know the maximum duration he could remain under arrest until he is brought before the competent judge (Art. 108.a of the CPC). The instruction must be handed to the person upon the arrest unless this is not possible in which case the said person must be advised of their rights verbally on the first four rights from the instruction. Verbal instruction is not given only when the person is unable to understand the instruction or there is a threat to life and limb. If the person did not receive the instruction upon being arrested, it shall be given to him upon the arrival to official premises of the police. Under special circumstances it is possible to delay the delivery of the said instruction, i.e. to delay the notification of the defence attorney, the family and consular authority for up to twelve hours from the arrest if life and property of great proportion is threatened, if a new criminal offence has been committed which is punishable under law by a term in prison of more than five years or if the person has been hiding or has destroyed evidence. During the time when the arrested person must not contact the defence attorney, no information can be obtained from him.

61 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 10 September 2013, Art. 4.

62 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

f) Legal recourse for the protection of the rights of the defence during the preliminary proceedings. In the event of unjustified restriction of any of the defence's rights, the defendant may file a complaint for the protection of procedural rights of the defence with the court (Art. 239.a of the CPC). The complaint is first filed with the State Attorney and if the State Attorney does not uphold the complaint within eight days, it is submitted to the investigating judge who must decide on it within no more than eight days.

3.6. Confidentiality of Inquiry and Non-Public Investigation

The Amendment V to the CPC has resolved one of the most contentious issues regarding the application of the CPC/08 related to the confidentiality of the investigation. In practice the said provision proved to be inapplicable as the media on daily basis violated this provision while the perpetrators of the criminal offence of disclosing official secrets were not criminally prosecuted and did not suffer any criminal sanctions. It is now possible to differentiate in the course of the criminal proceedings between three stages of the proceedings according to the principle of public access: confidential preliminary investigative actions, non-public investigation and public hearing. Provisions have been introduced in the CPC on the confidentiality of inquiry according to which the proceedings during the inquiry are confidential. The authority in charge of conducting the inquiry may inform the public about the course of the inquiry when this is in the public interest in the manner stipulated by law (Art. 206. f of the CPC). Formal criminal proceedings, which is how we can denote the stages of investigative actions and the investigation, are no longer confidential instead they are not public. The authority in charge of the investigation may pass a ruling declaring the entire investigation, its part or investigative actions confidential for the same reasons due to which it is possible, i.e. necessary, to exclude the public from the hearing or if releasing to the public any data would go against the interest of the proceedings (Art. 213, para. 3 and Art. 231, para. 2 of the CPC). The authority undertaking the action shall warn the persons who are participating in the proceedings which have been declared to be confidential that disclosing confidential information is a criminal offence. All the persons who learn of the content of the procedural action which has been undertaken in the course of covert investigative actions or investigation must treat as confidential the facts or data they have had the opportunity to learn. In order to secure the enforcement of the provisions on the confidentiality of the proceedings the catalogue subject to special evidentiary actions has been expanded in practice (Art. 334, para. 1, item 3 of the CPC) to include unauthorised disclosure of the confidential proceedings (300 and 307 of the CC) by an officer in charge.

3.7. Independence and Impartiality of the Investigator

The Amendment V of the CPC prescribes that when an officer who is responsible for detection and reporting of criminal offences, which are prosecuted *ex officio*, is subject to urgent evidentiary actions, the State Attorney shall conduct the said actions instead of the police in person or through the investigator under his order (Art. 212, para. 3). In addition, Article 67, para. 3 of the Law on the State Attorney's Office prescribes that if criminal charges have been filed against a police officer, the State Attorney shall conduct the investigation personally and if the investigation is not being conducted then he will undertake personally investigative actions. The State Attorney shall also proceed in the same way if the criminal charges have been filed against some

other officer who is authorised and has a duty to detect and report criminal offences which are prosecuted *ex officio*.

Unfortunately, the Ministry of Justice did not accept a number of provisions which were supposed to secure full independence of the investigation concerning the police officers and prison officers as well as the State Attorneys. The existing provisions refer only to the criminal prosecution of police officers with regard to undertaking urgent evidentiary actions, investigation and investigative actions. However, independence is not ensured while inquiries are being undertaken against the police officers which should be undertaken by an independent police unit, i.e. the State Attorney's Office independently with the assistance of the police officers who are independent of the suspect. It is also not prescribed that they must not make their decisions based solely on the depositions of civil servants who have participated in the event.[63]

3.8. Prescribing Deadlines and Procedural Sanctions for Failure to Meet Deadlines

The deadline for deciding on the criminal charges is six months from their entry in the register of criminal charges or arrests (Art. 213.b of the CPC). There is no particular deadline prescribed for the stage when investigative actions are being undertaken, instead, considering that when the criminal charges are resolved by being dismissed or by issuing an indictment, investigative actions must be completed as well, therefore, the said actions also have to be undertaken within the said deadline of six months. The set deadlines for the duration of the investigation have remained the same. The duration of the investigation is six months, in complex cases the higher State Attorney may allow a time extension of another six months whereas when the case is particularly complex and difficult, the State Attorney General may allow another six months (Art. 229, paragraphs 1 and 2 of the CPC).

The Constitutional Court has imposed an obligation on the legislator to determine the nature of deadlines set for particular stages of the proceedings, i.e. to prescribe whether they are instructive or preclusive. When dealing with this issue, on the one hand the right to protection from unlawful, arbitrary and prolonged prosecution must be taken into account and, on the other hand, the right to an efficient investigation must be considered. If criminal prosecution is precluded due to errors of the law enforcement authority regarding the duty to undertake actions within legally prescribed deadlines, it would violate the right to an efficient investigation with regard to criminal offences breaching the rights referred to under Articles 2,3, 5 and 8 of the European Convention on Human Rights. Therefore, according to the Amendment V to the CPC, the deadlines for conducting investigative actions and investigation are of instructive nature. However, meeting the deadlines should be secured through several other mechanisms such as: a legal recourse of addressing a higher instance with regard to unlawful actions of the State Attorney and

63 In addition, the proposal on the judicial investigation against the top-ranking officials of the State Attorney's Office which stated: "When there is a suspicion that a criminal offence has been committed by an officer of the State Attorney's Office, only the State Attorney's Office shall conduct criminal prosecution and investigation against him. Since the State Attorney's Office is a hierarchical, centralised and monocratic organisation, the system in which the monopoly of the criminal prosecution is held by the State Attorney's Office cannot ensure an independent investigation against the State Attorney, especially if the State Attorney in question is higher-ranking or the State Attorney General. Therefore, it is necessary to ensure that the inquiries and the investigation are conducted against the State Attorney by the police and the court." It is difficult to justify the aforementioned omissions by the Ministry of Justice regarding the fundamental human right of the victim to an independent investigation considering that the task force for the reform of the CPC has prepared certain legal provisions which would ensure this. See Đurđević, 2013, "Osvrt na...", footnote 35, pp. 14 and 15, 43.

the court, prescribing disciplinary offences for failing to meet legally prescribed deadlines by the Law on the State Attorney's Office and the Law on Courts as well as securing, finally, judicial review of the criminal prosecution which may result in a suspension of the criminal proceedings as well. Unfortunately, the introduced mechanisms, which were supposed to ensure that the deadlines under the statute of limitation are met, are faulty.

3.9. The Legal Recourse of Addressing the Higher Instance due to Unlawful Actions of the State Attorney and the Court

a) Addressing a higher instance within the State Attorney's Office as a legal recourse

For the purpose of achieving the standard of an efficient investigation, the Amendment V prescribes as many as four legal instruments for addressing a higher instance within the State Attorney's Office which may be resorted to by the victims, injured parties and defendants. These are:

1) The request by the victim and the injured party filed with the State Attorney's Office for notification on the undertaken actions after two months from filing the criminal charges (Art. 206.a);[64]
2) A complaint filed by the person who has filed the criminal charges, the victim or the injured person with the higher State Attorney due to excessive delays during the inquiry (Art. 206.b);[65]
3) A complaint filed with the higher State Attorney against the dismissal of criminal charges according to the principle of prosecutorial discretion (Art. 206.c)[66]
4) A complaint by the defendant and the injured party due to delayed investigation (Art. 229, para. 3);[67]

b) Legal recourse of addressing a higher instance regarding irregularities in the court's work: complaint filed with the President of the Court (Art. 347).

64 The State Attorney shall notify them on the undertaken actions in due time and no later than within thirty days from the receipt of the request unless this would jeopardise the efficiency of the proceedings. He must inform the victim or the injured party who has requested the said notification that the said notification is denied. If the State Attorney has not informed the victim or the injured party or if they are not satisfied with the received notice or the undertaken actions, they have the right to file a complaint with the higher State Attorney who may order undertaking the actions in due time. If the higher State Attorney finds that the lower-ranking State Attorney has violated the rights of the complainant by his actions, he shall inform him thereof specifying the right that has been violated. Such a request may be filed every six months by the victim or the injured party.

65 The complaint may be filed after the deadline of six months for deciding on the criminal charges elapses due to failure of the State Attorney to undertake actions which has resulted in delaying the proceedings. Higher State Attorney shall upon receiving the complaint without any delay request a response regarding the allegations cited in the complaint and if he finds that the complaint is well-founded, an adequate deadline shall be set by which a decision on the charges must be made. The higher State Attorney must notify the complainants within fifteen days from the day of the receipt of the complaint.

66 It is filed within eight days from the receipt of the ruling when pursuant to the CPC the State Attorney dismisses criminal charges or desists from criminal prosecution according to the principle of prosecutorial discretion. The higher State Attorney must act on the complaint within thirty days from its receipt. If the higher State Attorney finds that the ruling is not well-founded, he shall order the lower-ranking State Attorney to immediately proceed processing the case, of which the injured party shall be notified, as well as the defendant and the person who has filed the charges.

67 The CPC prescribes the deadlines for conducting and extending an investigation. The defendant and the injured party may file the complaint during the investigation with the higher State Attorney due to excessive delays in the proceedings and other irregularities during the investigation. The defendant may file the complaint with the higher State Attorney even before the investigation if after his questioning the ruling on the conduct of the investigation has not been rendered within 48 hours nor has an indictment been issued. The higher State Attorney shall examine the allegations cited in the complaint and if the complainant has requested it, he shall notify him of what has been undertaken.

ECHR has established that the concept of an efficient investigation does not only refer to the preliminary proceedings but to efficiency of the whole criminal proceedings which may result in the punishment of the wrong perpetrator.[68] Therefore, it is beyond any doubt that the obligation to ensure an efficient investigation does not refer just to the State Attorney's Office, as it is often erroneously understood here, but to the court as well during the first and second instance proceedings. The court must conduct criminal proceedings within reasonable time and without any delays whereas, with regard to the irregularities in the work of the investigating judge but also of other judicial authorities, an effective legal recourse should be guaranteed. The Amendment V to the CPC has introduced for the first time a legal recourse of addressing a higher instance within the court. The defendant, the State Attorney and the injured party may file a complaint with the President of the Court if the proceedings are excessively delayed by the court.[69] However, unlike the deadlines for the State Attorneys, the deadlines for the judges in criminal proceedings are not prescribed, nor are the disciplinary offences prescribed in the event of excessively delayed proceedings. Considering that not only State Attorneys but the courts as well must ensure that the aforementioned rights are exercised, it is not justified to restrict the provisions on procedural deadlines and procedural and disciplinary sanctions if they are not met just to the State Attorneys while leaving out the judges from accountability for delaying the proceedings, especially since jurisprudence of the ECHR regarding Croatia shows that in a certain number of cases it was the courts which were in violation of the right to efficient investigation (Remetin, D.J.).

3.10. Harmonisation of Coercive Actions with Constitutional Requirements

Amendment V of the CPC has harmonised certain coercive actions with the principle of proportionality, principle of legality and other requirements prescribed by the Constitutional Court. Thus, the procedural and substantive requirements for undertaking a number of coercive actions have been redefined such as covert investigative actions (special evidentiary actions), physical examination, search, collection of data through the use of molecular-genetic analysis, bringing in the person in question under coercion to the police station, arrest, cautionary measures, detention.[70] In addition, running a check on contacts established through telecommunications has been transformed from the measure of inquiry, which was not regulated by the CPC, into a formal evidentiary action which is ordered by the court and is regulated by the CPC.[71]

68 European Court has stated that the obligations imposed by the right to an efficient investigation surpasses the stage of the investigation and includes the proceedings before a national court and that the proceedings as a whole, including the trial, must meet the requirements of the positive obligations for the protection of the individual through such rights. *Oneryildiz v. Turkey*, the judgment of the Grand Chamber of 30 November, para. 94 as quoted in: Batistić Kos, Vesna, 2012, p. 123.

69 Two situations may be distinguished. The first one is when the court exceeds legally prescribed deadlines, in which case the President of the Court shall set a new deadline for undertaking actions which cannot exceed the legally prescribed one (Art. 347, para. 1). The second situation is when the law does not prescribe any deadlines but the court is not undertaking appropriate actions which is delaying the proceedings. In such a case the President of the Court shall request a statement to be given by the judge whose work is subject of the complaint, he shall examine the file and if he finds the complaint to be well-founded, a deadline shall be set for the action to be undertaken (Art. 347, para.5). The President of the Court shall notify of his decisions the complainant within 15 days. The complaint refers to the work of the investigating judge, indictment panel and pre-trial chamber during the preliminary proceedings.

70 See Đurđević, 2013, "Osvrt na...", pp. 79-91.

71 See *Ibid*, p.92.

4. Conclusion

When the investigation was transferred into the hands of the State Attorney, the pendulum of the repressive function and the function of the guarantee of the criminal procedure law in Croatia has swung a little too much on the side of the repression. Strengthening the powers and the role of the State Attorney and the police, i.e. transferring completely the initiation and the conduct of the preliminary criminal proceedings, was not balanced out by strengthening the rights of the defence, i.e. by securing the judicial review of the State Attorney and the police. The first indication that the pendulum was swinging back in the opposite direction was the Amendment II to the CPC passed in 2011. The return of the inquisitorial preliminary proceedings into the balanced mixed proceedings took place with the Amendment V passed in December 2013. This was a profound reform of the preliminary proceedings which has introduced uniform criminal proceedings for all criminal offences, new stages during the preliminary criminal proceedings, summary proceedings for the criminal offences punishable under law by a term in prison of five years, it has strengthened the independence, promptness and efficiency of the investigation, the principle of legality has been restored, preliminary proceedings have been judicialised through the introduction of the judicial review of the criminal prosecution, procedural rights of the defence have been established from the moment the person is charged, actions during the inquiry and the investigation are once again distinguished, a difference has been established between preliminary investigative actions and formal proceedings which starts with the charging moment, a legal recourse of addressing the higher instance due to irregularities in the work of the State Attorney and the Court has been introduced as well as a number of other amendments in accordance with the constitutional and international requirements.

Despite the fact that the Croatian Criminal Procedure Code still has certain structural, normative and technical flaws while some other new provisions still await the test of constitutional review, it may be concluded that the Amendment V to the CPC has returned the Croatian criminal procedure law on the path of humanisation and liberalisation. In addition, there is hope that the Amendment V to the CPC is going to stop any further massive shocks concerning the criminal procedure, that it shall establish more stable and permanent forms of criminal procedure and thus put an end to the legislative storm in which Croatian criminal justice system has been caught up over the last decade.

Katja Šugman Stubbs, PhD[1]

The Concept of the Phase of Investigation and Slovenian Criminal Procedure Legislation[2]

Introduction

As it is well known in theory of criminal procedure, the phase of investigation originates from the inquisitorial model of criminal procedure and is (or rather was) characteristic for the continental criminal law systems.[3] In this model the preliminary procedure consists of two phases: (a) a phase which is led by the police or (historically later on) public prosecutor and (b) a phase of investigation.[4] The latter is run by a judicial authority named investigating judge or investigating magistrate.[5] Common law systems, on the other hand, are built on different conceptual premises; their pre-trial procedure consists of only one phase, run by the police and/or a public prosecutor. They never had an analogue of a phase of investigation or an investigating judge. Following the example of common law countries,[6] a lot of continental countries in last decades abolished (or are in the process of abolishing) the phase of investigation including the *dominus litis* of this phase, the investigating judge.[7]

1 Professor, Faculty of Law, University of Ljubljana.
2 The article has been originally written in English.
3 V. Bayer, Kazneno procesno pravo: odabrana poglavlja, Povjesni razvoj kaznenog procesnog prava, MUP, Zagreb, 1995.
4 As the example of Dutch law shows: "In the Netherlands the pre-trial stage plays an important role in the criminal process. The pre-trial investigation is divided into two parts: a preliminary investigation conducted by the police under the direction of the public prosecutor, followed where necessary by a preliminary judicial investigation under the supervision of an investigating judge. The preliminary judicial investigation is aimed at clarifying the issues and collection of information." L. Meintjes-Van der Walt, Pre-Trial Disclosure of Expert Evidence: Lessons from Abroad, South African Journal of Criminal Justice, V. 13, 2000, p. 150.
5 The common law academic literature mostly calls the judicial authority who is *dominus litis* of the phase of investigation "investigating magistrate" based on the concept of their pre-trial judge which is called magistrate. On the continent, however, such a judicial authority is usually called investigating judge and I will therefore from now on use this expression.
6 Vogler even speaks of "a worldwide movement towards adversariality". R. Vogler, Reform Trends in Criminal Justice: Spain, France and England & Wels, Washington University Global Studies Law Review, V. 4, 2005, p. 631.
7 Germany, for example, abolished the institution of the investigating judge in the seventies. M. D. Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, Stanford Law Review, Vol. 49, 1997, pp. 547-605. Italy abolished an investigating judge while introducing its major adversarial reform at the end of the nineties. C. Li, Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience, Journal of Politics and Law, 2008, V. 1, no. 4.

The purpose of this article is to give an overview of the Slovenian concept of the phase of investigation, show the way it has developed in the last two decades since the split with Yugoslavia and analyze the flaws and benefits of this phase in general and with specific reference to Slovenia.

1. The concept of the phase of investigation

Theory of criminal procedure divides existing criminal procedure models into several types.[8] The most common and well known division is the one between the accusatorial and inquisitorial model of criminal procedure.[9] Continental criminal procedure theory makes a distinction within the so-called inquisitorial type, differentiating between a Middle Age inquisitorial type of procedure and another type, the so-called mixed type of procedure,[10] which refers to most of the continental models after the Napoleonic 1808 *Code d'instruction criminelle*. The structure of the Slovenian criminal procedure model stems from this Napoleonic code and is also a heritage of ex-Yugoslavian model. Based on that model it still consists of a two-phased pre-trial procedure: the police part and a phase of investigation.[11]

The current Code of Criminal Procedure (hereinafter referred to as CCP), which is the first Slovenian CCP after the break-up of the former Yugoslavia, was adopted by the National Assembly of the Republic of Slovenia in September 1994[12] and has already been amended twelve times since then.[13] In most of its prominent features it retains the structure of the former Yugoslav CCP adopted in 1967, although in the last twenty years some significant changes almost exclusively in the adversarial direction have been made. Some of them influenced the structure of the pre-trial procedure and a lot of them are changing the nature of the phase of investigation and the institution of the pre-trial judge.

In order to understand those changes, we first need to look at the structure of the Slovenian pre-trial procedure. It consists of two parts:

a) preliminary proceedings (*Slov. predkazenski postopek*) and
b) the phase of investigation (Slov: *preiskava*).[14]

8 For an overview see R. Vogel, A World View of Criminal Justice, Ashgate, Hants, 2005, p. 3-8.

9 Based on the work of Talcott Parsons, Herbert Packer developed an idea of two models of criminal procedure: crime control model and due process model; the former being an inquisitorial type and the latter an adversarial one. H. L. Packer, Two Models of the Criminal Process, University of Pennsylvania Law Review, 1964, V. 113, no. 1, pp. 1-68. A well-known division is also the one along the line of activism of the state: continental European countries stemming from the inquisitorial tradition being more activist than the common law ones. See M. Damaška, The Faces of Justice and State Authority, Yale University Press, New Haven, 1986. Later on a division between adversarial and non-adversarial criminal procedure models emerged. See T. Volkmann-Schluck, Continental European Criminal Procedures: True or Illusive Model?, American Journal of Criminal Law, V. 9, 1981, pp. 3-4.

10 A. Esmein, A History of Continental Criminal Procedure: With Special Reference to France, The Lawbook Exchange, New Jersey, 2007, pp. 3-11.

11 As Tak points out it is the same in Netherlands: there is the pre-trial phase of the police investigation and another phase, run by the investigating judge. P. J. P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, p. 142.

12 O. J. No. 63-2168/94.

13 O. J. No. 72-3622/98 CCP-A, 6-213/99 CCP-B, 66-3053/2000 CCP-C, 111/2001 CCP-D, 56/03 CCP-E, 43/2004 CCP-F, 101/2005 CCP-G, 14/2007 CCP-H, 68/2008 CCP-I, 77/2009 CCP-J, CCP-J, 91/2011 CCP-K, 47/2013 CCP-L; the most important amendments being the CCP-A, CCP-E and CCP-K.

14 In order to avoid confusion regarding the terms, I will consistently call the Slovenian phase of the criminal procedure led by the investigating judge "the phase of investigation" and not only investigation (despite the fact that this would be an adequate translation). Using only the term "investigation" as it is in the Slovenian original (preiskava) creates confusion for the English reader since this is a general term which in English language marks the police and prosecutorial activity before the filing of the indictment or even before the trial. In Slovenian criminal procedure, as in many other criminal procedures which consist of a two-part pre-trial procedure, the phase of investigation is a specific phase which should be distinguished from the pre-trial police and prosecutorial activities.

When talking about the pre-trial procedure we therefore have to consider two very different phases of criminal procedure: (a) preliminary proceedings with the police and increasingly the state prosecutor in charge; (b) and the investigation phase (*strictu sensu*) as a predominantly judicial phase with the investigating judge as *dominus litis*.

The preliminary procedure usually starts with a criminal report filed with the police or the state prosecutor, usually by a victim. The police are obliged to investigate each criminal offence reported (the legality principle) and must not exercise any discretion. From the first CCP in 1994 there has been a consistent tendency for the stronger role of the public prosecutor in this phase. Having inherited the ex-Yugoslavian model, in 1994 Slovenian law also started with the solution of police being the *dominus litis* of the preliminary procedure. In recent years the role of the state prosecutor is becoming stronger: e. g. prosecutor has a right to supervise the police and give instructions regarding the investigation of the crime (Art. 160a CCP).

The police exercise their investigative powers (regulated by the Police Tasks and Powers Act[15] - PTPA and CCP) mostly during the preliminary phase of the criminal procedure (before the beginning of the judicial investigation phase conducted by the investigating judge), when they can act as autonomous investigative authorities, except for formal investigative acts (e.g. house search, telephone tapping) for which the written order of the investigating judge is required. After the police investigation is concluded, the matter is transferred to the state prosecutor to decide whether there is a well-grounded suspicion (the standard similar to probable cause) to either (1) demand that a formal investigation be conducted by the investigating judge (in cases of serious or complex criminal offences) or, (2) to file a so-called direct indictment (without the investigation phase, but only in cases of criminal offences punishable by a prison term of up to eight years) if evidence gathered about a criminal offence and its perpetrator provide sufficient grounds to prefer the filing of such an indictment. (3) In milder cases the state prosecutor can also refer the case to alternative procedures by way of diversion or initiate plea agreement. (4) If after finalizing the preliminary proceedings, it is found that there is no substance for the earlier suspicion, that a criminal offence has been committed or that a certain person has committed it, the state prosecutor must drop the case.

Purpose of the phase of investigation

The purpose of the phase of the investigation is to collect the data and evidence which are necessary for the prosecutor's decision whether to file and indictment or drop the case and the evidence for which danger exists that they will not be able to be heard at the trial[16] (Art. 167 (2) CCP). After receiving the prosecutor's motion requiring the opening of the phase of the investigation, the investigating judge checks whether the evidence submitted by the prosecutor is solid enough to allow a conclusion to be reached that there exists a well-grounded suspicion to pass a decision on opening of the phase of investigation. Before deciding on the opening of the investigation investigating judge has to interrogate the defendant (Art. 169 (2) CCP). After the opening

15 O. J. No. 15/2013.

16 This is done for the purpose of securing the evidence. The Dutch investigating judge has the same function, so does the French judge *d'instruction*. P. J. P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, p. 143, V. L. Schwartz, Party-Prosecutor vs. Neutral Judge *d'instruction*, Stanford University, 2007, p. 5-6.

of the phase of investigation, the investigating judge, who is bound by the inquisitorial maxim, conducts the investigation at his own initiative in order to find the truth and performs the task of establishing the facts required to reach a lawful decision, as completely and accurately as possible (Art. 17 CCP).

2. Development of role(s) of the investigating judge

In recent decades the role of the investigating judge underwent some serious transformations. Originally designed as a collector of evidence and a complete *dominus litis* of the investigation phase, he gradually developed a new role; the one of judge of freedoms. In addition to his traditional investigative role, he is therefore acquiring more and more a real pre-trial judicial function, issuing authorizations to public prosecutors or police to conduct invasive investigative measures.[17]

Let us firstly look into investigating judge's investigative role. During the phase of investigation the investigating judge has a full range of investigative powers, although he can (in certain cases) transfer them to the police to carry out specific investigative acts (Art. 172 CCP). As mentioned before, the investigation phase opens with the interrogation of the defendant as an obligatory investigative activity (Art. 169(2) CCP). Afterwards he conducts the investigation according to his own initiative (*ex officio*), but also carries out the investigating acts proposed by the parties, and in particular the State prosecutor (Art. 177 (1) CCP). In this capacity the investigating judge still carries out his role of the investigator, inherited from the Middle Ages inquisitor.[18] As Fišer points out, the investigating judge (in this role) frequently found himself in a position when he was just an extended hand of the police, taking care that the evidence gathered in the police phase of the pre-trial procedure would be transformed into "formal" form, admissible as evidence in court.[19]

Historically, an institution of an investigating judge also had an important role in deciding whether the case was ready for the prosecution.[20] Luna and Wade point out that at the end of the phase of investigation, it was up to investigating judge to assess whether the case would proceed to trial or not.[21] If he decided that there was not enough evidence, he had the power to drop the case. In Slovenian criminal procedure, such a decision is always in the hands of the State prosecutor (Art. 180 CCP) or the pre-trial panel of judges (Art. 181 CCP). We can therefore already see that the role of investigating judge has weakened in this respect.[22]

17 In the Netherlands, for example, the investigating judge also issues judicial orders in order to allow more intrusive measures to be conducted. P. J. P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, pp. 142-143.

18 In France, an investigating judge historically had a similar function: he controlled the focus and results of the pre-trial phase with a goal of fully investigating the matter and he prepared *le dossier* (the court file). E. Luna, M. Wade (eds.), The Prosecutor in Transnational Perspective, Oxford University Press, Oxford, 2012, p. xiv.

19 Z. Fišer, Predkazenski postopek. In: Izhodišča za nov model kazenskega postopka (K. Šugman (ed.)), Inštitut za kriminologijo, Ljubljana, 2006, p. 74.

20 M. Ploscowe, The Organization for the Enforcement of the Criminal Law in France, Germany and England, American Institute of Criminal Law and Criminology, 1936, V. 27, p. 319. See as well L.M. Diez-Picazo, Should Public Prosecution be Independent? In: The Europeanization of Law: The Legal Effects of European Integration (F.G. Snyder (ed.)), Hart Publishing, Oxford, 2000, p. 42.

21 E. Luna, M. Wade (eds.), The Prosecutor in Transnational Perspective, Oxford University Press, Oxford, 2012, p. xiv.

22 We can observe the same tendency in the French and Dutch criminal procedure. The role of the prosecution expanded and diminished the role of the investigating judge. J. Hodgson, Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, pp. 116-134, P. J. P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade (eds.)), Oxford University Press, Oxford, 2012, p. 142.

There is, however another role of the investigating judge: namely the one of a judge of freedoms.[23] This role started developing much later in the history of Slovenian criminal procedure, after the Constitutional Court (CC) annulled certain provisions on investigative measures as unconstitutional.[24] There was a pressing need for a judicial authority which would grant prosecution the right to conduct certain measures which breach constitutional rights of defendants. Since there was no other institution more suitable for conducting this role, this right was given to the investigating judge who from then on also acts as a judge of freedoms (pre-trial judge). This is especially true during the pre-trial phase, when he is issuing certain orders upon the motion of the state prosecutor. Good examples of such a role are: (a) issuing the pre-trial detention order and (b) issuing different orders allowing the police and the prosecutor to carry out invasive investigative measures.

Pre-trial detention may be ordered by the investigating judge on the request of the State prosecutor (Art. 20 (1) Constitution of the RS and Art. 201(1) CCP). Hearing is organized in an adversarial way and the investigating judge is put in an impartial judicial role deciding whether certain legally required conditions exist for the pre-trial detention to be ordered.[25] The same is true when he is deciding whether conditions exist to order other measures which severely breach constitutional rights (e. g. the right to privacy). Slovenian system of investigating measures rests on the assumption that milder investigative measures (such as fingerprinting, identity check, stop and frisk or crime scene investigation) can be conducted *ex officio* by the police. On the other hand, a judicial approval in a form of judicial order is required for more invasive and intrusive measures such as (a) some investigating measures (e. g. house search, undercover measures); (b) measures of restraint (e. g. pre-trial detention). In such a case a certain investigative measure is ordered by the investigating judge on the motion of the public prosecutor if and when a certain set of conditions exists: e. g. a certain standard of proof, if there is a listed offence in question, if such a measure is in accordance with the principle of proportionality and the same effect could not be achieved through the use of a milder measure.[26]

We can therefore see that in this respect the investigating judge acts as a pure judicial authority, acting and deciding in a similar way that a trial judge does. He never acts upon his own initiative (*ex officio*) as a "real" investigator would; he reacts to a motion of the prosecution. This automatically puts him in a position in which he critically assesses the request of the prosecutor, weighing it, on the other hand, against the defendant's rights and the requirements of law. He is therefore assigned a role of an independent, impartial judge, acting as a judge of freedom and not as an investigator.

23 Interestingly, in France, homeland of *judge d'intruction*, it is not the investigating judge who orders pre-trial detention, but a special judicial authority named *judge des libertés et de la détention (JLD)*. It was established in 2000. M. E. Martin, Le role de judge des libertés et de la détention en procedure penale, Faculté de droit de Grenoble, 2006, p. 4.

24 There were few extremely important CC decisions regarding the Code of Criminal Procedure since CC annulled almost all the investigative measures for being unconstitutional. It annulled provisions on pre-trial detention (U-I-18/93, U-I-50/09), provisions on undercover investigative measures (U-I-U-I-25/95 and U-I-272/98), provisions on seizure (U-I-296/02), and the whole regime of statement gathering from the defendant (U-I-92/06-27). For more see K. Šugman, Kazenskoprocesna doktrina v luči odločb Ustavnega sodišča RS. Zbornik znanstvenih razprav, V. 63, 2003, pp. 469-502.

25 Those are: (1) the existence of a well-grounded suspicion (probable cause) that a certain person has committed the criminal offence to be prosecuted ex officio and (2) one or more of the following reasons: (a) the person is hiding, his identity cannot be established or if other circumstances exist which point to the risk that he would attempt to flee; (b) there are grounds for believing that he will destroy the traces of crime or if specific circumstances indicate that he will obstruct the criminal procedure by influencing witnesses or accomplices; (c) severity of the criminal offence, the mode of committing the criminal offence, the personal characteristics of the person in question, or any other special circumstances which might cause concern that he would repeat the criminal offence, bring to completion an attempted criminal offence or commit the criminal offence he is threatening to commit. (Art. 201 (1) CCP).

26 See more in K. Šugman, Pomen dokaznih standardov v kazenskem postopku, Zbornik Znanstvenih razprav PF v Ljubljani, 2007, V. 67, pp. 245-266.

3. Developments of the concept of the phase of investigation

Even though some of the Slovenian Governments set the goal of abolishing the phase of investigation as their political priority, they never completely succeeded in doing so. However, there have been numerous developments in the Slovenian criminal procedure law which are directly or indirectly diminishing the importance of the phase of investigation.

Firstly, the option of the public prosecutor to file a so-called "direct indictment" without the investigating judge's approval (when the prosecutor assesses that the phase of investigation is not needed; Art. 170 (6) CCP) has been extended. Before 2003 such an option was only available for criminal offences with the maximum prescribed penalty of 5 years of imprisonment; with the Amendment CCP-E this possibility was extended to criminal offences with the maximum prescribed penalty of 8 years of imprisonment.[27] The result of this change being that there have been fewer phases of investigation taking place and that the prosecutorial role in independently deciding the progress of the case is getting stronger.

The second important change which diminishes the importance of the phase of investigation is the introduction of the two consensual disposition mechanisms into the Slovenian legal system. Both have contributed to an enormous change of the course of our criminal procedures. The first one is the plea agreement. The prosecutor and defence can enter into a plea agreement, negotiating (among other things) the sentence that the defendant will get if he pleads guilty (Art. 450a-450č CCP). Those procedures account for about 10% of less workload on the courts. However, there is an even more common way of ending the procedure, namely the newly introduced pre-trial hearing (pre-trial arraignment).[28] This newly introduced phase of criminal procedure starts when the prosecutor files an indictment. The purpose of the phase is for the pre-trial judge to check (a) whether the defendant pleads guilty, (b) to verify the admissibility of evidence and (c) to provide both parties with the options to present different motions, and in general (d) to prepare the case for the trial (Art. 185a-285f CCP). For our discussion we only refer to the point (a), namely the question of the defendant pleading guilty. It turned out that in about 40% of the cases the defendant actually pleads guilty in the pre-trial hearing and in such a case the court only proceeds to the phase of passing the sentence.

All things considered, in the last two years we have seen a radical 50% drop in the workload of the trial courts. This means that we are witnessing a shift towards the prosecutor-led criminal procedure. About half of the cases are decided (mostly) based on the evidence collected by him (assisted by the police). The investigating judge still conducts the phase of investigation, but it is becoming dramatically less significant, since the prosecutors also play a certain game, hoping and preparing to the fact that the defendant would plead guilty at certain moment in the procedure.

The third trend which causes the decline of the phase of investigation is a general trend of relying on material and technologically advanced evidence and less on oral statements. The investigating judge is at his strongest when he is interrogating defendants or witnesses; he is rarely involved

27 The situation in the Netherlands is similar; the prosecutor requires the phase of investigation only for the most serious offences. See P.J.P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, p. 142.

28 Both mechanisms were introduced with the Amendment CCP-K in 2011 and came into power in May 2012.

in gathering material evidence.[29] Most of the real evidence is nowadays gathered by the police or is provided and interpreted by the court experts. In last decades criminal justice has been relying more on scientific discoveries and real evidence than ever; especially since the invention of the undercover techniques (e. g. phone tapping, computer data seizure) and new techniques (e. g. digital evidence, fMRI). In this respect the role of the investigating judge is getting weaker.[30]

4. Positive and negative aspects of the phase of investigation

Seeking the truth

There is a definite advantage to the investigating judge in the fact that he is a judicial authority and not party to the procedure.[31] In the prosecutor-based investigations we can rely much less on the prosecutor to secure the evidence which proves the innocence of the defendant. A prosecutor is a party to the proceedings with one definite goal: to discover, indict and secure the conviction of the defendant. His efficiency is measured in the number of convictions. This puts him in the position when (even unintentionally) he might be blind to evidence testifying to the defendant's innocence. This is not the case with the investigating judge.[32] Although not being completely impartial (due to his investigative role), he still searches for evidence in favour of the defendant either upon his own initiative (*ex officio*, Art. 171 CCP) or while hearing a motion of the defence (art. 177 (1) CCP). He is bound by the duty to search for the truth and to seek incriminatory and exculpatory evidence (Art. 17 CCP).

Confused double role

On the other hand, the investigating judge in Slovenia is put in a confused role: on the one hand, he has to investigate and on the other he is a judge of freedoms.[33] Those two roles are psychologically incompatible: it is impossible to be neutral and impartial on the one hand and be actively involved as an investigator on the other. Therefore, it is speculated that Slovenian investigative judges tend to be biased more to the prosecutorial side; namely, they identified more with their original investigative role.[34] However, it is also impossible to deny that the awareness of their role as a protector of human rights has strengthened in the last decades.

29 In Slovenia, the average phase of investigation consists of interrogation of the defendant and 1-2 witnesses. Bošnjak concludes that the most common purpose of the investigation is securing the evidence for the trial and not the investigation of the case. M. Bošnjak, Potek kazenskih postopkov v Sloveniji, Pravna praksa, Ljubljana, 2005, pp. 422-423.

30 T. F. Kiely, Forensic Evidence: Science and the Criminal Law, CRC Press, 2006.

31 V. L. Schwartz, Party-Prosecutor vs. Neutral *Judge d'instruction*, Stanford University, 2007, p. 8.

32 As Jörg points out about systems with prosecution-run pre-trial procedure: "There is no investigating judge to seek out 'the truth' and, despite official rhetoric about impartiality and prosecution the concrete legal duties of the police and prosecution lawyer do not extend to seeking out exculpatory evidence." N. Jörg, Are Inquisitorial and Adversarial Systems Converging? In Criminal Justice in Europe: A Comparative Study (C. Harding, ed.), Claredon Press, Oxford, 1995, p. 48

33 Z. Fišer, Predkazenski postopek. In: Izhodišča za nov model kazenskega postopka (K. Šugman (ed.)), Inštitut za kriminologijo, Ljubljana, 2006, p. 74-75.

34 Vogler speaks of judges performing the contradicting roles of investigators and impartial guardians of rights. R. Vogler, Reform Trends in Criminal Justice: Spain, France and England & Wels, Washington University Global Studies Law Review, V. 4, 2005, p. 633.

More equality of arms

The positive side of the phase of investigation is the fact that theoretically and in practice investigating-judge-run phase has a tendency to be more transparent and to guarantee more rights to the defendant. As Tak points out for the Dutch concept of the phase of the investigation: "...there is a greater degree of equality of arms between the defence lawyer and a public prosecutor, and there are greater possibilities for the defence counsel to play an active role. Moreover, the judicial preliminary investigation tends to be more transparent and the suspect has more rights than during the pre-trial police investigation."[35] This is without a doubt true for the Slovenian concept as well: the investigating judge, not being a party to the procedure, has no immediate interest in conviction. In this respect he acts much more transparently and impartially than the State prosecutor. In the phase of investigation the defence also exercises numerous rights: the right to propose evidence (Art. 177(1) CCP), the rights to be present while the interrogation of witnesses or experts is taking place (Ar. 178(4) and (2) CCP), during the crime scene investigation (178 (2) CCP). The defendant and his counsel can also pose questions to witnesses and experts during the hearing and give remarks to the record (Art. 178 (7) CCP).[36] Those rights could be much more limited in a pre-trial procedure conducted by a State prosecutor.

Length of the procedure

Finally, one of the frequently criticized features of the phase of the investigation is its length. Slovenian prosecutors tend to automatically refer the case to investigation even though it is frequently not necessary;[37] they could easily proceed with the so-called direct indictment. Secondly, the interrogations conducted by the investigating judge are too frequently just a repetition of what was already taking place in the police station or could be easily repeated later on, at the trial. Some therefore argue that the phase of the investigation has become redundant.[38]

5. Conclusion

Slovenian criminal procedure system inherited its structure including the phase of the investigation and the *dominus litis* of that phase, the investigating judge from the Yugoslavian criminal procedure. Despite the fact that in last 20 years numerous steps have been taken to get closer to the adversarial model, the phase of investigation is still present. It is, however, losing its importance and its role in the existing system. There are numerous reasons for this: firstly the newly introduced mechanisms of plea agreement and the pre-trial arraignment grossly diminished the importance of the phase of the investigation. Secondly, the possibility of the prosecutor to file the so-called direct indictment avoiding the phase of the investigation has been extended to more serious criminal offences. And thirdly, the role of the investigating judge has changed from an

35 P. J. P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, p. 142.

36 The defence has similar rights in the Netherlands. P.J.P. Tak, The Dutch Prosecutor: A Prosecution and Sentencing Officer. In: The Prosecutor in Transnational Perspective (E. Luna, M. Wade eds.), Oxford University Press, Oxford, 2012, p. 143.

37 Data from before 2005 show that the phase of investigation was required in about 73,7% of all the District Court cases which seems far too much and proves the hypothesis of "automatism". P. Mozetič, Učinkovitost ugotavljanja dejanskega stanja v slovenskem kazenskem postopku. In: M. Bošnjak, Potek kazenskih postopkov v Sloveniji, Pravna praksa, Ljubljana, 2005, p. 363.

38 *Ibidem.*

almost exclusively investigating one to a function of a judge of freedoms. This structural change has contributed a lot towards the self-perception of the investigating judges. They increasingly perceive themselves as the ones who guarantee the rights of the defendants and less and less as investigators. This psychological change, based on the legislative change, has also transformed the functioning of the investigating judges and heightened the sensitivity for the protection of human rights in the pre-trial procedure. In the future we can expect that the phase of investigation along with the investigating judge will be abolished, since there are convincing professional arguments and strong political pressures for doing so.

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Experiences with and Problems Identified in the Prosecutorial Investigation in BiH

1. Preliminary remarks

1.1. Brief summary of the reform of criminal procedural law in BiH

The first steps taken towards reforming and introducing a totally new system of criminal procedure law in Bosnia and Herzegovina are associated with the founding of the District of Brčko as an independent unit of local self-government in BiH following the conclusion of an arbitration process in which the status of this part of the BiH territory was established after the signing of the Dayton Accords. The District of Brčko was established by virtue of a final award of the arbitral tribunal in 2000, which set forth, *inter alia*, that the Brčko District of BiH would also have, among other institutions, an independent judiciary. All the necessary acts were passed in the process of implementation and creating of judicial institutions of the BiH Brčko District, in particular the Criminal Procedure Code of the BiH Brčko District.[2] It was an entirely new code of criminal procedure founded on the principles of the common law system in which investigative proceedings were entirely entrusted to the prosecution or the police. The Code governed, in a completely new manner, all the relevant segments of the rules of procedure. Later, the Code was used as one of model acts in the reform of criminal procedure law in BiH.

A comprehensive reform of criminal procedure law at all the levels of BiH followed in 2003. The Criminal Procedure Code of BiH was promulgated by virtue of a Decision of the High

1 Federal Prosecutor with the Federal Prosecutor's Office of the Federation of Bosnia and Herzegovina.
2 Criminal Procedure Code of the Brčko District of BiH (*Official Gazette of the Brčko District of BiH*, no. 7/00).

Representative for BiH[3] and it came into force on March 1, 2003. The new procedural legislation was enacted at the level of two entities (the Federation of BiH and Republika Srpska) as well as in the Brčko District of BiH and the contents of those codes of criminal procedure were essentially the same. On the day of coming into force of the Criminal Procedure Code of the BiH Brčko District,[4] the Criminal Procedure Code of the BiH Federation,[5] and the Criminal Procedure Code of the Republika Srpska,[6] the provisions of previous criminal procedure codes[7] as well as of all the other regulations adopted in accordance with them were set aside, unless otherwise provided for in the above-cited Codes.

The new codes of criminal procedure had eliminated the inherited Yugoslav model of criminal procedure and opened up a possibility for applying new procedural institutes which would, taken as a whole, modernise the rules of criminal procedure, thus ensuring the harmonisation of criminal laws and the criminal justice systems in BiH. The reform of the legislation on criminal procedure was aimed at: establishing an efficient criminal procedure and providing for legal instruments to efficiently combat crime; protection of human rights and freedoms guaranteed under international law; elimination of lengthy criminal proceedings; disburdening of the criminal justice system by means of simplifying procedural forms and institutes; harmonisation of national regulations with international human rights law and suppression of crime; achieving harmonisation within the national legal system; consideration and retention of certain segments from the inherited criminal procedure law.[8]

1.2. Changes in investigation procedure after the reform

A lot of discussion had been generated following the adoption of the current codes of criminal procedure, in particular about complex aspects of prosecutorial investigation and other important phases of criminal proceedings. Special attention was devoted to new procedural institutes which pertained to the relevant elements and specific features of the new criminal investigation process based on the accusatory principle. Looking from this perspective and after more than ten years of application of the new and reformed criminal procedure law in BiH, one could reach a conclusion that that law incorporates the elements of the mixed model of civil law and the adversarial model of the common law (or Anglo-American law). Not even in those ten years

3 Following its promulgation on an interim basis, the Code was adopted by the Parliamentary Assembly of Bosnia and Herzegovina and published in the *Official Gazette of BiH* no. 36/03 (subsequent amendments thereto were published in the *Official Gazette of BiH,* no. 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09), hereinafter (the BiH CPC).

4 The Code came into force on July 11, 2003; (Art. 434) of the Criminal Procedure Code of the BiH Brčko District (*Official Gazette of the Brčko District of BiH*, no. 10/2003), with subsequent amendments thereto published in the (*Official Gazette of the Brčko District of BiH*, no. 48/04, 6/06, 12/07, 21/07, 14/07, 21/07, 2/08 and 17/09), while its consolidated text was published in the (*Official Gazette of the Brčko District of BiH*, no. 44/10), hereinafter (the BD BiH CPC).

5 The Code came into force on August 1, 2003, published as the Criminal Procedure Code of the Federation of BiH (*Official Gazette of the Federation of BiH*, no. 35/03, 56/03, 78/04, 28/05, 55/06, 53/07, 9/09), hereinafter (the FBiH CPC)

6 The Code came into force on July 1, 2003 as the Criminal Procedure Code of the Republika Srpska (*Official Gazette of the RS*, no. 50/03, 111/04, 29/07, 68/07, 119/08, 55/09, 80/09, 92/09, 100/09) and its consolidated text was published in (the *Official Gazette of the RS*, no. 53/12), hereinafter (the RS CPC).

7 The following acts were repealed: Criminal Procedure Code of the BiH Brčko District (*Official Gazette of the BiH Brčko District*, no. 7/2000); Criminal Procedure Code of the Federation of BiH which entered into force on November 28, 1998 and thus replaced the procedural law inherited from the former SFR Yugoslavia (*Official Gazette of the BiH Federation*, no. 43/98 and 23/99); and Criminal Procedure Code of the RS, consolidated text (*Official Gazette of the SFRY*, no. 26/86, 74/87, 57/89 and 3/90) and (*Official Gazette of the RS*, no. 4/93, 26/93, 14/94, 6/97 and 61/01).

8 Dr Hajrija Sijerčić Čolić, Krivično procesno zakonodavstvo u BiH glavni izazovi nakon reforme krivičnog zakonodavstva Sarajevo 2003. godine" in „Pravo i pravda",- Journal of Legal Theory and Practice of the Prosecutors' Association of FBiH, no.. 1/2003.

of development of criminal law has "our way" of bridging the gap between the said models and combining the forms and subject matters from different legal systems been settled.[9]

Since 2003, the criminal procedure law has undergone and has been exposed to some necessary changes, both minor and far-reaching, which have taken various directions. Shortly after the procedural laws were enacted, a need for making amendments to those existing laws had arisen; as time passed by, more and more serious shortcomings were identified in the existing legislative solutions, so the scope of modifications broadened, in particular in the period 2008-2009. As part of criminal proceedings, the investigation has also been subject to modifications of the existing criminal procedure laws in BiH after the adoption of the new codes of criminal procedure. After the new Codes came into force and their implementation began, there have been discussions as to whether or not a prosecutor should inform a suspect and his defence attorney that an order for conducting an investigation has been issued. This matter has been discussed and assessed as an important procedural issue which could result in equating or at least bringing closer together the position of prosecutors as the representatives of the prosecution and of the defence and thus strengthen the position of suspects. However, no such concept has been incorporated into procedural laws until today, even though the number of its supporters is equivalent to the number of those who oppose it. Another important question corresponds with the previous one: at which point should a suspect be informed that a criminal proceeding – investigation is being conducted against him as well as at which point should he should questioned or when should his questioning commence and thus allow him to exercise his right to defence. In that regard, different approaches have been favoured, in particular to the issue of the moment at which a suspect should be questioned. The opinion in which suspects should be questioned at an early stage in the investigation seems justified since it is associated with some important elements of the suspect's position in respect of the establishment of the right to defence because suspects learn that they are in effect suspects when they are first questioned which is also when they assert their right to a defence counsel. However, things are different in practice and it has been revealed that suspects are questioned at the outset of investigations as well as just before the issuing of indictments. A dilemma about whether or not an indictment may be issued if the suspect has not been questioned during the investigation has resulted in adopting a provision whereby no indictment may be issued if the suspect has not been previously questioned.[10] Another moot point was raised immediately after the new codes of procedure began to be implemented, namely whether or not it was possible to use suspect's statement obtained in the course of investigative proceedings as evidence at the main hearing in the event he decided to plead his right to silence at the main hearing. The legislator was forced to make a decision on that matter as a result of differences in case law. There were certainly numerous arguments in favour and against, but the legislator opted for efficient criminal proceedings and successful proving of criminal offences, etc. According to the procedural solution that is currently in force, suspects are advised of all of the rights they enjoy under the CPC at the beginning of their questioning, among others about their procedural right (warning) that giving statements in the presence of a defence attorney means that such statements will be admissible as evidence at the main hearing and that they may be read out and used at the main hearing without their consent.[11]

9 *Ibid*., p.60.

10 Law on Amendments to the BiH CPC (*Official Gazette of BiH*, no. 52/08), Law on Amendments to the BD BiH CPC (*Official Gazette of BiH BD*, no. 17/09), Law on Amendments to the FBiH CPC (*Official Gazette of FBiH*, no. 09/09) and Law on Amendments to the RS CPC (*Official Gazette of the RS*, no. 119/08).

11 Amendments to the criminal procedure codes in BiH from 2008 and 2009.

Also, the issue of suspect's right to access documents and items has been a subject matter of analyses and debates. Undoubtedly, the principle of equality of arms and the right to adequate defence are in force during all the stages in the proceedings. However, under the procedural laws enacted in 2003, defence's right to access documents and examine items was limited in the stage of investigation. Those limitations were imposed with the aim of enhancing the efficiency of criminal proceedings. A suspect and his defence attorney were allowed to examine the documents and inspect the obtained items in favour of the suspect, although that right could be denied in case of documents and items whose examination and inspection could endanger the purpose of the investigation. This issue was the subject of a serious debate among professionals when a number of weaknesses in legislative solutions had been identified which were essentially prejudicial to the position of a suspect with regard to his right to defence; nevertheless, the right to inspect the documents and examine obtained items was kept within the scope of the legislation adopted in 2003. However, there has been a change in the legislative framework with regard to this right and cases in which a motion is filed for ordering detention in custody or in which detention has already been ordered. Thus, current legislation provides that the prosecutor shall, together with his motion for ordering detention, submit to the preliminary proceedings judge evidence (pertaining to reasonable suspicion and legal grounds for detention) relevant to making an assessment about the legality of detention and for the purpose of notifying the defence attorney.[12]

Procedural provisions on mandatory formal defence were amended in the course of the 2008 and 2009 legislative activities. According to those amendments, suspects must have a defence attorney when a ruling on the motion for ordering detention is given and for the duration of detention in custody. In addition, defence by a defence counsel is mandatory when it serves the interests of justice on account of the complexity of a case or financial status of the suspect (or the accused at the later stages in the proceedings).[13]

The legislative solutions adopted in 2003 did not expressly require that a special decision be made in cases when prosecutors opted against issuing the order for conducting an investigation. Hence, in trying to resolve new procedural situations than arose in the work of prosecutor's offices and issues opened up in practice, the legislator charged prosecutors with the duty to *issue an order that no investigation will be conducted*, under the conditions laid down by the law.[14] The same amendment struck down from all the codes the provision which gave prosecutors a discretionary right to decide if they would issue the order for conducting an investigation and introduced new procedural solutions in respect of the phase in investigative proceedings in which investigation is discontinued. Current solutions have been revised in the following manner: circumstances *which exclude the criminal liability of suspects (except in cases when a suspect has committed an unlawful act in a state of mental incompetence)* have been added as grounds for issuing an order for discontinuing an investigation; not only the injured party, but also the suspect who has been questioned and the person who has reported a crime are informed that investigation has been discontinued; the said persons are informed of the grounds for its discontinuance. As a result of modifications of procedural norms, it has been provided that in cases when an investigation has been closed for lack of evidence that a suspect has committed a criminal offence and for the purpose of affording protection against unfounded prosecution, the prosecutor may re-open

12 *Ibid.*
13 *Ibid.*
14 *Ibid.*

the investigation if new facts and circumstances should come to light which indicate that there are grounds for suspicion that the suspect has indeed committed the offence.[15]

2. Prosecutorial investigation in BiH

2.1. General overview

Over a long period of time, reforms of the systems of criminal procedure have been undertaken in a number of European countries, including the region of the former Yugoslavia, in which they have been implemented only in a last few years (with the exception of BiH),. A majority of those reforms have been focused on changing the position and role of prosecutors in the investigation process. Particular attention was devoted to establishing the rights and duties of prosecutors who perform the function of criminal prosecution and their investigative activity understood as identifying suspects, collecting statements, evidence, and other information which could be used in criminal proceedings; providing for the activities of the police force aimed at detecting and proving criminal offences and discovering perpetrators; the manner of governing complex relationships between the prosecution and the police; court's activities in the investigation due to the elimination of investigating judges and their transformation into judges in charge of protecting the rights and freedoms of suspects by virtue of court's decisions; the rights and duties of persons suspected of committing a crime and exercising the right to defence; providing for the rights of the injured party; simplifying the investigation and broadening the scope of application of the principle of prosecutorial discretion through the elimination of criminal proceedings.[16] It was agreed, with the aim of accelerating criminal proceedings, to abolish judicial investigation by eliminating investigating judges from the criminal procedure laws of Bosnia and Herzegovina; the prosecutorial investigation was legislated as an innovation, whereby prosecutors have been entrusted with the right and duty to collect evidence necessary for issuing indictments. This crucial step in the reform process has resulted in the elimination of the so-called pre-investigation phase (preliminary investigation). Thus, criminal proceedings conducted prior to the issuing of indictments, *i.e.* investigative proceedings within which the procedural functions of criminal prosecution and investigation into facts are fused together, have been entrusted with the prosecutors. The central issues which have been topics of an ongoing debate include as follows: prosecutor's rights and duties in the course of the investigation process; the activities of authorised officers and communication with the prosecutor who is the *dominus litis* for the entire duration of the investigation; the position of suspects and their defence counsels; the role of preliminary proceedings judges, as well as the rights of the injured party.

Special circumstances in which changes in the criminal law were effected and in which the law was implemented have had an impact on the principal characteristics of the concept of prosecutorial investigation in Bosnia and Herzegovina. When attempting to determine which type of investigation is provided for by the laws of Bosnia and Herzegovina, legislative solutions pertaining to the investigation indicate that the concept of investigation was formulated in the light of

15 *Ibid*.
16 Dr Hajrija Sijerčić Čolić, *op.cit*.,pp. 57-68.

nquisitorial elements and some ideas typical of the accusatory model of criminal procedure.[17] Judging from the manner in which this stage in criminal proceedings is structured, investigation is dominated by inquisitorial elements manifested in the legislative solution according to which investigations are ordered and conducted by prosecutors. Over the entire course of an investigation, the prosecutor is its *dominus litis*, *i.e.* he leads and oversees the investigation and directs the activities of authorised officers aimed at identifying suspects and collecting statements and evidence (Art. 35, para. 2, item a) of the BiH CPC).[18] The inquisitorial element is supported by a number of prosecutor's rights and duties pertaining to the investigative stage of criminal proceedings, such as his right and duty to order an investigation if there are reasonable grounds to suspect that a crime has been committed (Art. 216 of the BiH CPC).[19] Prosecutors are entitled to undertake any evidentiary action, including the questioning of suspects, interviewing the injured parties and witnesses, conducting of crime scene investigations, undertaking reconstructions of events, taking special measures to ensure witness protection, obtaining of information and ordering expert witness assessments (Art. 217 of the BiH CPC).[20] In that regard, the inquisitorial elements are also indicated by legislative solutions found in procedural codes in BiH which assign prosecutors the duty to undertake investigative actions by virtue of their office for the purpose of achieving the aims of investigation. Prosecutors are obligated to examine and establish with equal attention both incriminating and exculpatory facts concerning suspects (Art. 14 of the BiH CPC); they have the right to question suspects (Art. 77 of the BiH CPC). Then, there is the openness of the investigation which is reflected in the right of a suspect and his defence counsel to be present during some investigative actions, for instance during the search of a residence, premises or persons (Art. 58, item j) of the BiH CPC)[21] and the right of a defence counsel to be present during the questioning of a suspect under Art. 78, para. 2, item b) of the BiH CPC.[22]

Investigation's accusatory elements in the current codes of criminal procedure are found in the ac the accusatory principle in general, according to which proceedings may not be initiated or conducted without a request from the prosecutor, or *nemo iudex sine actore*. Thus, prosecutor's decision is not needed only to initiate investigation, but such a request made by the prosecutor is needed throughout the whole investigation. The adoption of such an accusatory element has resulted in the fact that investigations may be opened and conducted only against persons and in connection with criminal offences cited in the prosecutor's order for conducting an investigation (Art. 216, para. 2 of the BiH CPC).[23] The prosecutor is bound by his order for conducting the investigation for the duration of the entire investigation. Should the prosecutor issue an order for the investigation to be terminated for reasons set out by the law, the Court cannot initiate and conduct criminal proceedings *ex officio.* Other elements also favour the accusatory principle, such as suspect's position in the proceedings and rights he has in the investigation, eg. the right to inspect the documents and examine the collected items (Art. 47 of the BiH CPC);[24] then, the right to immediately communicate with his defence attorney, (Art. 48 of the BiH CPC);[25]

17 Dr Hajrija Sijerčić Čolić,„Akuzatorske i inkvizitorske forme u krivičnom pravu u BIH", in „Pravo i pravda",- Journal of Legal Theory and Practice of the Prosecutors' Association of FBiH, Sarajevo, no. 1/2005,p. 195.

18 Dr Hajrija Sijerčić Čolić,„Krivično procesno zakonodavstvo u BiH, glavni izazovi nakon reforme krivičnog zakonodavstva 2003", *op.cit*., p. 196.

19 Art. 35, para. 2, item 2 of the BD CPC; Art. 45, para. 2, item 2 of the FBiH CPC; and Art. 43, para. 2, item 2 of the RS CPC.

20 Art. 217 of the BD BiH CPC, Art. 231 of the FBiH CPC, and Art. 217 of the RS CPC.

21 Art. 58, item j) of the BD BIH CPC, Art. 72, item J) of the FBiH CPC and Art. 122, item j) of the RS CPC.

22 Art. 78, para. 2, item b) of the BD BIH CPC, Art. 92, para 2, item b) of the FBiH CPC, and Art. 142, para. 2, item b) of the RS CPC.

23 Art. 216 of the BD BiH CPC, Art. 231, para. 2 of the FBiH CPC, and Art. 216, para. 2 of the RS CPC.

24 Art. 47 of the BD BiH CPC, Art. 61 of the FBiH CPC, and Art. 55 of the RS CPC.

25 Art. 48 of the BD BiH CPC, Art. 62 of the FBiH CPC, and Art. 56 of the RS CPC.

the privilege against self-incrimination (*nemo tenetur prodese se ipsum*) or the right of a suspect not to make a statement or answer questions throughout the entire course of an investigation of which the prosecutor is obligated to inform him (Art. 6, para. 3 and Art. 78, para. 2, item a) of the BiH CPC).[26]

It could be said that the current criminal procedure law in BiH is a result of "reconciliation" between two legal cultures or systems: the civil law or the continental system and the common law system or the Anglo-American law. Thus, the BiH criminal procedure could be called a compromise between the civil law system of the mixed type and the common law system, *i.e.* the Anglo-American system of law of the accusatory (adversarial) type.[27]

2.2. Key stages in an investigation according to the Bosnia and Herzegovina procedural laws

2.2.1. General overview

The critical stages in a criminal investigation under the current criminal procedure law are laid down and can be identified in the part two of the BiH CPC titled "Course of the Proceedings", Chapter XIX of the BiH CPC "Investigation" (provisions contained in Articles 213 through 225 of the same Code).[28] The following is can be inferred from the above mentioned procedural provisions: important segments of the course and organisation of criminal investigation; prosecutors' role and position in investigative proceedings; the position and role of authorised offices, and the like as well as other relevant matters such as the moment at which an investigation commences, the decision-making process with regard to initiating investigations, prosecutorial oversight of the work of authorised offices, termination and duration of investigations.

2.2.2. What is understood by the notion of investigation?

a) Notion of investigation. A definition or concept of the investigation is laid down by a provision contained in (Art. 20, para. 1, item j of the BiH CPC),[29] based on which an *"investigation includes all the activities undertaken by a prosecutor or authorised offices in accordance with this Code, including the collection and preservation of statements and evidence"*. According to a provision contained in Art. 35, para. 2, item a) of the FBiH CPC[30] which defines the role of prosecutors, their rights and duties with regard to instituting and conducting investigation proceedings, *"as soon as they have learned that there are grounds for suspicion that a criminal offence has been committed, prosecutors shall have the right and duty to take steps to discover and investigate it, to identify a suspect, lead and oversee the investigation, as well as to direct the activities of authorised offices in connection with the identification of suspect(s) and gathering of statements and*

26 Art. 6 para. 3 of the BD BiH CPC, Art. 78 para. 2 item a) of the BD BiH CPC, Art. 6, para. 3 and Art. 92, para. 2, item a) of the FBiH CPC; Art. 6, para. 3 and Art. 142, para. 2, item a) of the RS CPC.

27 Dr Hajrija Sijerčić Čolić,„Akuzatorske i inkvizitorske forme u krivičnom procesnom pravu u BIH" , *op.cit.*,pp. 191-200.

28 See Articles 213 through 225 of the BD BiH CPC, Articles 228 through 240 of the FBiH CPC, Articles 213 through 225 of the RS CPC.

29 See Art. 20, para. 1, item j) of the BD BiH CPC, Art. 21, para. 1, item j) of the FBiH CPC, and Art. 20, para. 1, item i) of the RS CPC.

30 See Art. 35, para. 2, item a) of the BD BiH CPC, Art. 45, para. 2, item a) of the FBiH CPC, and Art. 43, para. 2, item a) of the RS CPC.

evidence". Pursuant to paragraph 2, item b) of the same provision, it is required that prosecutors *"shall conduct investigations in accordance with this Code"*. Therefore, prosecutors have both the right and the duty to undertake necessary measures aimed at discovering a crime and conducting an investigation as soon as they become aware that there are grounds for suspicion that the crime has been committed. In consequence, the existence of "grounds for suspicion" suffices for initiating an investigation, unlike in the former system of criminal law, when a higher degree of probability that a criminal offence was committed or *"reasonable suspicion"* was required for initiating investigations. It follows from the above, that the legislator uses this provision to differentiate between the activities of – competences for *"discovering a criminal offence" and "conducting an investigation"*, although it remains unclear of what character other than investigative could be the measures taken for the purpose of discovering a crime. Therefore, the prosecutor shall order that an investigation be conducted if there are *grounds for suspicion* that a criminal offence has been committed and if the above degree of probability follows from the existing evidence and information; thereby, grounds have been created for conducting an investigation in which all the actions and measures are taken in order to determine circumstances to be investigated by means of specific investigative actions. It follows from the above that the investigation could also be defined as a set of all the actions and measures undertaken by prosecutors or authorised officers after having learnt of grounds for suspicion that a criminal offence has been perpetrated and aimed at discovering and resolving a criminal offence and identifying its perpetrator so that he could face criminal prosecution.[31]

b) Problems with defining the notion of investigation. If we are to consider all of the above, it might seem that there is nothing to be added to it or subtracted therefrom and that the issue has been provided for in a clear manner. However, both in practice and interpretation of the notion of "investigation", in particular with respect to its initiation and scope, there are a number of points at issue, for instance the question of the moment at which it is considered that the procedure for criminal investigation commences or when an investigation is deemed initiated and by which procedural activity. There are serious dilemmas in that regard, as well as various interpretations of the content of that notion. Two things should be considered and taken into account in that respect. First, the absence of a complete and clear legal definition of the notion of investigation. Second, the absence of a precise definition of the moment at which an investigation is deemed initiated. In that context, it should be emphasised that it is not open to debate if grounds for suspicion that a crime has been committed constitute grounds for issuing the order for conducting an investigation (Art. 216 of the BiH CPC). Thereby, a prerequisite has formally been created for the police to undertake all the required investigative actions under the prosecutor's supervision. What has been problematic in practice is this: what stage do the activities of the police, *i.e.* authorised officers represent when it is beyond doubt that there is sufficient evidence and information to support the grounds for suspicion that a criminal offence has been committed, but the prosecutor has not yet officially issued an order for conducting an investigation? Under such circumstances, as well as in situations when an authorised officer has informed the prosecutor about the existence of grounds for suspicion that a crime has been perpetrated, the officer has a duty to carry out, under prosecutor's supervision, all the necessary actions to locate the perpetrator, prevent a suspect or his accomplice from fleeing, discover and secure the traces of a crime, etc. (Art. 281, para. 2 of the BiH CPC).[32] In that regard, it is necessary to point to the provision

31 Modul 3,„Krivična oblast", Istraga, CEST RS i CEST FBiH (p. 39).
32 Art. 218, para. 2 of the BD BiH CPC, Art. 233 of the FBiH CPC, and Art. 218, para. 2 of the RS CPC.

contained in Art. 221, para. 1 of the BiH CPC[33] whereby "an authorised officer shall, upon notifying the prosecutor that there are grounds to suspect that a criminal offence has been committed, carry out the investigation of a crime scene and order necessary expert witness assessments, with the exception of an autopsy and the exhumation of a body". It could be concluded from the abovementioned provision of the BiH CPC that the existence of an investigation is not formally conditioned by the issuance of the order for conducting an investigation (Art. 216 of the BiH CPC). One could even arrive at an opinion that investigation represented an undividable whole of actions and activities of authorised officers and the prosecutor, regardless of whether or not the order to conduct an investigation has been officially issued. Given that the process of gathering information by authorised offices that takes place as performing concrete evidentiary actions is dependent on the existence of grounds for suspicion that a crime has been perpetrated, which is equal to the standard for issuing the order for conducting an investigation, the commencement of an investigation procedure should be associated with the first evidentiary action taken by an authorised officer or the prosecutor pursuant to CPC provisions, which fits into the general definition of investigation as set out in the provision contained in Art. 20, para. 1, item j) of the BiH CPC.

***c) Is there the preliminary investigation*?** The question of whether or not there is something in the investigative proceedings what used to be regarded in the previous codes of criminal procedure as "preliminary investigation" corresponds with the issue and challenge of defining the notion of investigation. This is a conceptual issue, in particular if we consider that under the former Criminal Procedure Code the standard of proof required for preliminary investigation were "grounds for suspicion", whereas the standard of proof for the investigation conducted by the court at the prosecutor's motion was "reasonable suspicion". The answer follows from Article 216, para. 1 of the BiH CPC[34] pursuant to which *"The prosecutor shall order the conduct of an investigation if there are grounds for suspicion that a criminal offense has been committed."* It clearly and undoubtedly follows from such a legislative provision that the current investigation has sublimated the former preliminary investigation as well as the former judicial investigation (pre-trial proceedings) into one single investigation carried out on the basis of one single standard of proof, *i.e.* "grounds for suspicion" and led or overseen by the prosecutor. Accordingly, the essential concept of the new Criminal Procedure Code is clearly defined by Article 216, paragraph 1 of the BiH CPC pursuant to which all the activities performed by the prosecutor and authorised officers after becoming aware of grounds for suspicion that a crime has occurred and aimed at discovering all the relevant facts and circumstances in connection with that crime or perpetration thereof are regarded as an investigation ordered, led and overseen by the prosecutor.

Consequently, another issue still remains open and unresolved, namely whether or not certain activities of authorised officers that are part of their regular activities, the so-called operational activities, etc. performed in order to collect information and evidence to support grounds for suspicion that a crime has been committed could be regarded in a manner as preliminary investigation. However, given the provision contained in Article 216, paragraph 2 of the BIH CPC[35] whereby the legislator designates prosecutors to be in charge of the investigation previously conducted by the Court that in fact encompasses the former preliminary investigation, the only

33 Art. 221 of the BD BiH CPC, Art. 236 of the FBiH CPC, and Art. 221 of the RS CPC.
34 Art. 216, para. 1 of the BD BiH CPC and of the RS CPC, Art. 231, para. 1 of the FBiH CPC.
35 Art. 216, para 2 of the BD BiH CPC and of the RS CPC, Art. 231, para. 2 of the FBiH CPC.

possible conclusion is that legislator's primary intention was to emphasise the position of the prosecutor as the original holder of authority to conduct investigative proceedings as well as that it was precisely him who can directly conduct investigations or transfer some of his powers to authorised officers obligated to work under his leadership or supervision from the moment of establishing the grounds for suspicion.

2.2.3 Initiating an investigation

a) General overview. Having regard to the existing procedural solutions found in the criminal procedure law of Bosnia and Herzegovina, the role of prosecutors in investigative proceedings is conceived of in a specific manner. Even though it could be understood that prosecutors are those who "literary" carry out investigations and all the investigative or evidentiary actions, they do not carry them out exclusively by themselves either according to the legislative solutions or in practice. Prosecutors, in cooperation with authorised officers and after having learnt that there are grounds for suspicion that a crime has been committed, undertake steps such as planning, leading, and overseeing the investigation and thereby the supervision of the work of authorised officers in investigative proceedings; they also directly undertake certain actions for the purpose of finding out all the relevant facts about and circumstances in connection with the commission of a crime and its perpetrator. The key stages in an investigation include the assessment of whether or not there are grounds for suspicion that a criminal offence has been perpetrated on which the making of a decision to conduct an investigation and issuing an order to that effect are contingent, then planning, *leading and overseeing an investigation.*

b) Assessment of whether or not there are grounds for suspicion. One of the crucial questions present in the initial stage of opening an investigation is the assessment of whether or not there are grounds for suspicion that a crime has been committed and of the identity of its perpetrator. It follows from the relevant provisions of the BiH codes of procedure that a starting point or basis for any prosecutor's activity in criminal proceedings is the existence of grounds for suspicion that a criminal offence has occurred. In effect, that would imply that prosecutors should not carry out a single action in criminal proceedings or in investigative proceedings without the initial standard of suspicion. Consequently, making an assessment of grounds for suspicion is the initial stage of making a decision to conduct an investigation, which represents a very serious issue in the prosecution process. Grounds for suspicion should not be construed restrictively nor should their assessment be made in such a manner. At this stage, a professional issue arises in that regard – under which circumstances do grounds for suspicion that a crime has been committed actually exist? The legislator has not provided an answer to this question because the criminal procedure codes do not include a definition of the notion of "grounds for suspicion". For those reasons, *the assessment of whether or not there are grounds for suspicion that a criminal offence has been committed is within the jurisdiction and is left at the discretion of prosecutors and authorised officers who are to decide thereon based on currently and objectively available evidence as well as on the appraisal of facts and circumstances which, in connection with certain logical hypotheses that follow from direct or indirect evidence, can indicate, based on experience, that a crime has been committed.* This issue is related to several other relevant issues which are particularly important for the decision-making process in connection with the initiation of investigations and their further course. A majority of issues and doubts that arise in prosecutorial practice with regard to the fulfilment and performance of this procedural task carried out in direct contact with

authorised officers are associated with the moment at which authorised officers inform prosecutors that a crime has occurred. In that regard, misunderstandings frequently occur between authorised officers and prosecutors and there are also issues that are procedural in nature, administrative and technical problems, and the like. Application of the above-mentioned provisions is related to the key role of authorised officers and prosecutors because when there is a lack of definition of the notion of "grounds for suspicion" necessary for arriving at a conclusion that a crime has actually been committed and in that respect, which circumstances point to that conclusion, the prosecutors and authorised officers can only act in accordance with rules and procedures for assessing the degree of grounds for suspicion according to the previously mentioned principles. In practice, the above state of affairs also gives rise to frequent misunderstandings between prosecutors and authorised officers manifested as the latter informing the former before time that a crime has occurred (when authorised officers discharge their duties pursuant to the provisions of Article 218, paras. 1 and 2 of the BiH CPC) despite the fact that available information and evidence clearly indicate that there is a significantly lower degree of probability that the crime has occurred (circumstantial evidence, information obtained by the police, etc.).[36] Furthermore, the process of assessing grounds for suspicion that a crime has been committed is also associated with the prosecutor's procedural duty to issue orders for conducting investigations and authorised officer's duty to undertake all the necessary measures and actions aimed at resolving crimes and identifying their perpetrators under prosecutor's supervision.[37] This has resulted in unnecessary and unjustified "swamping" of BiH prosecutor's offices with notifications, data and pieces of information about allegedly committed criminal offences that have not attained the degree of *grounds for suspicion* that a crime has been committed and there are no procedural grounds for prosecutors to open investigations by issuing orders based on such information. Such practice has been accompanied by not so uncommon phenomenon that certain law enforcement agencies submit reports about committed criminal offences pursuant to Article 219, para. 5 of the BiH CPC[38] in spite of the fact that relevant conditions have not been met, which in such situations frequently results in negative decisions being reached by prosecutors. Under such and similar circumstances, the law enforcement agencies unfoundedly shift the burden of defining the subject of police investigation onto prosecutors. In the process of assessment of whether or not there is reasonable suspicion that a crime has occurred, there has to be constant professional coordination between prosecutors and authorised officers, as well as mutual trust and respect for each other because decisions in that regard are usually made quickly and efficiently because the efficiency of entire investigative proceedings is dependent on them.

c) Issuing orders for conducting an investigation. As opposed to the previous Criminal Procedure Code in which this issue was settled, the moment at which criminal proceedings are deemed to have begun has not been precisely defined in the current procedural laws in Bosnia and Herzegovina.[39] Two main positions have been adopted on this issue that is directly related to prosecutor's procedural activities. From one standpoint, criminal proceedings begin with the issuing of an order to conduct an investigation or with the undertaking of measures and activities by authorised officers (upon learning that a criminal offence has been committed) approved by a prosecutor after receiving notification thereof.[40] From another point of view, criminal

36 Art. 218 of the BiH CPC, Art. 218 of the BD BiH CPC, Art. 218 of the RS CPC, Art. 233 of the FBiH CPC.
37 Art. 216 of the BiH CPC, Art. 216 of the BD BiH CPC, Art. 216 of the RS CPC, Art. 231 of the FBiH CPC.
38 Art. 219, para. 5 of the BD BiH CPC, Art. 219, para. 5 of the RS CPC, Art. 234, para. 5 of the FBiH CPC.
39 BiH CPC, FBiH CPC, RS CPC and BD BiH CPC.
40 Art. 218 of the BiH CPC, Art. 218 of the BD BiH CPC, Art 218 of the RS CPC, Art. 233 FBiH CPC.

proceedings begin with the confirmation of an indictment. The problem arises due to different interpretations of a provision contained in Article 18 of the BiH CPC[41] which reads: "When it is provided that the initiation of criminal proceedings entails the restriction of certain rights, such restrictions, unless otherwise specified herein, shall start to apply as of the confirmation of an indictment. As regards criminal offenses punishable with a fine or imprisonment of up to five years as their principal penalty, those consequences shall ensue as of the day the judgment of conviction is rendered, regardless of whether or not the judgment has become final." *Other opinions can also be found in practice, but it is clear that it has not been resolved if criminal proceedings are initiated by issuing an order for conducting an investigation and whether or not and to which extent the issuance of the order for conducting an investigation has legal effects on suspects and other participants in investigative proceedings as well as what procedural consequences actually arise with the issuing of orders for conducting investigations in respect of the entire course of an investigation.* Therefore, it is absolutely certain that it can be held that the first stage in criminal proceedings is dependent upon the issuance of the order for conducting an investigation and the moment at which, from the perspective of prosecutors, investigation has been initiated. A prosecutor shall order that an investigation be conducted if there are grounds for suspicion that a criminal offence has been committed.[42] In addition to being prosecutor's procedural duty, the issuing of such an order has some other major procedural consequences as well. The order for conducting an investigation represents prosecutor's decision that there are indeed grounds for suspicion that a criminal offence has been carried out and constitutes grounds for planning an investigation at its initial stage, for formulating an investigative strategy and working out a tactic to ensure efficient prosecution. The order for conducting an investigation issued by a prosecutor shall include as follows: information about the perpetrator, if known; statement of facts which constitute elements of a crime; circumstances that support the grounds for suspicion for conducting an investigation and available evidence. In the order, the prosecutor shall state circumstances that should be investigated as well as investigative actions that should be undertaken.

Consequently, the law provides a clear procedure for making a decision to initiate an investigation and issue the order for conducting it. However, problems do arise in practice in the process of making decisions to open investigations and issuing orders to that effect. The existing procedural solutions with regard to the initiation of investigations, namely provisions contained in Art. 216, paragraphs 1 and 2 as well as in Art. 218 of the BiH CPC lead to a conclusion that orders must be issued, which in essence is not debatable. Nevertheless, various situations arise in the course of prosecutors' work when it is necessary to undertake evidentiary actions – investigative actions that cannot be delayed. Under such circumstances, authorised officers are obligated to take all the necessary measures and activities in accordance with the law and under the supervision of the prosecutor, even without an order for conducting an investigation. In such situations, prosecutors give verbal orders to authorised officers to carry out investigations. Such practice, which is the result of actual needs and a factor in promoting the efficiency of investigations, has been widely adopted, which is why it does not happen rarely that entire investigative proceedings are concluded, *i.e.* all the necessary investigative actions are performed even before an order for conducting investigation is issued and the order is issued only as a matter of form. Looking from the perspective of procedural law, a problem arises in that regard in situations when an authorised officer is obligated to take urgent actions and measures of investigative

41 Art. 18 of the BD BiH CPC, Art. 18 of the RS CPC, Art. 19 FBiH CPC.
42 Art. 216 of the BiH CPC, Art. 216 of the BD BiH CPC, Art. 216 of the RS CPC, Art. 231 F BiH CPC.

character because their delay would pose a risk (Art. 218, para. 2 of the BiH CPC);[43] also, in cases when it may happen that investigative actions and measures which led to resolving a crime have already been taken prior to informing the prosecutor, which is why under such circumstances the issuing of orders for conducting investigation, planning investigation, etc. is essentially pointless. This in particular applies to criminal offences punishable with imprisonment of up to five years, in which cases authorised officers are obligated to inform the prosecutor within seven days of available information and evidence concerning a crime and its perpetrator (Art. 218, para. 3 of the BiH CPC).[44]

2.2.4. Conducting and concluding an investigation

a) Planning investigations. Within this system of prosecutorial investigation, the process of planning investigations emerges as a very important segment of investigative proceedings on which depends the efficiency of an investigation and it also represents a necessary step towards efficient and successful conduct of investigations in accordance with the provision of Art. 216, para. 2 of the BiH CPC. The provision sets out that in his order for conducting an investigation, the prosecutor shall list circumstances that need to be investigated as well as investigative actions that should be taken. Formulating a plan for an investigation could entail several phases which could, for instance, be defined in the following manner: *stating the known facts and circumstances, as well as known direct and indirect evidence related to a possible criminal offence and its perpetrator; formulating hypotheses, developing a theory of the case; assessing if there is a need to take measures to ensure the presence of suspect(s) in the proceedings for the purpose of their successful conduct (deprivation of liberty, imposing detention, etc.); analysis and evaluation of facts and circumstances necessary to be established in the course of the investigation; evaluation and establishment of evidentiary – investigative actions by means of which individual facts and circumstances relevant to criminal prosecution will be established; determining which evidentiary – investigative actions are to be undertaken and if court's approval needs to be sought for any of them; assigning specific persons to undertake the planned investigative actions; defining the order in which investigative actions will be performed; planning and setting a time limit – deadline for each individual evidentiary – investigative action and all the investigative actions taken together; defining periods and means of communication between participants in the investigation.* Another important segment in planning investigations is establishing cooperation with authorised officers who will actually undertake investigative actions, which is why it could be said that as regards the planning of investigations, prosecutors figure as some type of coordinators and managers of investigations. They have to be informed by authorised officers about their activities and results of investigative actions for the purpose of coordination, possible additional planning or modifications of some or all the elements of the existing plans. Certain complex investigations, particularly into criminal offences from the sphere of corruption or financial crime and organised crime should, as a rule, include participants from various types of authorities (the police, tax administration inspectors, treasury inspectors as well as other authorised officers, experts from specific fields – expert witnesses, etc.) because only in that manner may those investigations develop in the right direction and ensure that their key elements are given due attention in a timely fashion. At the same time, the expert knowledge of the above-mentioned persons should be made use of already during the

43 Art. 218, para. 2 of the BD BiH CPC, Art. 218, para. 2 of the RS CPC, Art. 233, para. 2 of the FBiH CPC.
44 Art. 218, para. 3 of the BD BiH CPC, Art. 218, para. 3 of the RS CPR, Art. 233, para. 3 of the FBiH CPC.

planning stage in order to prepare an investigation plan that focuses on key facts that need to be investigated. For that purpose, it would be desirable to "delegate tasks" and determine the order in which each investigative action will be performed, so that each subsequent action could have as its basis the results obtained from the previously completed investigative action. It is extremely important to prepare a time schedule for an investigation and establish the lines of communication between participants so that all the persons concerned could receive timely information obtained in the course of the investigation and so that that information could help them fulfil their tasks in a successful manner.

A very important segment in the process of planning and conducting investigations is the analysis and assessment of risks of destroying and/or concealing evidence or of obstructing investigation in some other way because in cases of certain investigations, there are instances of particularly conspiratorial and detrimental behaviour of perpetrators and of their accomplices, if any, in criminal offences committed in secrecy; for that reason, it would be necessary to avoid as much as possible taking premature investigative actions and measures which require judicial approval (apart from cases when there are serious risks that a failure to take such actions would result in evidence being destroyed or concealed). Thus, during the planning phase, when the order of taking individual investigative measures and actions is determined, one should take into account the risks of disappearance or destruction of evidence or the discrediting investigative proceedings in some other manner.

The tasks of leading and overseeing investigations fall within the competence of prosecutors and represent yet another specific feature of prosecutorial investigation. It could be said that those two tasks span from the beginning of investigation planning up to the point the investigation is concluded as well as that they represent particular continuity of planning which is implemented through the prosecutor's direction and oversight. Leading entails prosecutor's active role in an investigation as soon as it has been found out that there are grounds for suspicion that a crime has been committed; in some situations, prosecutors may and should, in cooperation with authorised officers, get involved even in the early phase of discovering a crime and its perpetrator, even before it is established that there are grounds for suspicion that the crime has occurred. Furthermore, leading implies that the prosecutor adopts an active attitude in addition to his direct and active involvement in the planning and undertaking of specific investigative actions, that he makes analyses, summaries, etc. Oversight represents prosecutor's more passive involvement in the investigation, when he leaves the initiative and dynamics of the investigation to authorised officers and supervises their work with the aim of ensuring its legality and efficiency and giving them assistance. In the first place, the aim of leading an investigation is to formulate and adapt the investigative strategy and tactic, in which process prosecutors may decide to take certain investigative actions themselves and to entrust authorised officers with others. As previously mentioned, the order of performing investigative actions needs to be defined at the very beginning of an investigation. However, it may be necessary to change the order in which investigative measures and actions are taken in the very course of an investigation due to new developments and information. Leading also entails keeping in regular and *ad hoc* contact with all the participants in an investigation, for which purpose it would be useful to organise regular meetings with all of them; the following would be done at those meetings: presenting the results of investigative actions; addressing problems encountered in the course of the investigation; evaluating the as-is status of the investigation and making decisions on its further directions and possibly new investigative measures and actions not been planned at the beginning of the investigation that

could nevertheless serve to overcome problems that occurred over the course of the investigation or accelerate the investigation and make it more efficient. Leading also entails being responsible for the course of the investigation or the timeframe for taking individual investigative measures and actions because only in such a manner can an investigation be efficient and successful, its costs reduced, and material and human resources used in the optimal manner. The fact that prosecutors are the ones who lead and oversee investigations should not be construed as stifling the creativity of authorised officers participating in investigations; it is quite the opposite, the authorised officers participating in investigations under the leadership and supervision of prosecutors need to show a maximum level of creativity when carrying out tasks assigned to them by the prosecutors. Prosecutors should lead and oversee investigations in such a manner as to encourage the creativity of authorised officers participating therein; for that very reason, authorised officers should be included in the process of planning investigative strategies and tactics from the very beginning of investigation planning until the closing of investigations.

Supervision of the work of authorised officers is exercised through various procedural as well other types of activities, such as: providing professional support by interpreting provisions of both substantive and procedural criminal law and taking care that human rights of citizens are exercised and protected in the course of activities performed by authorised officers for the purpose of ensuring the legality of the entire course of investigative proceedings; prosecutors give all the necessary orders and instructions to authorised officers in the course of investigations so that information and evidence could be collected in a manner allowed by the law and admissible in a proceeding before a court of law; prosecutors take part in necessary procedural activities and other actions in the course of investigations pertaining to the involvement of authorised officers such as prosecutors' actions before the court by virtue of authorised officers' requests that certain measures and actions be taken, etc. Likewise, special investigative actions in terms of Article 116 of the BiH CPC must be taken under the direct supervision and guidance of prosecutors.

The basis for such an approach to leading prosecutorial investigations can be found in the provisions of Articles 216 through 225 of the BiH CPC.[45] Those procedural provisions give enough room to prosecutors and authorised officers to plan investigations in a creative way, act and end investigations in a prompt, efficient and lawful manner while keeping within the boundaries of the law.

b) Conclusion of investigations. Under the current criminal procedure codes, it is required that for an indictment to be issued, prosecutors themselves must evaluate whether or not the facts of a case have sufficiently been cleared up in an investigation. This entails an assessment of available evidence, evaluation of whether or not all the necessary investigative actions have been taken, clarifying to which class of criminal offences the act belongs, identifying the person suspected of committing the crime. If a prosecutor concludes that the facts of the case have been sufficiently cleared up, he will issue an indictment. If he should find that all the evidentiary actions have been taken and that there is still no sufficient evidence that the suspect has committed the criminal offence, he will issue an order for the discontinuance of criminal proceedings. If no order for conducting an investigation has been issued and all the necessary evidentiary actions have already been taken, he will issue an order for no investigation to be conducted. A provision contained

45 Dr Hajrija Sijerčić Čolić,„Akuzatorske i inkvizitorske forme u krivičnom procesnom pravu u BIH" , *op.cit.*,pp. 191-200.

in Article 225 of the BiH CPC[46] sets out a procedure for verifying the completion of investigations as well as a time limit for their completion. The time limit has been set as a reference limit of six months calculated from the moment of issuance of the order for conducting an investigation. Unless the investigation is completed within the period of six months after the date of the issuance of the order for its conduct, the chief prosecutor is obligated to undertake all the necessary measures to complete the investigation. In that regard, it would be important to highlight a procedural solution which follows from the above mentioned statutory provision, namely that indictments may not be issued unless suspects have been questioned in the course of investigative proceedings, which in some situations has an important impact on the duration of that process. As previously mentioned, the time limit for completing investigations is a point of reference or reference time limit for concluding investigations because the expiry of those six month after the initiation of an investigation does not mean that there will be any legal consequences in terms that it will not be possible to conduct the investigation any further. In the above context, the only conclusion that can be drawn from such a legislative solution is that some investigative actions and elements of investigative proceedings conducted by the police under prosecutor's supervision in situations when the prosecutor has not issued an order for conducting an investigation, which happens quite often, are not included in the six-month time limit, which is perfectly acceptable under the above-mentioned legislative provision. The manner in which it has been provided for calculating the duration of investigations as well as other provisions on how prosecutors and authorised officers shall act allow the manipulation of the moment at which orders for conducting investigation are issued given that they may be issued after the entire investigation has been conducted because orders are prosecution's internal documents and they are not subject to any external review by the Court or suspects. Namely, they are not served on suspects and no legal remedy may be filed against them by any person whatsoever, aside from possible internal review. As a stage in criminal proceedings, the investigation may last, in accordance with the current legislative solutions, as little as 24 hours in some cases (meaning a very short time), whereas in other cases it may last a very long time, which means until the running out of statute of limitations.

The duration of a criminal investigation is directly associated with the right of a suspect or the accused to be brought before a court of law and tried without undue delay within a shortest possible reasonable time and it is an expression of the right to a fair trial according to which everyone charged with a criminal offence is entitled to a hearing within a reasonable time before a tribunal (Art. 6, para.1 of the ECHR). The European Court for Human Rights has often deliberated on the right to a trial within a reasonable time and this issue takes an important place in the jurisprudence of that Court. It needs to be emphasised that the ECHR has set certain criteria in a number of its decisions relevant to making assessments whether or not a particular criminal proceeding has been completed within a reasonable time. From the perspective of the ECtHR jurisprudence, *the time period relevant for calculating a reasonable time starts on the date of the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.*[47]

In the light of thus expressed legal opinion, it should be emphasised that the question of duration of the entire criminal proceedings, in particular of criminal investigation, is extremely

46 Art. 225 of the BD BiH CPC, RS CPC, Art. 240 of the FBiH CPC.
47 ECtHR, *Foti et al. v. Italy*, 1982, Series A no. 56.

important and that precisely because of the fact that certain investigations are unjustifiably prolonged, a number of appeals have been brought before the Constitutional Court of Bosnia and Herzegovina in which it is argued that due to the excessive duration of investigations there were violations or breaches of the right to have a judgement within a reasonable time under Article II/3, item e) of the Constitution of Bosnia and Herzegovina and Art.6, para. 1 of the ECHR. The Constitutional Court of Bosnia and Herzegovina has found while deciding on the appeal of R. I.[48] in the case AP 206/08 that the right to a judgement within a reasonable time under Article II/3, item e) of the Constitution of Bosnia and Herzegovina and Article 6, para. 1 of the ECHR is violated when the competent prosecutor's office fails to complete an investigation within a period of more than five years *and still fails to offer any reason for the duration of those particular proceedings which might be deemed reasonable and justified and omits to take, pursuant to the law, all the measures and actions for the purpose of completing the investigation*.

2.2.5. Role of authorised officers in investigative proceedings

The reform of prosecutor's role carried out in accordance with the new criminal procedure laws of Bosnia and Herzegovina was accompanied by a corresponding change of the role of authorised officers. By merging preliminary investigation and pre-trial proceedings into one single investigation led or supervised by a prosecutor, the role of authorised officers in investigative proceedings has been broadened from being the initiators – filers of criminal charges (under the former criminal procedure code) to active investigators. That is what makes this reform of criminal investigation proceedings fundamental since through a correct interpretation of the role of authorised officers, in accordance with the current codes of criminal procedure, instruments have been created which make possible extremely fast and efficient investigations that may be carried out by authorised officers in cooperation with and under the supervision of prosecutors. Procedural powers of authorised officers in investigating proceedings are defined by the law, which is why undertaken measures and activities have the status of investigative actions and measures, while statements and evidence obtained by authorised officers in the course of an investigation under the conditions required by the criminal procedure codes in BiH have been legally obtained and thus admissible in court.

In essence, authorised officers initiate criminal proceedings not by filing criminal charges, but as participants in investigative proceedings, which is why they have a range of rights, duties and powers in the procedure for uncovering criminal offences and identifying their perpetrators; some of them should be highlighted: informing prosecutors about the existence of grounds for suspicion that a criminal offence has been committed; taking necessary measures to find perpetrators, prevent suspects and their accomplices from hiding or fleeing within the time limits set by the law and under the supervision of prosecutors; uncover and preserve traces of a crime and objects that can be used as evidence; collect all the information that may be of use in criminal proceedings, etc.[49] For the purpose of fulfilling the tasks referred to in Article 218 of the Criminal Procedure Code, authorised officers may: collect necessary statements from persons; examine vehicles, passengers, luggage; restrict movement in a certain area during the time required for

48 Decision of the BiH Constitutional Court in the case number AP 206/08; Decision of the BiH Constitutional Court in the case number AP 2130/09.

49 Art. 218 of the BiH CPC, BD BiH CPC, RS CPC, Art. 233 of the FBiH CPC.

completing a certain action; undertake necessary measures to establish the identity of persons and objects; launch a search for a person or objects being sought; in the presence of a responsible individual, search specified facilities and premises of state authorities, public enterprises and institutions, and examine certain documents thereof; take other necessary measures and actions.[50]

2.2.6. Role of the court in investigative proceedings

When the new criminal procedure codes came into force in Bosnia and Herzegovina, the roles of prosecutors and courts in criminal proceedings became substantially altered when compared with the previous Criminal Procedure Code. The most radical change has occurred precisely in the investigative proceedings. From the court that used to be actively in charge of investigative proceedings, now under the purview and authority of prosecutors, its role has taken a new form, more passive than it used to be under the former criminal procedure codes when investigating judges were in charge of investigative activities. Namely, when the new criminal procedure codes entered into force, the role of the court has become the role of something of a controller of investigations in situations when investigative measures and actions undertaken by prosecutors or authorised officers invade civil rights and liberties on the one hand, while on the other, the role of the court is such that it is in effect the only legal mechanism for taking investigative measures and actions which limit the civil rights and liberties, thus ensuring the lawfulness of evidence collected in that manner.

The crucial role fulfilled by the court is to oversee if human rights and freedoms are fully respected by prosecutors and authorised officers in investigative proceedings in cases when their measures and actions restrict those rights and freedoms for the purpose of obtaining evidence that could not be obtained without imposing those restrictions or to ensure the presence of suspects in proceedings and successful conduct thereof; the court achieves that by assessing if it is justified to take such investigative actions and measures given the goal of an investigation and existing circumstances documented to it by prosecutors or authorised officers. In addition, the court does not review grounds for conducting investigative proceedings at this stage in the criminal proceedings, even though it does indirectly judge if certain prosecutor's conclusions are well-founded when ruling on prosecutor's or authorised officers' applications as well as on suspect's objections, motions and complaints in connection with prosecutor's applications and court's rulings, in which process he applies the principle of legality whose objective is that no innocent person may be convicted of a crime and that criminal sanctions are imposed against perpetrators of criminal offences. Considering the above-mentioned duties of the court, it can be concluded that the court, as early as at the stage of investigative proceedings, takes care that suspect's right to defence is exercised especially in cases when there are requests for court's intervention in those proceedings. In investigative proceedings, the court bases its decisions (orders and rulings) on the idea of achieving the aims of criminal proceedings by judging a degree to which suspect's rights are restricted on the basis of presented facts supporting the well-foundedness and justifiability of certain investigative actions and measures that restrict certain civil rights and liberties. The court usually fulfils its role in investigative proceedings through the activities of preliminary proceedings judges who, over the course of investigations, issue orders and rulings on applications made by prosecutors or authorised officers and decide on suspects' motions in connection with those applications.

50 Art. 219 of the BiH CPC, BD BiH CPC, RS CPC, Art. 234 of the FBiH CPC.

2.3. Concluding remarks

An answer to the question whether or not the reform goals in respect of the criminal procedure system are being attained in entirety depends vastly on whether or not prosecutor's offices are fully functional in accordance with their reformed position, which is one of the more important links in the functioning of the system itself. Improvement of prosecutors' and judges' professional work and their coordination with law enforcement agencies represent a crucial factor for achieving the aim of criminal prosecution, *i.e.* the administration of justice in each individual criminal case and establishing rule of law. Another key factor in achieving the above goal is that investigations are conducted in an expeditious and effective manner. The reformed criminal procedure has been implemented in BiH for over ten years, which is the same amount of time the criminal investigation has been within prosecutorial jurisdiction.

In its ten years of development on those new principles, the system of criminal procedure in BiH has gone through many ordeals, including being adapted for practical use, improved in all of its segments, even the one pertaining to the criminal investigation. Not only judicial and prosecutorial practice, but also the theory and science of law had to be adapted. Judging by the experience of ten years, it could be maintained with certainty that on that road, the existing system of criminal procedure has gained a foothold and become functional to such a degree that making radical changes in any direction would result in failure or be met with resistance from practitioners.

In respect of potential directions that a development of the system of criminal procedure law may take in the future, in particular with regard to the investigation stage, the following directions can and need to be taken: on the one hand, the existing prosecutorial practices in conducting investigative proceedings should be further improved according to the principles of current procedural solutions, in particular the development of manners of undertaking coordinated activities with police authorities and models thereof for the purpose of making investigations more efficient (co-operation between the police and the prosecution in investigative proceedings); on the other hand, the system of criminal procedure law could develop in the direction of improving procedural solutions concerning prosecutorial investigation by amending certain legislative solutions that are problematic in terms of practical administration of the law (simplification of procedures, etc.).

Undoubtedly, prosecutors in BiH, regardless of all the difficulties they are facing in conducting investigations, would not accept or propose any new changes in the system of criminal procedure aimed at returning the previous system or any other change, except for changes whose objective would be to perfect the existing system. The current system of criminal procedure, according to which prosecutors are assigned the task of conducting investigations, guarantees and provides that prosecutors will assume the responsibility for the entire course of criminal proceedings. Prosecutors are in a position to decide about criminal prosecution in their full capacity, to collect evidence themselves and make decisions thereon, to collect it quickly and efficiently and not to be in a position to shift the responsibility onto some other participant in the process of criminal prosecution.

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Introduction of the Prosecutorial Investigation in Croatia: Results

1. Introduction

In 2002 the Ministry of Justice of the Republic of Croatia rendered a decision establishing a Task Force which set out the principles for drafting the Criminal Procedure Code. The said principles were adopted by the Government of the Republic of Croatia in 2006.

The Principles imply that one of the basic reasons for the change in the procedure code was how lengthy the proceedings had been, especially the preliminary proceedings prior to the issuance of the indictment and consequently the inefficiency of the proceedings. The new Criminal Procedure Code aimed at changing this and the investigation and, consequently, the whole proceedings were supposed to become quicker and more efficient. Naturally, the provisions on the investigation were not the only ones that were amended, the proceedings were harmonised with the provisions of certain international agreements and the European Convention on the Protection of Human Rights and Fundamental Freedoms as well and certain other provisions were also introduced which were meant to simplify and accelerate the proceedings.

The aforementioned Principles state among other things: "Prosecutorial investigation is introduced instead of the judicial investigation. The State Attorney criminally prosecutes criminal offences which are prosecuted *ex officio*. The State Attorney has the right and a duty to investigate (collect sources of information) during the preliminary proceedings (the prosecutorial investigation). During the prosecutorial investigation the prosecutor, alone or through other authorities, receives criminal complaints and other information, collects data, initiates and conducts the investigation, manages the operations of the police and other investigative bodies, files motions requesting urgent judicial actions to be undertaken, and files requests for the issuance of court

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orders as well." According to the Principles, the prosecutorial investigation includes not only the investigation in a typical sense of the word, but also receiving the criminal complaints the duty of collecting the data (inquiry into criminal offences).

Amendment to the Criminal Procedure Code which entered into force on 15 December 2013 actually changed significantly the part of the proceedings which had been referred to as "the prosecutorial investigation" in the principles, therefore it is necessary to list specifically what the State Attorney's powers include and consequently what are the possibilities of conducting the prosecutorial investigation efficiently and quickly according to Criminal Procedure Code which was passed in 2008 and what was introduced in terms of the position and the restrictions of powers by the Amendments to the Criminal Procedure Code passed in December 2013.

2. Prosecutorial Investigation according to the Criminal Procedure Code (2008)

2.1. Evidentiary Actions Prior to the Initiation of the Proceedings

Unlike the Criminal Procedure Code (1997) and the Criminal Procedure Code preceding it, the new Criminal Procedure Code allows the State Attorney a broad option of conducting evidentiary actions without formally initiating the proceedings or informing the defendant thereof and it was this very provision that has been proven to be crucial for effective collection of evidence and uncovering of a number of cases involving the abuse of power and corruption at the highest level.

Article 213 of the Criminal Procedure Code (2008) specified when the evidentiary actions could be undertaken prior to the initiation of the proceedings. The Code makes a distinction between the actions which cannot be delayed and the actions which are to be undertaken before rendering the decision on issuing the indictment.

Article 213 of the Criminal Procedure Code (2008) under paragraph 1 stipulates that the State Attorney (or the investigator at his order) may, prior to the initiation of the investigation, when the investigation is mandatory (Article 216, paragraphs 1 and 2 of the Code), undertake evidentiary actions where there is a risk of delay. While the evidentiary actions procedure is regulated according to Article 213, paragraph 1 of the Criminal Procedure Code (2008) similarly to how it was regulated by the previous Code (1997), but under paragraph 2 of the same Article it is stipulated that in cases in which the investigation is not mandatory[2] the State Attorney or the investigator at the State Attorney's order may undertake evidentiary actions where there is risk of delaying them or which serve a purpose when deciding on whether or not to issue an indictment. In such a case, the State Attorney is allowed to undertake all of the evidentiary actions which he deems necessary and only then question the defendant at the end. It is the aforementioned provision that has enabled the State Attorney to collect the necessary evidence for the issuance of the indictment quickly and to a considerable extent it has increased the efficiency of the proceedings. Which evidentiary actions, in addition to questioning the defendant and undertaking evidentiary actions which cannot be delayed (crime scene investigation, seizure of items, identification,

2 The investigation was mandatory only with regard to criminal offences for which a long-term prison sentence could be pronounced and if the perpetrator was mentally incompetent.

etc.), are to be taken because they serve a purpose regarding the issuance of the indictment depends on the case in question and jurisprudence but also on the State Attorney's approach. The State Attorney has to thoroughly study the file, assess the importance of the statements witnesses made and decide which witnesses should be examined before deciding on the charges. As a rule, these are just the actions necessary to enable the indictment to enter into force.

The said provision has been immediately amended, partly because the rights of the defendant were considerably restricted by it, allowing the defendant who has been advised of his rights to request from the State Attorney certain evidentiary actions to be undertaken and file a motion with the investigating judge for an evidentiary hearing. The provision has been completely altered by the last Amendment to the Criminal Procedure Code.

In addition to conducting the evidentiary actions which serve a purpose when the indictment is to be issued, the State Attorney is allowed to undertake certain evidentiary actions if the perpetrator is unknown and special evidentiary actions.

2.2. Investigation

2.2.1. Judicial Investigation versus the Investigation by the Prosecutor

Although the objective of the judicial investigation and the prosecutorial investigation is to clarify the matter through the investigation sufficiently so that the prosecutor may decide whether to issue the indictment or desist from prosecution, the two types of investigations differ considerably and not just in terms of who should conduct the investigation but also in the manner in which it is conducted, as well as the rights of the parties to the proceedings during the investigation.

Judicial investigation which used to be conducted by an investigating judge was often criticised. The most common objection was that it was too long. Since during the investigation most of the undertaken actions are the ones related to the information that was obtained during the inquiry and then the exact same actions were to be undertaken again at the main hearing. Although the judicial investigation is criticised a lot, it still should be mentioned that its greatest advantage was the fact that it was conducted by a judge and thus obtained evidence was later to be used in the proceedings. Alternatively, the prosecutorial, and in some legal systems the investigation conducted by the parties to the proceedings, is less formal, quicker but the actions undertaken during such an investigation, especially if it is party-led, do not have the strength and credibility as the actions undertaken by the investigating judge.

2.2.2. Investigation – How and When is it Conducted?

The Code passed in 2008 made a distinction between the ordinary and summary proceedings. Ordinary criminal proceedings were conducted in cases involving criminal offences which were under the jurisdiction of the County Court. The criminal offences which were subject to ordinary criminal proceedings could be divided into two categories based on whether the investigation was mandatory or optional.

The investigation according to the Code (2008) was initiated by an order issued by the State Attorney when it was determined that there were grounds for suspicion that a criminal offence had been committed. Investigation was based on the State Attorney's actions. Article 216, paragraph 1 of the Criminal Procedure Code (2008) stipulated that the investigation had to be conducted when the criminal offence was punishable under law by a long-term sentence and later amendments added if the perpetrator was mentally incompetent as well.

Pursuant to Article 217, paragraph 1 of the Criminal Procedure Code, the investigation order had to be issued by the State Attorney within twenty days from the day the criminal charge was entered into a register of criminal charges. In practice, the State Attorney issued an investigation order only if the investigation was mandatory.

The investigation order had to be served on the defendant by the State Attorney within eight days from the day it was issued together with the instruction on his rights. The State Attorney was allowed to postpone serving the investigation order for up to a month if serving it would put at risk someone's life, endanger them physically or the property on a large scale. This provision was not applied. From the moment of the receipt of the investigation order the defendant has all the rights of the defence except the right to examine the file, which he is entitled to after he has been questioned. The defendant did not have any legal recourse against the said order and for this reason it was stipulated that issuing the said order did not initiate the criminal proceedings, which were to be conducted before a court of law according to the Constitution of the Republic of Croatia. However, upon the receipt of the order and the instructions on the rights, the defendant was allowed to request from the State Attorney to undertake certain evidentiary actions during the investigation. If the State Attorney granted the said request, he would undertake the said action. If the State Attorney did not grant the defendant's request, the request was to be submitted to the investigating judge within eight days notifying the defendant thereof. The investigating judge would decide on the said request by an order. Article 226 of the Code stipulated that the investigating judge, when deciding on an issue, should render the decision on the suspension or termination of the investigation if he found that there were reasons for its suspension or termination.

2.2.3. The Duration of the Investigation

Pursuant to Article 230 of the Criminal Procedure Code (2008), the State Attorney had to complete the investigation within six months and if this was not possible, he had to report to the higher State Attorney what were the reasons for failing to complete the investigation. Paragraph 2 of the said Article stipulated that the higher State Attorney had to undertake measures enabling the completion of the investigation, for instance by assigning more State Attorneys (Deputies) to work on the said case, or assigning the case to another State Attorney etc. In more complex cases, the higher State Attorney could extend the set deadline for another six months, and in particularly complex and difficult cases, the Attorney General could extend the set deadline for the completion for another twelve months at the State Attorney's elaborated request.

2.3. Powers of the Investigating Judge and the Position of the Parties to the Proceedings during the Investigation

2.3.1. Duties and Powers of the Investigating Judge

The investigating judge decides whether to suspend or terminate the investigation, conducts the evidentiary hearing, decides whether the evidence is valid, decides on the protection of the witnesses, detaining and remanding in custody, bail and other measures. He also issues a search warrant, an order to undertake special evidentiary actions, authorises the State Attorney's actions in cases stipulated by the Code, etc. Therefore, his powers are broad and indisputable.

The defendant and the injured party may always address a complaint to a higher State Attorney due to the delays in the proceedings and other irregularities during the investigation. Higher State Attorney shall look into the allegations made in the complaint and if the complainant requested it, he would inform him of the undertaken actions. In order to ensure that the evidentiary actions are consistently undertaken and that the deadlines are met by the State Attorneys, the Law on State Attorney's Office would have to define more precisely what omissions by the State Attorney during the investigation constitute disciplinary offences.

2.3.2. The Rights and Duties of the Defendant and the Defence Attorney

The Code stipulates the rights and duties of the defence attorneys in detail. The defendant and his defence attorney have the right to request certain evidentiary actions to be undertaken, evidentiary hearing to be scheduled, etc. The defendant must be questioned before the investigation is concluded and he must be served the instructions on his rights. The defendant should be questioned by the State Attorney or, at his order, by an investigator. As he did not have the right to examine the file before being questioned, this part of the Code was amended prior to the Constitution Court's decision so that the defendant is now allowed to request to be questioned, which must be done within 30 days and after the set deadline expires, he had to be allowed to examine the file. The first time the defendant is questioned, an audio-visual recording of the questioning must be made.

2.4. The Decision of the Constitutional Court of the Republic of Croatia

As was already mentioned, the State Attorney was able to quickly and efficiently collect the necessary data after the Criminal Procedure Code (2008) entered into force, either by ordering the inquiry or even more by undertaking evidentiary actions which were often undertaken without an investigation order if the investigation was not mandatory.

The State Attorney used his powers effectively, especially in complex cases, however, since some attorneys filed a constitutional complaint immediately after the Code was passed, the Constitutional Court of the Republic of Croatia rendered decisions under the following reference numbers: U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011 of 19 July 2012 rescinding 43 articles in total of the CPC (2008) since they did not

comply with applicable law: Constitution of the Republic of Croatia, European Convention on the Protection of Human Rights and Fundamental Freedoms as well as other local and international law applicable when assessing constitutionality.

Immediately after the Decision of the Constitutional Court of the Republic of Croatia was passed, it was partly executed by harmonising the Criminal Procedure Code (2008) with legal opinions held by the Constitutional Court of the Republic of Croatia and amending 17 of the rescinded articles. The remaining part of the Decision of the Constitutional Court of the Republic of Croatia was executed when the Amendment of December 2013 came into effect since the Constitutional Court of the Republic of Croatia had set 15 December 2013 as the final deadline. Although fewer provisions were being rescinded, in order to harmonise the remaining part it was necessary to amend a considerable number of the existing provisions so it could be said that after the said Amendment came into effect a new Code was in essence created.

3. The Changes in the Powers of the State Attorney and Prosecutorial Investigation after the Amendment to the Criminal Procedure Code (December, 2013)

3.1. Inquiries

With regard to the inquiry, the Amendment has not introduced great changes while the duty of the police to detect and report the commission of criminal offences is emphasised. A significant innovation with regard to this is the provision of the new Article 206.i of the Criminal Procedure Code related to asset seizure. Namely, Article 77, paragraph 1 of the Criminal Code (2011) stipulates that proceeds from crime shall be seized by a court decision establishing that an unlawful act has been committed. Proceeds from crime are seized from the person they have been transferred to if it has not been acquired in good faith. Article 78 of the Criminal Code regulates the extended seizure of proceeds from crime. In order to be able to seize the proceeds from crime the amendment regulates the inquiries into assets and urgent evidentiary actions under a separate article. The new Article 206.i, paragraph 1 of the Code stipulates that when there is reasonable suspicion that a criminal offence has been committed which is prosecuted *ex officio* and that the proceeds have resulted from that criminal offence, the State Attorney must immediately undertake and order the inquiry and urgent evidentiary actions in order to determine the value of such proceeds and to determine where thus obtained proceeds are located. The second sentence of Article 206.i, paragraph 1 stipulates that if the proceeds are hidden or if there are grounds to suspect money laundering, the State Attorney must undertake all that is necessary in order to locate the assets in question and secure the seizure of such assets. The expression "all that is necessary" implies all actions and measures depending on the type of the acquired assets, the manner in which the criminal offence has been committed, especially if it has been committed as a part of a conspiracy to commit a crime, whether it is related to money laundering etc.

Since the value of the proceeds resulting from the commission of criminal offences which are under the jurisdiction of County State Attorneys or their Office is often extremely high, paragraph 2 of this Article allows special departments for such inquiries and actions to be established. In the most complex cases in which the obtained proceeds from crime of extremely high value, the State Attorney may request from the heads of the police and competent administrative authorities of

the Ministry of Finance to put their employees at his disposal to participate under his supervision in joint inquiries. Such employees are in a way delegated to the State Attorney and they act solely according to his orders.

3.2. Urgent Evidentiary Actions

The amended Article 212 of the Code specifies when urgent evidentiary actions may be conducted and by whom. The said Article prescribes who is authorised to conduct urgent evidentiary actions depending on the prescribed sanction. The procedure in particular cases is regulated according to the aforementioned criterion.

3.2.1. Urgent Evidentiary Actions Conducted by the Police

The amended Article 212, paragraph 1 of the Code stipulates that the police may, if there is a risk of delay, conduct a search (Art. 246), temporarily seize items (Art. 262), conduct a crime scene investigation (Art. 304), take fingerprints and the impressions of other parts of the body (Articles 211 and 307 of the Code) even before the criminal proceedings are initiated with regard to the criminal offences which are punishable under law by a term in prison of up to five years. The police does not need the State Attorney's order when undertaking these actions except for a search warrant which is issued by the investigating judge. In this case, the police does not notify the State Attorney prior to undertaking the said actions since paragraph 5 of the said Article stipulates that the results of the actions which the police has undertaken pursuant to paragraphs 1, 2 and 4 of this Article shall be reported to the State Attorney without any delay.

If a search warrant is necessary for the search regarding the criminal offences which carry a sentence of up to five years, the police shall submit the data to the State Attorney which provide legal grounds for the warrant to be issued. If the investigating judge has issued a warrant and ordered a search to be conducted by the police, they do not have to inform the State Attorney on the beginning of the search, instead, they just have to submit a report on the completed search without any delay.

3.2.2. The State Attorney's Decision on Undertaking Urgent Evidentiary Actions

According to the amended Article 212, paragraph 2 of the Code, the police must, prior to undertaking urgent evidentiary actions of search or crime scene investigation regarding the criminal offences punishable under law by a term in prison of more than five years which are under the jurisdiction of the Municipal Court, notify the State Attorney who may decide to observe the crime scene investigation or the search. If the State Attorney is present while the crime scene investigation or the search are in progress, he may conduct them personally or delegate the said actions to the police. Such a notification is not mandatory when it comes to undertaking evidentiary actions of temporary seizure of items and taking fingerprints and the impressions of other parts of the body. Naturally, the State Attorney may inform the police that he would not be present at the scene upon receiving the notification.

3.2.3. Urgent Evidentiary Actions Conducted by the State Attorney

The amended Article 212, under paragraphs 3 and 4 of the Code specifies when the urgent evidentiary actions may be conducted or ordered by the State Attorney.

The State Attorney conducts or issues an order for the urgent evidentiary actions to be conducted in two situations:

- if the criminal offence in question has been committed by an officer who is authorised and under an obligation to report criminal offences,
- and if the criminal offence in question falls under the jurisdiction of a County Court.

The amended Article 212, paragraph 3 of the Criminal Procedure Code stipulates that the police must immediately inform the State Attorney if urgent evidentiary actions need to be undertaken against an officer who is authorised and under an obligation to detect and report criminal offences which are prosecuted *ex officio* and fall under the jurisdiction of the Municipal Court. The State Attorney must immediately decide whether he would personally undertake the said action or issue an order for an investigator to do it. The provision has been introduced into the Code in order to eliminate any doubt that might be cast on the results of the undertaken urgent evidentiary actions.[3] The State Attorney in such a case must decide immediately, depending on what criminal offence has been committed and under what circumstances, whether to undertake the evidentiary actions in person. When the criminal offence has been committed by an officer in service (e.g. inflicting a serious injury on an arrested person etc), the State Attorney shall not issue an order for an investigator to undertake the said evidentiary action, he must undertake it himself. A number of judgments have been passed by the European Court of Human Rights finding the Republic of Croatia in violation of the European Convention on Human Rights precisely because such criminal offences have been investigated by the police stations or administrative authorities employing the officer accused of committing the said criminal offence. Undertaking urgent evidentiary actions by the State Attorney on the one hand ensures the impartiality of the proceedings and on the other hand it protects the police from potential complaints on biased proceedings at a later time.

The State Attorney is immediately notified by the police if there is a risk of delay regarding the criminal offences which are under the jurisdiction of the County Court and if there is the need to undertake urgent evidentiary actions except in case of the temporary seizure of items. The State Attorney decides if he is to undertake the said action or order the investigator to undertake it.

3.3. Investigative Actions

While it was relatively simple to regulate the issue of judicial protection against unlawful (arbitrary) criminal prosecution for offences which are being investigated, in the proceedings regarding the criminal offences for which the investigation is not being conducted this was much more difficult. According to Article 2, paragraph 5 of the Criminal Procedure Code (2008) it was

3 Article 67, paragraph 3 of the Law on the State Attorney's Office stipulates the procedures for the investigation and investigative actions if the investigation or investigative actions are conducted against a police officer or some other officer who is authorised and under an obligation to detect and report criminal offences prosecuted *ex officio*.

stipulated that the criminal prosecution was to be initiated when the criminal charge was entered into the register of criminal charges. However, since the moment of initiation of the criminal prosecution may not be the same as the moment when the criminal charge is entered into the register of criminal charges according to the Decision of the Constitutional Court of the Republic of Croatia the act of entering the criminal charge into the register of criminal charges "cannot be qualified, by the nature of the matter, as the first act which initiates the criminal proceedings against a certain person, an act which represents in itself a restriction on the fundamental rights and freedoms".

Under item 39.8 of the Decision, the Constitutional Court of the Republic of Croatia concludes that a lack of measures for judicial protection against unlawful (arbitrary) criminal prosecution is an indication of flaws in the normative structure of the preliminary proceedings. The Constitutional Court has imposed a constitutional obligation on the legislator "to determine the moment when a person acquires the status of a suspect and to define the obligation of notifying the said person of this fact in accordance with the previously established legal positions in cases when the investigation is not conducted."

Due to the aforementioned, the Amendment prescribes that the State Attorney must notify the person for whom there is reason to suspect that they have committed a criminal offence about the first evidentiary action that has been undertaken within 3 days from the moment of undertaking it. From that moment, the person in question is also subject to certain procedural guarantees referred to under Article 28 in the part related to the criminal matters of the Constitution and Article 6 of the Convention "to the extent in which it is probable that the fairness of the trial would be seriously compromised by omitting to observe its provisions in the first place" (judgment in the case Kuralić vs. Croatia, 2009, § 44). Furthermore, according to the decision of the Constitutional Court (item 39.3.) with regard to the scope of the requested judicial protection at the preliminary and investigative stages of the proceedings, such protection must include fundamental issues of legality of the preliminary proceedings. The courts must review if the prerequisites for criminal prosecution have been met and if there are reasons which preclude criminal prosecution.

3.3.1. The Commencement of Investigative Actions

Investigative actions in terms of the amended Article 213, paragraph 1 of the Criminal Procedure Code include undertaking evidentiary actions against a known perpetrator for the purpose of deciding whether to issue the indictment concerning the criminal offences punishable under law by a fine or a term in prison of up to five years. The investigative actions start when the defendant is notified thereof. As has been already mentioned, the Amendment stipulates that the defendant is entitled to notification that certain actions are being undertaken against him within three days from the moment the first evidentiary action was undertaken.[4]

What evidentiary action would be undertaken first depends on each particular case. The State Attorney conducts the investigation in person or orders the investigator to conduct certain evidentiary actions.

4 This does not refer to urgent evidentiary actions stipulated under Article 212 of the amended Criminal Procedure Code.

3.3.2. Notifying the Defendant

The amended Article 213, paragraph 2 of the Criminal Procedure Code stipulates that the State Attorney must serve a notice on the defendant on undertaking evidentiary actions within three days from the moment the first evidentiary action was undertaken pursuant to paragraph 1 of this Article. In the said notice, the State Attorney must specify when and what evidentiary action has been undertaken first and this notice must be accompanied by an instruction on the rights.

In addition, the State Attorney should, according to internal instructions,[5] even though it is not specifically stipulated by the Code, notify the defendant that the evidentiary actions are going to continue and at the end of the notice refer to the enclosed instructions on the rights he has after the receipt of the said notice. At the end of the said notice, the State Attorney must instruct the defendant that he is entitled to request evidentiary actions to be undertaken upon receiving the notice and the investigating judge may be requested to schedule an evidentiary hearing.

Upon receiving the notice, the defendant is entitled to the rights listed in the instructions on the rights, i.e. he is entitled to know what he is accused of,[6] that he does not have to defend himself, that he has the rights pursuant to Article 184, paragraphs 4 and 5 of the Code the right to examine the file etc.

The defendant is entitled to request certain evidentiary actions to be undertaken upon receiving the notice. Upon receiving the request to undertake evidentiary actions, the State Attorney shall proceed in the same way as he does during the investigation, i.e. if he does not grant the request, it is submitted to the investigating judge.

3.3.3. Failure to Notify: Repercussions

The new Article 213.a of the Criminal Procedure Code stipulates the repercussions if the defendant has not been notified after the first evidentiary action was undertaken. If the State Attorney has not served the notice pursuant to Article 213, paragraph 2 of the Code, but the evidentiary action of questioning a witness has been undertaken, the defendant has the right to request the said evidentiary action to be repeated by the State Attorney, and if he does not grant the said request, the request should be submitted to the investigating judge. Therefore, there are two types of situations. If the State Attorney has undertaken the first evidentiary action and then, for instance, the evidentiary action of requesting expert witness's opinion, without first notifying the defendant, according to the new amendment he does not have to repeat the said action. If the evidentiary action in question is interrogation of a witness, the defendant has the right to request the interrogation to be repeated. If the State Attorney does not wish to undertake the requested action then he has to submit the request to the investigating judge. In any case, the report on the evidentiary action concerning the questioning of the witness by the State Attorney without informing the defendant shall be excluded from the file and shall not be allowed to be used as evidence.

5 Handbook on the Practice of State Attorneys p. 337.

6 Usually factual and legal description of the offence is provided under item 1 of the instructions on the rights as well as the legal qualification as accurately as it can be determined according to the description of the offence at that stage.

The Code also stipulates that the repeated questioning shall be undertaken in the presence of the defendant and the defence attorney if he has one. The said persons may object to the report which shall be included in the final report. Therefore, the defendant who is present at the questioning of the witness has just the right to object to the report. However, the State Attorney's Office has adopted a practice long ago to allow a question requested by the defence to be asked if the State Attorney finds it to be well-founded and decides it should be asked since it is in the interest of the State Attorney to resolve the matter as soon as possible in order to pass a decision.

3.3.4. The Amendment and its Consequences

The very first experiences already indicate that the aforementioned changes are going to considerably affect the work of the State Attorney. So far the State Attorney could undertake evidentiary actions and decide after that whether he would issue the indictment or dismiss the charges. Now the State Attorney must notify the defendant and the injured party, i.e. the victim, of the start of the investigation, he must undertake actions ordered by the investigating judge, write reports on the proceedings etc, which increases his workload additionally in the proceedings involving minor criminal offences. There is a risk, and the first feedback supports this claim, that the State Attorney is going to focus more on following the procedure than on the content of particular actions, which is going to have an adverse effect on the efficiency of the prosecution.

3.4. Investigation

The investigation is conducted with regard to the criminal offences punishable under law by a term in prison of more than five years. As far as the evidentiary actions during the investigation and the course of the investigation are concerned, the Amendment does not introduce any significant changes. Significant changes have been introduced in accordance with the Decision of the Constitutional Court regarding the right of the defence to an effective legal recourse in terms of the completion of the investigation as well as the deadline for passing the decision.

The Amendment stipulates that the State Attorney should no longer issue an investigation order, which could not be appealed, but a decision on conducting the investigation against which an appeal may be filed by the defendant within eight days. Consequently, the defendant has been provided with an effective legal remedy against unlawful (arbitrary) criminal prosecution.

Prior to passing a decision on whether to conduct the investigation, the State Attorney or the police may conduct urgent evidentiary actions as stipulated by the amended Article 212 of the Code. Apart from the urgent evidentiary actions, the State Attorney may prior to the rendering of the decision on whether to conduct the investigation question the suspect. He cannot undertake other evidentiary actions.

3.4.1.Mandatory Investigation

According to the amended Article 216, paragraph 1 of the Code, the investigation is conducted with regard to the criminal offences punishable under law by a term in prison of more than five years, except in the case stipulated under Article 341, paragraph 3 of the Code.[7] With regard to the criminal offences punishable under law by a term in prison of more than five years, but not more than 15 or long-term imprisonment, the investigation is to be conducted, but under special circumstances a direct indictment may be issued even without conducting an investigation if the results of the undertaken actions regarding the said criminal offence and the offender provide sufficient grounds for the issuance of the indictment. With regard the criminal offences punishable under law by a term in prison of more than 15 years or long-term imprisonment, the investigation is always conducted. The State Attorney's Office warned when the Amendment was being passed that this would influence greatly the efficiency of the proceedings. State Attorney's Office proposed, similar to what was stipulated by the Criminal Procedure Code (1997), that the State Attorney should be allowed, depending on the complexity of the case file, to decide whether to issue a direct indictment or conduct an investigation with regard to criminal offences punishable under law by a term in prison of up to eight years. This would restrict the investigation to cases under municipal jurisdiction involving serious criminal offences and the cases where the facts are such that the investigation is necessary.

In addition to urgent evidentiary actions that precede the decision on conducting the investigation, the State Attorney may question the defendant. Therefore, that is the only evidentiary action which is not urgent and which may be undertaken before the decision on conducting the investigation is passed. After having questioned the defendant, the State Attorney must decide on whether to initiate the investigation within 48 hours.

The phrase "decide whether to initiate the investigation" means that the State Attorney must render a decision on conducting the investigation within 48 hours from the moment the defendant is questioned or dismiss the charges if he has found after questioning the defendant that there are no grounds to proceed, and only under special circumstances should he continue with the inquiry and only after that decide on the said issue.

3.4.2. The Decision on Conducting the Investigation and its Service

According to the Criminal Procedure Code (2008), the State Attorney used to issue an investigation order when there were grounds to suspect that the suspect had committed a criminal offence he was accused of. Now the State Attorney may render a decision on conducting the investigation when there is a *reasonable* suspicion that the said person has committed a criminal offence which is subject to investigation provided there are no legal impediments for the criminal prosecution of the said person.

7 Amended Article 341, paragraph 3 of the Code stipulates that under special circumstances a direct indictment may be issued when the State Attorney, after having questioned the defendant, believes that other evidence in the case file are sufficient for the indictment to be issued without having conducted the investigation, unless the criminal offences in question require mandatory investigation.

The decision on conducting the investigation is essentially of the same content as the investigation order. The State Attorney must specify in the very decision on conducting the investigation which urgent evidentiary actions have been undertaken prior to the said decision, which circumstances he intends to investigate and what evidentiary actions he is going to undertake and, of course, an instruction must be included. Along with the decision on conducting the investigation, the defendant must receive instructions on his rights by the State Attorney.

The decision on conducting the investigation is served on the defendant within eight days from the time it is rendered at the latest. The defendant may file an appeal against the decision on conducting the investigation with the investigating judge within 8 days from the day of the receipt. The appeal is filed with the State Attorney who has to submit it to the investigating judge along with the case file. The new Article 218.a of the Code stipulates the criminal offences with regard to which the service of this decision may be postponed for 30 days if the service of the said decision would put someone's life at risk or physically endanger a person or property on a large scale.

If an appeal is filed, the investigating judge may dismiss the appeal in a ruling as untimely or inadmissible, reject it as unfounded, or grant it and overturn the decision on conducting the investigation. The innovation is that the investigating judge may return the case file to the State Attorney and order certain evidentiary actions to be undertaken necessary for the ruling on whether the decision on conducting the investigation is well-founded. The State Attorney must undertake the ordered actions and subsequently submit the file to the investigating judge for a decision.

3.4.3. Case File

The Amendment specifically stipulates the procedure for the State Attorney to follow with regard to compiling the file on the case which is being investigated. According to the earlier provision, only after the investigation was completed, the State Attorney would compile the file on the investigation from his file. Now he must open the case file before the decision on conducting the investigation is rendered, i.e. before the first evidentiary action is undertaken pursuant to Article 213, paragraph 1 of the Code.[8] It is stipulated, which is unlike the current provision, that once formed case file shall accompany the indictment. After the completion of the investigation, according to Article 89 of the Code, unlawful evidence is excluded from the file, i.e. the notes which must be excluded prior to the issuance of the indictment with regard to the criminal offences punishable under law by a term in prison of over five years.[9]

The reasoning for this provision is in line with the spirit of the Decision by the Constitutional Court. In certain cases which contained a great number of written documents, the State Attorney did not immediately allow the defendant to examine the file at his request. The justification the State Attorney offered in such cases was that the file needed to be prepared, that it was required for work etc. In order to prevent such practices, the provision was introduced stipulating that the file must be compiled in advance so that it may be examined by the defendant immediately after he is allowed to exercise this right.

8 Case file definition is provided under the amended Article 202, paragraph 39 of the Code.
9 The notes are excluded after the indictment panel's decision if the indictment was issued for a criminal offence punishable under law by a term in prison of up to five years.

3.4.4. Evidentiary Actions during the Investigation and Public Access to the Investigation

As before, the State Attorney undertakes during the investigation necessary evidentiary actions, i.e. orders such actions to be undertaken by the investigator.

It is important to mention that the amended Article 219, paragraph 3 of the Code stipulates that the defendant is to be questioned by the State Attorney when the criminal offence in question is under the jurisdiction of the County Court.

The investigation is not public. Under special circumstances if the legal requirements have been met, as stipulated under Article 388 of the Code,[10] the authority conducting the investigation may pass a ruling declaring the investigation secret in its entirety or in part if publicising the information from the investigation would not be in the interest of the proceedings.

3.4.5. Who Should Conduct the Investigation

The investigation is conducted by the State Attorney. The State Attorney may order the investigator to conduct the evidentiary actions, apart from the examination of the defendant who is under the jurisdiction of the county, and he must act as ordered by the State Attorney.

It is stipulated by law that in complex investigations, pursuant to the decision rendered by the State Attorney, in addition to the investigators, consultants and expert associates may participate. They may prepare certain evidentiary actions to be undertaken, take statements and receive proposals and independently undertake an evidentiary action entrusted to them by the State Attorney. The State Attorney shall sign the report on such an action no later than within 48 hours from the time it was undertaken. Moreover, in order to clarify certain technical or other expert issues concerning the collection of evidence or with regard to undertaking evidentiary actions, the State Attorney may request appropriate professional institutions or experts to provide him with necessary explanations on which the State Attorney shall draw up a report.

3.4.6. Completion of the Investigation and the Deadline for Issuing the Indictment

Article 228, paragraph 1 of the Code has remained unaltered. The State Attorney or the investigating judge complete the investigation when the evidentiary actions required by law have been undertaken and the facts of the matter have been sufficiently clarified during the investigation to allow the indictment to be issued or to terminate the proceedings. The conclusion of the investigation is entered into the register of criminal charges and the defendant and the injured party are notified thereof. Until the receipt of the said notice, both the defendant and the injured party may request evidentiary actions to be undertaken.[11]

The State Attorney must complete the investigation within six months. If the investigation does not end within six months, the State Attorney must inform the higher State Attorney on the

10 The cited Article lists the reasons due to which the court may exclude the public from the main hearing.
11 Amended Article 234, paragraph 1 of the Code.

reasons for failing to complete the investigation. The higher State Attorney must undertake measures ensuring that the investigation is completed. In complex cases, higher State Attorney may at the elaborated request filed by the State Attorney extend the allowed six months for another six months. In particularly complex and difficult cases the Attorney General must at the elaborated request by the State Attorney allow that a deadline for the completion of the investigation of six months is extended for no more than another twelve months. The defendant and the injured party may file a complaint during the investigation with the higher State Attorney citing the delays in the proceedings and other irregularities in the course of the investigation.

After the completion of the investigation, pursuant to amended Article 230 of the Code, the State Attorney must issue the indictment or suspend the investigation within 15 days from entering the conclusion of the investigation in the register of criminal charges and within 30 days in complex cases. The set deadline may be extended by the higher State Attorney at the request of the State Attorney for no more than another 15 days, and in complex cases for no more than another 30 days, and under special circumstances if the indictment could not be issued due to *force majeure*, the higher State Attorney may allow a time extension of another 15 days. Failure to meet the set deadlines, especially if a time extension was not requested, constitutes a serious disciplinary offence for which it is possible to render a decision on relief of duty of the State Attorney or the Deputy State Attorney, since paragraph 5 of this Article stipulates that if the State Attorney does not issue an indictment within the set deadlines, it is considered that he is desisting from criminal prosecution. If the disciplinary proceedings prove that the omission has occurred due to the commission of a disciplinary offence, the proceedings may be renewed.

3.5. The Rights of the Injured Party and the Defendant during the Investigation

During the investigation the defendant and the injured party may file a complaint with the higher State Attorney due to the delays in the proceedings and other irregularities in the course of the investigation (amended Article 229, paragraph 3 of the Code).

The defendant may file a complaint with the higher State Attorney if he has been questioned and the State Attorney has not passed a decision on conducting the investigation nor has he issued a direct indictment. The higher State Attorney must examine the allegations of the complaint and if the complainant requested it, inform the complainant of the undertaken actions.

As before, amended Article 234 of the Code prescribes the right of the defence to request evidentiary actions to be undertaken by the State Attorney. If the State Attorney grants it, he shall undertake the said actions, otherwise the request shall be submitted to the investigating judge within eight days notifying in writing the defendant thereof. If the investigating judge grants the request for evidentiary actions to be undertaken, the State Attorney shall be ordered to undertake them, and if the request is not granted, the defendant shall be notified thereof. Paragraphs 3 and 4 stipulate the manner in which the evidentiary actions requested by the defendant are to be undertaken.

3.5.1. Protection of Procedural Rights of the Defence during the Investigation and Investigative Actions

The new article 239.a of the Code stipulates the right of the defence to file a written complaint with the State Attorney after receiving the decision on conducting the investigation or the notice on the undertaken evidentiary actions if the defendant deems that his rights have been unlawfully denied to him or that they have been violated. The complaint should contain a reference number of the case subject to decision and the actions with regard to which it is filed, as well as the period referred to in the complaint and a proposal on how to exercise the denied right.

The State Attorney must immediately, and no later than within 8 days from the receipt of the complaint, render a decision, if he does not uphold the complaint, it shall be submitted with the investigating judge within the set deadline, who will then decide on the complaint immediately or no later than within 8 days from the receipt of the complaint. If the investigating judge upholds the complaint and it is possible to exercise the said right, i.e. the action may be repeated, the State Attorney shall be ordered to allow the said right to be exercised or to undertake, i.e. repeat, the said action within the set deadline. When the criminal offence is punishable under law by a term in prison of up to five years, the investigating judge may render a ruling stating that the legal requirements for investigative actions have not been met.

4. Concluding Remarks on the Criminal Procedure Code (2008) and its Amendment (2013)

It is indisputable that the provisions of the Criminal Procedure Code regarding the prosecutorial investigation have influenced how prompt and efficient the criminal proceedings are.

Statistical data on the work of the State Attorney's Office collected by the office show that promptness of their work has been considerably improved. The State Attorney's Offices resolve a vast majority of the charges within two months, there is a smaller number of charges which are not resolved within six months in which case a higher State Attorney's Office must be notified. Such promptness of the proceedings has been greatly influenced by the Criminal Procedure Code which allows the State Attorney to conduct an inquiry.

Apart from the aforementioned, in the most complex cases involving economic crimes and corruption, without the State Attorney's powers during the investigation, the results which have been achieved and which have been of great importance during the process in which the Republic of Croatia joined the European Union would not have been possible.

However, it should be stressed here that the Code alone is not enough, it is only if the State Attorney applies all of the provisions he has at his disposal, if he uses the possibility of plea bargaining and agreements on the sanctions which are to be proposed, etc., that the Code may be successful.

It is quite certain that the changes introduced by the Amendment are going to influence the efficiency when obtaining the evidence, but if the actions are planned, the standard of quality during the inquiry is maintained and if certain actions are undertaken when it is decided that it would be optimal, the potential negative effects of the said Amendment, which undoubtedly provides greater rights to the defence, may be reduced and the Amendment should not have a considerable effect on the efficiency of the proceedings or on how fast they are unfolding.

Zvonko Fišer, PhD[1]

Conducting Investigations in Slovenia: Experiences of the Prosecution

1. Introductory remarks

The Criminal Procedure Code (CPC) of Slovenia was adopted in 1994.[2] It was an act which greatly relied on the last Yugoslav procedural code enacted in 1977 since at that moment there was neither time nor will to make some substantial amendments. Understandably, the Code inherited the conceptual approach which was characteristic of its predecessor as well as its basic structure, main participants, and the course of proceedings. Formally speaking, that Code is still in force and come autumn, we will celebrate its twentieth anniversary.

It is easily presumed that over the course of time and during its existence, the Code has undergone some major changes. It has been forced to go between the Scylla and *Charybdis* of challenges set to it by everyday events, or »the practice« as we like to call it and the lawmakers have been more than willing to accommodate its requests for amendments. Moreover, it was »under attack« by numerous Constitutional Court decisions coming from all directions. At first, the Court was finding serious conflicts with the Constitution in regard to every issue it looked at. Recently, such interventions from the Constitutional Court have been less frequent. Theoretical thought has had a limited influence on the amendments made to the CPC of the Republic of Slovenia. It could be said that the highest judicial instances where those who relied on it maybe even more than the lawmakers. During the first phase, theorists were cautious supporters of the reform of procedural law, following a prevailing trend in many other European countries.[3] As time passed by, that

1 Chief Prosecutor of the Republic of Slovenia, university professor of law.
2 The first version of its text can be found in the *Official Gazette of the Republic of Slovenia* no. 63/94.
3 See Šugman, K. (ed.), *Izhodišča za nov model kazenskega postopka*, Institute of Criminology at the Faculty of Law Ljubljana, 2006. The drafting of the first part of the new CPC-1 had followed (until the conclusion of preliminary proceedings, Article 343), after which all the serious and systematic efforts to prepare the CPC-1 were virtually abandoned, with the exception of some occasional, mostly politically motivated attempts.

enthusiasm has worn off. At present, a sum total of CPC amendments include some two-dozen more or less comprehensive amendments and the procedure for passing the set of ammendments called CPC-M is underway while this paper is being written. As an illustration, the Code could be compared to beggar's clothes whose original material can no longer be differentiated from patches subsequently sewn onto holes due to its worn-out state.

The above accounts for how it came about that there are (still) pre-trial proceedings divided into preliminary investigation, managed by authorities in charge of crime detection and state prosecutors, and investigation managed by investigating judges. The following paragraphs will mainly focus on the role of state prosecutors in preliminary proceedings, first in the course of preliminary investigation and then in the investigation.

2. Several critical thoughts on the origins and basic structure of preliminary investigation and regulations which govern it

2.1. Those who still remember the Yugoslav CPC of 1977 and those who studied it are aware that its governing principle was that investigative activities should be conducted by the police (at that time referred to as: authorities of interior affairs), an independent administrative body. Police activities did not originally draw on the provisions of the criminal procedure law (or the CPC), but it was believed that they constituted an actual administrative activity of special type. As a result, the powers of law enforcement authorities concerning detection of criminal offences and offenders were rather suggested than specified.

Regardless of the above, the law enforcement authorities *de facto* had a very powerful position in the procedure. The first reason was the standard one, given the fact that the greatest power is concentrated in the hands of those to whom most of the information is available. The police cannot be rivalled in that regard and one should be aware of that. The impact of information collected by the law enforcement authorities in the course of detection activities at the initial stages surpassed by far the effect attributed to it by the legislator (grounds for decision by the prosecuting authority) and extended – sometimes directly, other times indirectly – to the final decision in a criminal case.[4] The legislator should be held responsible for the second reason. The model he had conceived (a division of tasks and responsibilities, as well as excluding the police from criminal proceedings) was idealistic and could not function successfully, among other things owing to the fact that other participants in the proceedings – in particular the public/state prosecutor as the prosecuting officer – were too weak.

De iure, or more precisely, as conceived by the then legislator, the key authority in preliminary investigation was to be the prosecuting authority and that was the public/state prosecutor. His most important task was to decide whether or not he was going to bring criminal prosecution in

4 I would not elaborate on this issue if it did not also concern the central problem of the so-called latter-day reformed criminal proceedings. It is perhaps even more strongly manifest in them. As opposed to the previous situation in which the investigation, *i.e.* judicial stage in the proceedings was present in the basic structure of proceedings, located in between the investigative stage managed by the police and the trial, it is absent from the reformed proceedings. Schematically speaking, there is a direct transition from the stage of police investigation into a trial. This could explain why some speak in favour of referring to the initial stage in the proceedings as an investigation (which can be associated with judicial investigation from the point of view of terminology), thereby only just covering up the fact that the judicial inter-phase (which undoubtedly fulfilled the function of judicial oversight and thus of the guarantor) is actually gone.

a particular case. In principle, when making such a decision, he had to observe the principle of legality. Preliminary investigation was his investigation in a way or a procedure primarily conducted for his purposes. Such an investigation should provide or result in collecting a sufficient amount of information needed by the prosecutor to reach his decision. Information collected at that stage, as well as later in the course of proceedings, was used for the purpose of conducting proceedings.[5] The preliminary investigation was (and in that regard it still is) a type of an informational framework of criminal proceedings initiated in connection with criminal offences prosecuted *ex officio*. The relationship between the police and the state prosecutor was the key relationship in the preliminary investigation.

From the very beginning, it was planned that there would be another participant in preliminary investigation on the side of the state – an investigating judge. His role, although less prominent with regard to the quantitative aspect of that stage, was essential, even though, at least initially, it was not possible to claim that it was clear to the legislator which decisions should be made by an investigating judge and to which end.[6] In any case, we can assert with certainty that the legislator had not envisioned that stage as a judicial proceeding or as a proceeding under the control of the court.

The above mentioned three-way relationship between the police, state prosecutor, and investigating judge was the true *folie a trois.* The police were independent in their actions and mostly did not tolerate well anyone's interference in their work. The police had developed a theory of the so-called separate success, which held that police's task was to draw up a solid criminal charge, whereas other matters did not concern them. It was revealed in practice that the police had lacked knowledge of the procedural matter necessary for carrying out efficient investigations (in terms of the direction which should be taken in each particular investigation, evidence that should be collected, the issues of substantive and procedural law which were decisive in each specific case, etc.) and that their experience with regard to procedural law was, understandably, (almost) non-existent.[7] Supposedly, the "law" was to blame since it had left the police out of the criminal proceedings and deprived them of having any official influence thereon.

The Code had pushed back state prosecutors into the position of an office-based authority, making them a type of armchair prosecutors. As previously mentioned, they were tasked with making decisions to bring prosecution, then issue indictments and represent them before the court.[8] Police activities aimed at discovering perpetrators and finding evidence were of little interest to them, other than in exceptional cases, even though they had the right to set the course of preliminary investigation.[9] A softer option for achieving balance in the relationship between the police and prosecuting authority was selected. The police remained independent and prosecutors were

5 In order to avoid misinterpretation, it needs to be stressed that this concerns more the information about sources of evidence, *i.e.* information which can be used to obtain *media probandi* suitable to be used at the trial stage, than information obtained during the investigative stage that can be directly used in the trial.

6 However, the law still insists, in the manner of the good old Hans Gross, that in urgent cases investigating judges should take part in crime scene investigation, although it is widely known that such practice has been stopped in the overwhelming majority of cases and that the focus of actions taken by judges in preliminary investigation has shifted to entirely different tasks.

7 It is implied that this statement refers to criminal cases which are complicated in some respect (complex factual situations, borderline classifications of offences, high standard of proof) and to common crimes.

8 This is still the case; see Article 135 of the Constitution of the Republic of Slovenia (RS).

9 A provision governing public/state prosecutors' right to direct the course of preliminary proceedings was included in the CPC when it underwent a wide-ranging reform of procedural law in 1967; see Article 44, paragraph 2, item 1 of the CPC (*Official Gazette of the SFRY*, no. 23/67).

given an opportunity to influence police work, although it was not planned that it would be under their (direct, operational) control.

At first, the role of investigating judges was pretty much up in the air. As we have seen, preliminary investigation had not been designed as their procedure. Over time, the competences related to the infringement of human rights and freedoms occurring in the investigative stage of the proceedings had begun to be associated with investigating judges, up until the moment when the proceedings would in any case come within their jurisdiction. Such an idea has never been systematically provided for by the law, but truth to be told, up until this point, that pattern has already become so well-formed, fixed and clear that it has to be taken into account as reality. It can be seen from the measure in which it has spread into that section of the Slovenian Code which should govern preliminary investigation[10] and ultimately, from the title of a separate chapter in the Code.[11]

The relationships that built between the three participants in preliminary investigation were rather interesting. Even though the closest and strongest relationship should have been established between the police and state prosecutors, that has not always been the case. That did not mean that there were not numerous promises of cooperation in principle or effective cooperation in specific cases, but there was no true "love". The prosecuting authority faced difficulties when it came to instructing the police, which had impacts on various levels; the prosecution lacked both experience and knowledge needed to provide instruction and there were never enough prosecutors to deal with far more numerous police and the like. Paradoxically, when the process of giving instructions was concerned, it depended in the first place on those who needed to be instructed. If the police failed to submit to the prosecution concrete and adequate information about a criminal offence, prosecutors could not – as simple as that – efficiently direct the police. Also, even when an effort was made to regulate the notification system, it turned into formalism, as we will see, because the very starting point was flawed. Instead of realizing that instructing the police what to do constituted prosecution's right and that it was a process that was markedly related to the issue of quality (rather than quantity), there were attempts to regulate a number of technical details, which threatened to end in failure legislator's perfectly sound idea.

For a long time, the Code had disregarded the role of the prosecutor as the prosecuting authority because it was obviously believed that stress should not be laid on prosecutor's decision to bring criminal prosecution as his key and central role. In other words, procedure was definitely regarded as actions taken by public authorities rather than as adversary proceedings or some small-scale version thereof. Instead of providing for a chain of decision-making that would clearly and without any exceptions start with the police, after which the prosecution and finally the judge would take over (when necessary), it was not rare that the Code simply overlooked the prosecution and provided for or allowed direct communication between the police and judges.

However, such a situation was untenable because it created at least two essential dysfunctionalities: in the first place, the police had become an authority that instituted criminal proceedings (which the law aimed to prevent); also, it was equally wrong to consider such a measure as

10 Presently, there are 33 Articles in the chapter, some of which are several pages long. Practically, there has been no amendment without a new article being incorporated into it and new articles are also planned to be included in a forthcoming act (currently being drafted).

11 See Chapter XV of the CPC, whose title is Preliminary Investigation. This is the first chapter in the part two of the Code titled Preliminary Investigation. It is followed by Chapter XVI: Investigation.

judicial action by virtue of office since in such cases judges would take over the function of the prosecuting authority. In short, it was a non-systematic solution because under no circumstances should it have been allowed that the authority which decided whether or not there would be criminal prosecution at all was left out or excluded from the decision-making process. A definite sign indicating that the actual situation with regard to that issue had become clear to the stakeholders was a decision by the Constitutional Court of the Republic of Slovenia (RS) on undercover investigative measures late in 1997.[12] The Constitutional Court found that, *inter alia*, the police might only give the initiative to the state prosecutor for such actions to be taken, but the prosecutor was the only one who could file a motion to such end to an investigating judge.[13]

It was also convenient for the police to communicate directly with investigating judges simply because their decisions acknowledged police endeavours to the greatest possible extent. An investigating judge was not a demanding partner to the police since, as a rule, he could not request anything from them, in particular activities in terms of criminal prosecution: that would be outside his jurisdiction. As opposed to this, state prosecutors did make demands to the police if they opted for directing them. With the aim of ensuring successful prosecution in the future, prosecutors usually demanded a lot from the police, more than they were willing to do.

2.2. As a challenge, I described preliminary investigation as a non-existent procedure some time ago. My intention in doing so was to draw attention to the fact that it was a stage in the proceedings which was not provided for or regulated by the legislator.[14] Regulations to that end have been adopted over time and step by step. Actually, it was a phase that has always been present (investigative activities which followed directly after the perpetration of a crime), the only difference being that legislators would, depending on their own concept of criminal procedure, arrange it in this or that order, without providing for it by law in a systematic manner.

It was becoming evident that the position on strict division between detection and prosecution was untenable. On the one hand, the amount of evidence collected in the course of preliminary investigation which had decisive effect on rendering decisions on the matter was increasing. Undercover investigative measures come to mind as they are routinely undertaken in the early stages of proceedings and can provide important if not crucial evidence for conviction.

12 Or on special operational methods and techniques as we used to call them. See a decision by the RS Constitutional Court, no. U-I-25/95 dated November 27, 1997. For more on this: Fišer, Z., "Posebne operativne metode in sredstva ter delitev procesnih funkcij v predkazenskem postopku", PP, 1997, no. 17/18, pp. IV-VIII.

13 It came as a great surprise that only recently has the Constitutional Court of the RS rendered a decision by which it defined the same conditions for searches of residence. The law requires that the search of residence shall be ordered by the Court (as a rule), but it does not specify who can apply for it. For a long time, the case was that the police could apply for search warrants, even though such a solution was inconsistent with the system of procedural law since the police could not "go over the head" of the authority which decided whether or not criminal prosecution would be instituted at all. It would be equally inadequate if one presumed that a judge could order investigation *ex officio* because if that were the case, he would transform from the judge-guarantor into a judge-investigator or even someone who fulfilled the function of the prosecution. Nowadays, it is clear that only prosecutors are authorised to apply for search warrants. What was interesting in this process was that prosecutors were not thrilled with the decision, even though it acknowledged their role in criminal proceedings. Truth to be told, prosecutors' reservations were not a matter of principle, but they pertained to the fact that as a result, the volume of prosecutors' work had increased considerably. Those matter-of-principle reservations emerged among prosecutors in the second half of the 1990s when the Constitutional Court decided that remand (and other restrictive measures imposed on persons and property) could be ordered only if an authorised applicant (state prosecutor) applied for it and that it could under no circumstances be ordered by the Court acting *ex officio*. It is evident from this very instance how slowly has the concept of an active role of the prosecuting authority in proceedings which are not established as adversary proceedings spread.

14 Even though the legislator knew that he had to regulate it. Thus, the chapter previously titled Criminal Charges was renamed by the legislator to Preliminary Investigation in the CPC passed in 1994. Ever since (or if truth be told, few of them existed before), provisions governing the activities of various authorities from the moment a crime is perpetrated to the moment a criminal case comes under the jurisdiction of the Court have started to be included in that chapter.

Some criminal offences are proven in such a manner with increasing frequency. In cases when evidence obtained during preliminary investigation can constitute grounds for a decision on the matter, the cooperation from the Court or Court's actions are literally imperative. Subsequent judicial control exercised at the trial stage may not suffice. Procedure that does not guarantee judicial control of decisive evidence at the time at which it emerges, at least as much as possible, cannot be considered fair criminal procedure.

On the other hand, measures which encroach upon human rights and freedoms may not be taken without a court decision. This refers in the first place to restrictive measures imposed on persons or property. Some of them are implemented later in preliminary investigation, in particular those pertaining to property (asset freezing). In terms of their contents, these actions are extensive and often time-consuming. From that perspective, custodial remand is fairly unproblematic in our legal system because the Constitution has already laid down a high standard of proof for it as well as that the Court has sole jurisdiction over it. It certainly does not mean that the legislator did not have difficulties with regard to its compliance with the Constitution.

And so, the preliminary investigation as we know it now has emerged gradually, as already noted, in a complex interaction between the legislator, theory and practice, and Constitutional Court decisions which have had a crucial influence on its structure. The manner of its emergence described above has without any doubt left a mark on Slovenian preliminary investigation: although the existing legal order manages somehow to fulfil its function, I would not take it as an example.

2.3. A decision whether or not to initiate criminal prosecution has traditionally been made independently by the prosecutor. The only corrective to his decision not to prosecute would be a potentially dissatisfied injured party who has been allowed to take over the role of the prosecutor as the so-called subsidiary prosecutor. By making a decision to bring criminal prosecution before a court of law, the prosecutor would subject his theory of the case to the judgment of the court.

If a prosecutor had decided to request an investigation – a solution provided for by the legislator as a common one in cases of criminal offences that have specific degree of seriousness – a criminal case came under the jurisdiction of the Court. When the investigation had been launched, an investigating judge would become not only *dominus litis*, but a main protagonist in that stage. That was the case from the very beginning, and in principle, it still the case, although we cannot refuse to acknowledge that the balance shifted in the course of the investigation, not extensively but substantially. In such a manner, investigation was becoming a more and more adversarial stage in the proceedings, the parties' role was becoming more and more significant (neither of which is typical of investigation), and what was particularly interesting was that there were fewer and fewer investigations in terms of their number.

It should be noted that from the very beginning the legislator provided for certain procedural options which allowed investigations to be avoided. Some have been more and others less

productive; some have been adopted and applied in practice, while others have remained more or less a dead letter and not made use of.[15]

3. Role of prosecuting authority in preliminary investigation

If we consider the fact that the position of (investigating) judges in preliminary investigation has stabilised at least in principle in the last two decades,[16] the relationship between the police (and other authorities in charge of crime detection to a certain extent - increasingly) and state prosecutors as the prosecuting authority has remained the crucial issue at this stage in the proceedings.

An in-depth analysis of relationships formed between the police and state prosecutor in preliminary investigation is both needed and important. If the Code continues to develop within the current framework, it will be revealed (if it has not already been revealed) that present regulations and current practice of the prosecution directing the authorities in charge of crime detection and preliminary investigation have been hiding, in addition to their positive aspects, some disadvantages and flawed solutions. Secondly, if a reform aimed at adopting the so-called prosecutorial investigation is implemented, it should be kept in mind that relationships between the police and prosecution in such a context must be regulated in a different manner. Seemingly, the people who prepared the draft CPC-1 were not sufficiently aware of that condition because they still refered to directing quite often.[17] If they refer to directing in the present context, they are wrong because, in my opinion, when the relationship between the police and prosecution in a prosecutor-led investigation is concerned, prosecutors are more involved in such investigations, with a number of subtle gradations.

3.1. I have defined prosecutorial direction of the police under the current CPC as soft encroachment of an independent prosecuting authority upon the territory of an independent authority in charge of crime detection. From the point of view of state prosecutors, the directing of the detection process and authorities in charge thereof constitutes their right, meaning that they are allowed to direct them when they deem it necessary, even though they are not obligated to do so. Providing direction is his tool with which he aims to improve the detection process and in direct or indirect consequence, his performance in the broadest sense of the word.

A prosecutor will not opt for directing (the police/investigation) when he deems it unnecessary because if a case is straightforward and it is expected that crime detection authorities will deal with it successfully without an intervention from his part or when his intervention would not

15 This primarily refers to the both forms of direct indictment provided for by the Code: the first one that cannot be disputed in theory and for which an investigating judge must grant consent (Article 170, paragraph 1 of the CPC), not so much used in practice and the other one, limited to less serious criminal offences adjudicated in regular proceedings and decided on independently by the state prosecutor (Article 170, paragraph 6 of the CPC). The second type of indictment, despite theoretical scepticism about it was (and still is) used a lot in practice. In addition, it needs to be clarified that upon the introduction of objection, the possibilities for preferring this type of indictments have widen since state prosecutors are allowed to issue indictments even in cases when they have concluded plea agreements with the accused.

16 In concrete terms, a careful observer cannot but notice reservations very similar to objections made to the judge-guarantor in general; namely, that his role as a guarantor is weak because he does not oversee the entire proceedings but only certain segments thereof and that some parties to the proceedings regard his role as instrumental.

17 For instance, see Article 163, paragraph 1 of the draft CPC-1 under which the state prosecutor "shall direct and oversee" the investigation process. In that regard, another two paragraphs of the same article are even more express; paragraph 4 which reads that the state prosecutor shall instruct the police by means of "requests, consent, orders, instructions" and paragraph 5 which says that the police shall act in accordance with prosecutor's directions.

result in improved performance of the crime detection authorities because, for instance, he has no idea what else the police could do other than what they are doing at that moment. It is also perfectly clear that in providing direction he may not exceed his authority or give instructions which are outside his purview.

The first restriction is particularly important: it is not acceptable for a prosecutor to direct the crime detection authority when something like that is not necessary. Providing direction in clear cases[18] results in a decreasing level of responsibility and independence of the crime detection authority and the same applies to their resourcefulness and initiative, all of which are necessary elements of high-quality police work. On the other hand, by providing direction in clear-cut cases, prosecutors waste their abilities which should be directed towards cases that are truly complex.

As previously mentioned, the crime detection authority, which remains an independent authority, must act within its competences and therefore has to know what course of action to take at every moment, even without prosecutorial direction. If nothing else, it must always perform all those actions which cannot be delayed. It may not act in accordance with directions which cause it to take unlawful actions. Since this concerns a relationship between two independent authorities, I am of the opinion that the crime detection authority is not obligated to act in accordance with every direction from the prosecution: it may decline those that are clearly unfounded, but it is expected to provide an explanation for its disagreement. The police and prosecutors must communicate with each other, although it needs to be clear at every moment that the prosecuting authority is the only one to decide whether or not to bring prosecution.

3.2. For state prosecutors to be able to direct a detection process, certain conditions need to be met. The first and undoubtedly most important one is that they need to be well-informed: a state prosecutor needs to be informed in a timely and satisfactory fashion about the fact that there is a case which might require him to become involved. Such information may be received from anyone[19] and more often than not, it will naturally come from the crime detection authority.

Little attention has been devoted to the issue of providing timely information. The central problem lies in a (rigid) structure of the (old) code which somehow became focused on the criminal charge as a document which transfers a case from the hands of the police to the hands of the prosecutor whose further activities it should stimulate. It is not familiar with the concept of timely exchange of information between the crime detection authority and the prosecution or of cooperation between them, especially in cases when the crime detection authority acts based on its own findings.

18 Throughout my long career, I have found that (and this applies in general, not only to providing direction) many people are happy to deal with clear-cut cases and the major part of them runs away from difficult, slow and borderline cases. It is a question of psychology: clear-cut cases offer good chances of positive end-results people can take pride in, which can be gratifying and useful in every respect. Only the rarely committed ones will know that stakes were too high and maybe even completely unnecessary for a result which would be the same without them. As opposed to this, dealing with difficult cases may be unfavourable, if not risky from the point of view of professional satisfaction. There is a considerable risk that it will not end successfully. Success has many fathers, but failure is an orphan.

19 The CPC contains a provision requiring state prosecutors to react even when they hear rumors about a criminal offence (see Article 161, paragraph 2 of the CPC). It is not possible to elaborate here on all the aspects of that provision, its origin and consequences on the work of prosecutors or issues that it raises. For the purpose of this paper, it suffices to say that it is one of the most typical situations that can promt prosecutors to direct the police or other crime detection authorities.

3.3. In that regard, a practice has developed in Slovenia, which has been persistent in imposing problematic solutions. Both sides are responsible for this: the police, because they consider prosecutorial direction as instrumental, as some kind of prosecutorial oversight of police activities together with their potential mistakes and state prosecutors whose aim is to get rid of the task of providing direction because they see it as additional burden and because they are aware that they do not have command of it and thus do not feel self -confident enough in their work.

Consequently, it is important to provide for that particular relation in the overall relationship between the police and prosecution. It has been revealed that it would not be easy to accomplish such a task if we intend to provide for the subject matter and not the form. The detection stage is a part of proceedings which is full of dramatic events, surprises, and unavoidable need for quick reactions. It is difficult, even impossible, to formulate it by rules which will provide for all of its potential forms. However, with a view to bringing certain order into providing direction, the Slovenian Association of Prosecutors and the police signed a special co-operation agreement in 2001.[20] That document, entitled Rules of professional co-operation, had as its starting point a postion that the police had to inform the state prosecutor about each case in connection with which there were grounds to believe that a crime had been committed, whereas the state prosecutor was allowed to direct police activities. In cases when undercover investigative measures were undertaken, providing direction by the prosecutor was intended to be the rule. The Rules were an attempt to define as precisely as possible what was included in the scope of providing direction in preliminary investigation as well as to enumerate police duties with regard to providing information to the prosecution. The Rules imposed by the heads of two authorities as legal grounds for cooperation have also raised some doubts, although as umbrella rules, they have been comparatively successful in taking into account the positions and roles of both authorities.

It is my belief that a leap in the wrong direction occurred when the Government interfered in the relationship between the police and prosecution service by adopting its first and then yet another decree on co-operation between the state prosecution service and crime detection authorities.[21] In all fairness, Article 160.a of the CPC[22] did provide, technically speaking, a legal basis for issuing that decree since it defined in more detail than the above-mentioned principled provision contained in Article 45 of the CPC duties to be fulfilled by state prosecutors in the process of giving directions not only to the police, but also to other state authorities in charge of crime detection. Likewise, that provision has been *sedes materiae* for organising specialised investigation teams and finally, as previously mentioned, it does give the Government authority to lay down procedures, cases, time limits and manner of providing direction and information.

In the light of the cited CPC provision, the manner in which co-operation was organised considering its subject matter seemed acceptable at first glance. Nevertheless, it is a moot point in my judgement, if the Government – which in Slovenia does not have jurisdiction over criminal prosecution, notwithstanding rules it may impose in the sphere of criminal prosecution, even

20 See Rules of professional co-operation between the police and state prosecution service in the process of detecting and prosecuting criminal offenders issued by the then Director General of the police, Marko Pogorec, and Chief Prosecutor Zdenka Cerar. The Rules came into force in November 2001.

21 See Decree on co-operation between state prosecution service and the police in detecting and prosecuting criminal offenders (*Official Gazette of the RS*, no. 52/04) and Decrees on co-operation between state prosecution service, the police and other competent government authorities in detecting and prosecuting criminal offences and actions of specialised and joint investigation teams (*Official Gazette of the RS*, no. 83/10).

22 This provision has been relatively new – it was introduced by the Amendment CPC-E in 2003 (*Official Gazette of the RS*, no. 56/03).

to govern apparently technical issues – is allowed to dictate what the state prosecution service – which is an independent state authority in charge of criminal prosecution – should do. Namely, it should be noted, without going into detail at this point, that according to the practice of the Constitutional Court, the state prosecution service has until lately been regarded as a *sui generis* authority, which, as held by that Court, could not be classified as a body belonging to the executive branch without any reservations. Only recently did the Constitutional Court include the state prosecution service into the executive branch more explicitly, while emphasising a high degree of state prosecutors' independence as the authority in charge of criminal prosecution.[23] [24] In brief, the decree might constitute an encroachment on the autonomy of the state prosecution service inasmuch as it lays down that service's tasks and duties.

In terms of its content, the first decree was fairly restrained since it regulated only police duties with regard to providing information to state prosecutors, activities of state prosecutors in the process of giving directions to the police and in particular, undercover investigative measures. In that respect, the most controversial provision pertained to what was understood to mean direction[25] since that issue falls under the purview of prosecution and it was certainly not something for which the government had authority.

As opposed to the first one, the second decree was a complex regulation. As previously mentioned, it did not pertain only to the police, but to all state institutions which could come into contact with criminal offences in the course of their work. It specified police duties with regard to providing information to state prosecutors about uncovered crimes as well as about actions and measures planned to be taken by the police in a similar manner as the first one, although more precisely. The scope of chapter on direction had been broadened a lot and there were an increasing number of provisions under which state prosecutors were directly bound to take certain actions. It was followed by chapters on undercover investigative measures, security measures of confiscation of material gain, then on specialised and joint investigation teams, and finally, even on training and co-operation. In brief, a genuine little code of conduct between state prosecutors, the police, and various other state authorities, oscillating between the subject-matter that is legal in nature, which is the reason why a government could not be competent for it, and completely professional issues, whose fitting into a mould of regulations is not wise.

The last step, by which a certain level of grotesque has already been reached when the regulation of relationships between the police and prosecution in preliminary investigation is concerned, was taken only recently, no more than a year ago. Namely, the new act which governs the organisation of the police[26] lays down that notwithstanding the code governing criminal procedure, it shall be deemed that a state prosecutor has assumed the direction of the police work in preliminary investigation as of the moment he is informed about a criminal offence.[27] In other words, it is evident from the cited provision that not only do the police (if we are to use legislator's term)

23 In order to avoid misinterpretation, it needs to be clarified that Slovenian laws governing the prosecution service specify that holders of prosecutorial function are individual state prosecutors (as in decentralised systems), not the head of the authority or even chief prosecutor in the country (as in monocratic systems). This has been so since the first law on state prosecution was enacted in independent Slovenia in 1994.

24 For more on this subject, see Decision by the Constitutional Court of the RS no. U-I-42/12 of February 7, 2013.

25 The Decree specified in its Article 11 that direction included instructions and proposals, expert opinions and activities of prosecutors in procedural actions, as well as prosecutors' decisions on police measures against suspects deprived of liberty.

26 Organisation and Activities of the Police Act (ZODPol), *Official Gazette of the RS*, no. 15/13.

27 See Article 4, paragraph 8 of the Organisation and Activities of the Police Act.

see direction in markedly instrumental terms, but they also see it as a mechanisms for dispensing with responsibility for their own activeness (and naturally, inactivity) and transferring it to state prosecutors. Seemingly, this provisions is so far removed from reality that it has not until now awaken any special interest among professional audience, which otherwise would be well-deserved; also, police attempts to apply it in practice or cite it have not been noticed.

In brief, Slovenian attempts to provide by regulations for prosecutorial direction of the police in preliminary investigation, *i.e.* the central relationship at that stage of the proceedings, have not been successful in my judgement. The new and expected standard of quality has not been attained. The relationship between the police and prosecution still remains a tough nut yet to be cracked.

4. Investigation as seen through the eyes of state prosecutors

Main participants in an investigation are: an investigating judge, the (authorised) prosecutor, the accused and a pre-trial chamber. Regrettably, the following paragraphs will focus, rather unsystematically since there is little objective information available, on the prosecution's view of investigation which is a typical judicial investigation in Slovenia as mentioned above.

4.1. It is difficult to define the attitude of state prosecutors towards investigation as such or in general. On the one hand, it is a relatively mandatory phase in the proceedings and prosecutors are aware that they must request that an investigation be undertaken as soon as relevant conditions have been met. Prosecutors are expected to demonstrate that there is a sufficient probability that a criminal offence has been committed and that the accused is its perpetrator since investigations, as opposed to preliminary investigation, may be conducted only against individual perpetrators.

4.2. The standard of proof for initiating an investigation (reasonable suspicion) is not controversial in principle. Problems occur because it has proved to be a fairly unstable category since practice has not achieved to provide typical subject-matter for it. It is open to debate whether or not something like that is even possible in our criminal procedure. As a result, it seems that standards of proof are rather relative than absolute: reasonable grounds to suspect have to offer more than a reason to suspect, while reasonable suspicion has to offer even more – but what exactly is a question that is difficult to answer. For that reason, disputes over that issue are not rare.[28]

According to the current structure of investigation, a pre-trial chamber may assume the role of an arbiter in a dispute between the prosecutor and investigating judge. It can occur in practice that the prosecutor and the judge enter into or conduct some type of negotiations, which

28 It should be stressed that disputes are not provoked only in cases when a decision needs to be made about initiating an investigation as such, but also in cases when the existence of reasonable suspicion, as some kind of a preliminary issue, is made part of the decision-making process concerning remand. Under the Constitution, there has to be reasonable suspicion as a condition for ordering remand in custody (Article 20). Since in most cases remand is ordered before initiating an investigation, the state prosecutor is obligated among other things to adduce evidence that there is reasonable suspicion, whereas the investigating judge has to find that there is reasonable suspicion if he is to order remand in custody *lege artis*. In some cases, a request for the protection of legality may be filed against a final decision on remand (Article 420, paragraph 4 of the CPC); as a result, the case law of the Supreme Court with regard to this matter is paradoxically richer when it comes to such, essentially incidental decision-making, than to actual decisions on launching investigations.

sometimes leads to prosecutor's motion for conducting an investigation (and in consequence, a decision to initiate investigation) being amended without the involvement of the pre-trial chamber. Most often, amendments are made to the statement of facts of the offence, while other modifications are rarer.[29] Given the fact that the Code does not provide for such a solution, it seems that it cannot be supported for that reason alone.[30] Moreover, such "negotiations" are conducted somewhere behind the scenes, secretly, and in a non-transparent manner, conceivably even to the prejudice of defendants and even more likely to the detriment of other participants in the proceedings (for instance, the injured party).

However, nothing is that simple. In the first place, a situation can be conceived in which a prosecutor has made a mistake in his motion and a warning from an investigating judge could only be understood as a gesture of loyalty to one's fellow colleague which serves to accelerate the proceedings and to which no other meaning should be assigned. Nevertheless, often it is only a short step, sometimes in the wrong direction, from such a gesture to interfering in the content of the motion for conducting an investigation, which investigating judges are not allowed to take, but might wish just to demonstrate who is beyond the shadow of a doubt the true *dominus litis*. Sometimes, such negotiations are discernible from the case file, but more often than not they cannot be identified and we can only assume that they have been conducted. Even so, such situations are not new and could have developed at any time in the past, up until the moment when the investigation as we know it today was legislated by the Code, which was why they had not been noticed.

If we disregard a possibility that they did exist but have not been reported, which seems less likely, a very realistic possibility is presented, namely that they should be assigned to the relationships between participants in the investigation which have recently been altered. Two changes seem worthy of consideration: the first one is the strengthening of the role of state prosecutors which has made them more aggressive in their motions for initiating investigations and thus more demanding in their attitude towards investigating judges; the second one is a growing awareness of investigating judges that their role in the investigation is twofold – they are still investigators and at the same time judge-guarantors. From the point of view of its development, the focus of their function has been approaching their second role. If an investigating judge succeeds in convincing the state prosecutor to consider his objections, he will additionally strengthen his position even without the involvement of a pre-trial chamber.[31]

The third circumstance which in my judgement has brought about the shift in relationships between prosecutors and investigating judges is of the most recent date: the introduction of negotiations into criminal procedure. By no means have negotiations between an investigating judge and prosecutor been included in the Slovenian criminal procedure, certainly not, but the critical thing is that the philosophy underlying the proceedings has changed. Proceedings that used to

29 Usually, direct disputes do not arise about the issue of legal classification of criminal offences because judges are not bound by classifications set by prosecutors; however, in the above case, a legal classification may be changed indirectly.

30 On the other hand, some kind of a negotiation situation has long since been indicated by the institute of evidentiary hearing (Article 169, paragraph 3 of the CPC), which is hardly ever applied in practice.

31 The position of a pre-trial chamber as an arbiter in a dispute between an investigating judge and state prosecutor is rather unusual. Even though we know when, why, and which model was followed when such a solution was adopted, I am convinced that the time is coming for a change. In my opinion, it would be possible to simplify the decision-making process in the investigation (if it remains as it is) and establish it by regulation on different grounds. A dispute may arise only between parties to proceedings, not between two state authorities. Such a dispute has to be resolved by a judge and if either party is not satisfied with his ruling, they must be guaranteed the right to appeal.

be manifestly unfavourably disposed towards any kind of negotiations have turned into proceedings which allow a broad scope for negotiations. In addition, negotiations have been given surprisingly favourable reception in practice. Therefore, it would not come as a surprise if their influence started to spread across the limits set by the law. A definite opinion about the reasons why (secret) negotiations between state prosecutors and investigating judges occur cannot be formed until the phenomenon is examined in detail.

4.3. Investigating judges may sometimes set the requirements for initiating investigations too high. Usually, such exaggerations have been prevented early in the process by pre-trial chambers based on appeals from prosecutors; however, sometimes they were not prevented and criminal proceedings were not initiated. Recently, the state prosecution service has filed requests for the protection of legality in a number of cases and interestingly enough, the Supreme Court – almost always in cases of economic crime – has adopted those requests and found that the law has been broken.[32] An initiative was launched to amend the Code and allow prosecutors to file appeals which would be heard by a higher court, but it was not adopted.

And yet, it is not an end to the story. It happened in some potentially similar controversial cases that investigating judges started to deny motions for initiating investigations in order to allow prosecutors the possibility to appeal before a higher court in the event of negative decisions by pre-trial chambers. We should be worried about the manner in which this situation has developed.

4.4. Investigations are often criticized for taking too long.[33] Such an objection, even though it cannot be generalized about, should be seriously considered. Investigations into relatively complex cases actually last a very long time, in certain cases even years. Since there have been less and less investigations in simple cases, lengthy proceedings are becoming even more conspicuous. Precisely every participant in the investigation process is partly responsible for such a state of affairs: starting from crime detection authorities, then prosecutors who spend too much time on filing motions for initiating investigations, and finally to investigating judges. It is difficult to believe that an investigation can last several years due to objective circumstances, with exceptional cases excluded (such as looking for the accused who is a fugitive, obtaining evidence from abroad, even though the procedure for mutual legal assistance in criminal matters has made considerable progress in recent years, then providing expert witness opinions in particularly complicated cases, and the like). Also, it is difficult to explain why so much time is spent not on investigative work in the narrower sense of the word, but on preparations and decision-making before investigations are initiated, as well as on making decision in the course of investigations. Cases in which the accused is in custody and investigations have to be completed within a time limit set in advance prove that things can be done differently.[34] Prosecutors are mostly inclined to believe

32 Naturally, the judgement was a declaratory one (Article 426, paragraph 2 of the CPC), meaning that it was no longer possible to initiate criminal proceedings except if the prosecutor obtained new evidence (Article 409 of the CPC). Such a decision represented only a source of moral satisfaction for the prosecutor that he was right with regard to the motion for conducting an investigation; it served as a warning to the first-instance court that they had gone too far and as guidance in other cases for jurisprudence.

33 For more detailed information on the duration of investigations, see: Bošnjak, M. (ed.), "Potek kazenskih postopkov v Sloveniji", Institute of Criminology at the Faculty of Law Ljubljana, 2005, as regards district courts, p. 109 and further.

34 It is true that lately there have been concerns that some more complex investigations into economic crime in cases when remand has been ordered cannot be completed within the maximum time limit (6 months), as defined by the Slovenian Constitution (Article 20, paragraphs 2 and 3). In particular, digital forensics has begun to cause delays in the process.

that too much time is lost on investigations and that they do not yield expected results. For that reason, they try to avoid them whenever possible.

4.5. In brief, it seems that prosecutors' experiences in relation to the investigation are predominantly negative; they are associated with its every stage, namely with its beginning or a motion for initiating an investigation, its course and time span, as well as with its conclusion. Many believe that the investigation is more or less a waste of time for prosecutors, whereas defence attorneys use it in the first place to establish which evidence prosecutors have obtained against defendant and to adapt their further actions accordingly. That is evident from the fact that defence attorneys mostly take a passive or reactive stance in the course of investigations, while active proposals are very rarely put forward by defence attorneys, actually they are the exception to the rule.

It is difficult to form an accurate picture of the investigation. Slovenian criminal procedure had for a long time been criticized for not allowing judgements of conviction to be pronounced under any conditions if the main hearing had not been concluded. Even when an investigation had been conducted resulting in a high degree of probability that a judgement of conviction would ensue, prosecutors had to file a charging document and the Court had to schedule a main hearing and adjudicate the case. This objection has been overcome by legislating the penal order, but the truth remains that penal orders with all of their advantages and disadvantages are for the moment limited to summary proceedings[35] and relatively mild criminal sanctions.

An essentially novel situation has arisen with the amendment CPC-K[36] that legislated plea bargaining between the parties and allowed guilty pleas. At present, it is possible to conclude proceedings without holding main hearings, even in cases of more serious offences[37] and it seems that the investigation has risen in importance on account of that. This applies to both parties: at first glance, it applies more to defendants since they are in a position to judge more realistically the evidence gathered in the course of an investigation and weigh out the consequences of their decisions. As regards prosecutors, a successfully conducted investigation which results in a high degree of probability that a crime has been proven and that its perpetrator is guilty also creates a solid starting position for plea-bargain negotiations.[38]

Since it would seem that no radical turn will be made by introducing single preliminary proceedings in regulations governing criminal procedure in Slovenia in the near future, it would be wise to call for bringing needed improvements into the investigation within the scope of current regulations and press for it to be adapted to our current needs.

35 The amendment CPC-M (in preparation) provides for extending the scope of the penal order to encompass some criminal offences that are otherwise prosecuted in regular proceedings.

36 This amendment was adopted in November 2011 (*Official Gazette of the RS*, no. 91/11), whereas it came into force in May 2012 in respect of plea-bargaining and institutes related to it.

37 Plea bargaining negotiations and agreements are allowed in Slovenia regardless of the seriousness of a criminal offence.

38 In particular if we consider initial information about plea-bargain negotiations which shows that they first take place at pre-trial hearings (and thus relatively late in the proceedings), whereas plea agreements concluded before that stage are fairly rare; virtually no plea agreement has been signed before formal proceedings are initiated even though they are allowed if certain conditions are met.

Aleksander Jevšek, MA[1]

Police Experiences in the Implementation of Investigation in Slovenia

1. The Role of the Police in the Preliminary Investigation according to the CPC of the Republic of Slovenia

Preliminary investigation is considered to be a set of norms which more or less systematically define the rights and duties of the police as an authority in charge of detecting criminal offences and their perpetrators, the public prosecutor as the only authority in charge of criminal prosecution and the investigating judge as a guarantor of legality of the preliminary investigation (Fišer, 2002). The Criminal Procedure Code of the Republic of Slovenia[2] under Art. 148 stipulates that the police must "do everything necessary" to discover the perpetrator of a criminal offence in the preliminary investigation, in order to prevent the perpetrator or his accomplice from hiding or fleeing, to find and secure the traces of a criminal offence and items which could serve as evidence, to collect all information which could be used in order to conduct the criminal proceedings successfully. In order to perform these tasks, the police may request the necessary information from individuals; inspect transportation vehicles, persons and luggage if required; restrict movement in a location for as long as it is deemed necessary; do everything necessary to identify persons and items; issue a search warrant for persons and items subject to search; inspect certain facilities and premises of companies and other legal entities in the presence of liable persons and view their documentation; as well as undertake or initiate other necessary actions. A report or an official note shall be made regarding the facts and circumstances which are established during certain actions and which may be significant for the criminal proceedings and regarding items either found or seized (Art. 148, para. 2 of the CPC of Slovenia).

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2 Criminal Procedure Code, *Official Gazette of the Republic of Slovenia*, no. 63/1994 – 47/2013.

The police may undertake the listed actions based on the lowest standard of evidence, which is "grounds for suspicion that a criminal offence has been committed".[3] After the police establish who might be the offender, i.e. how the criminal offence has been committed and who did it, the investigation focuses on a specific individual. This implies a higher standard of evidence "reasonable grounds for suspicion that a person has committed a criminal offence" (Mozetič, 2007). If this standard under criminal law has been met, the police may interrogate the suspect according to the rules applicable to the interrogation of a suspect (Art. 148a, para. 2 of the CPC); confront witnesses (Art. 229 of the CPC); photograph the suspect, take his fingerprints and a swab for testing (Art. 149, para. 2 and 3 of the CPC) and, provided the requirements stipulated under para.. 6 of Art. 54 of the Police Tasks and Powers Act (ZNPPol)[4] are met, perform a polygraph test as well[5]. When in the "scheme" of standards of evidence "reasonable grounds for suspicion that a person has committed a crime" has been met, the police has powers which infringe the most basic human rights and freedoms even before the start of the investigation. The police is given powers to use secret investigative measures (Art. 149 of the CPC); to detain the suspect (Art. 157, para.. 2 of the CPC) and to search a home or a person (Art. 164, para.1 of the CPC). After Slovenia was included among the states which implement the Schengen system of border control, the novelty related to the standard of "reasonable grounds for suspicion that a person has committed a crime" is the possibility of sending out a circular requesting secret registration or targeted control which is entered into the Schengen Information System (Art. 44 of ZNPPol) (Mozetič, 2007).

The police acts *ex officio* according to the principle of legality when working on the detection of criminal offences and their perpetrators. On the other hand, the police is relatively autonomous when deciding how to organise their operations, even when it comes to the methods used to uncover criminal offences and securing the traces which might be used as evidence in the criminal proceedings.[6] The success of the preliminary investigation, the level of quality of information and gathered evidence do not depend solely on the police. In cases involving serious criminal offences in the field of economic criminal offences and corruption, in financial investigations which are initiated and a multitude of other crimes of more serious nature, the success of preliminary investigation depends on how good is the established multidisciplinary cooperation of the police, the public prosecutor's office and other institutions involved in the process.

2. Multidisciplinary Character of the Preliminary Investigation

Slovenia has undergone a period of intense development over the last two decades, along with the rest of the modern world, propelled by the information revolution which has profoundly changed the society. Perpetrators of economic crimes and organised crime have quickly started exploiting the weaknesses modern information society has exhibited, as well as the advantages it has to offer. These trends have been accompanied by a change in the methods employed by criminal groups as well as the emergence of new unconventional forms of crime. It is an established

3 This refers to the degree of probability which is required for the initiation of the preliminary investigation. The said standard is met even when there is minimal information implying that a criminal offence has been committed. For the purposes of thus set minimal standard, it is not necessary to personalise the suspicion, it is sufficient that the suspicion refers to a criminal offence which, at this stage, does not have to have a legal qualification. (Dežman, Erbežnik, 2003).

4 Police Tasks and Powers Act (ZNPPol), *Official Gazette*, no. 15/2013.

5 The police may use a polygraph test only during the preliminary investigation, which means only while investigating a criminal offence and not related to other police procedures.

6 The rules governing crime investigation and forensics regulate how these methods are used.

fact that economic crimes and crimes related to public finances and corruption do not just pose a security problem or a criminal legal issue, but endanger the very foundation of the state governed by the rule of law and transparent economic mechanisms (Jevšek, 2010). Over the last ten years, the process of finding the most efficient strategies and models for detecting and proving criminal offences has undergone a very dynamic period of development. The police and the prosecutor's office in the Republic of Slovenia have been searching for and shaping the new approaches during this period, which would enable a more efficient fight against crime, especially economic crimes, corruption, money laundering, organised crime and other more serious types of crimes. In order to make progress and improve the investigation and consequently prevent the aforementioned types of crimes, it was necessary to examine closely the process of detection and prosecution of criminal offences. This process unfolds on multiple levels which involve different state authorities and institutions with their specialised knowledge and information upon which it depends how much time would elapse between filing the criminal charges and the indictment. The efficiency of the work performed by the prosecutor's office, as the authority conducting the preliminary investigation, to a great extent depends on how good is the multidisciplinary cooperation between the authorities and the institutions involved.

Multidisciplinary approach implies that two or more disciplines are combined, that relevant knowledge from different disciplines is implemented and integrated into a single whole and that thus obtained results and knowledge are applied in practice (Žontar, 2009 in: Bobnar, 2013). The members of multidisciplinary task-forces or teams must be individually accountable and the work should be divided among team members in such a way that everyone can contribute to reaching the common goal. A multidisciplinary team consists of a group of people of various professions and from different lines of work who are brought together to work towards a common goal while ensuring that material resources are being used rationally (Bobnar, 2013).

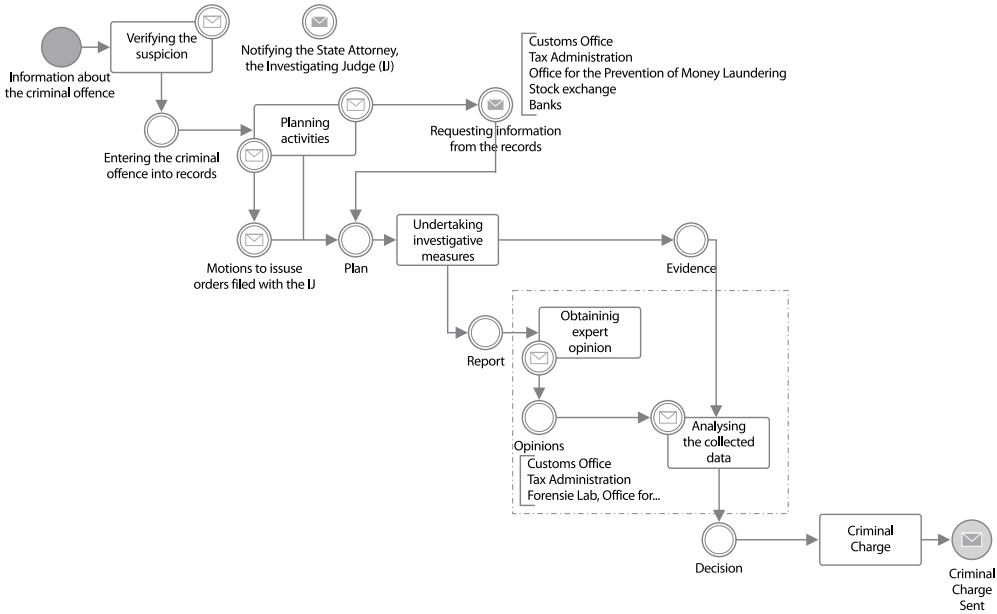

Diagram – Multidisciplinary nature of preliminary investigation

The diagram shows the multidisciplinary nature of the preliminary investigation from the moment it is learnt that a criminal offence has been committed to the moment a criminal charge is filed. Especially when it comes to uncovering complex criminal offences related to economic crimes and corruption, when there are multiple suspects both physical and legal entities and when it involves international cooperation, the process itself may last for a relatively long period of time. The duration of the process and its level of quality often depend on not only objective but subjective factors as well. Annual reports on the cooperation of institutions with the police and the prosecutor's office often underline "a very good level of cooperation" However, if we consider that several weeks or months elapse between the time the police forwards a request to a certain institution (e.g. Tax Administration or Customs Office) in order to confirm the criminal offence has occurred and the moment a reply is received by the police, it cannot be claimed that the cooperation is good. The reasons for frequently delayed replies to police or prosecutor's office inquiries which is often cited by the said institutions are the lack of legal framework for such cooperation, work overload due to other "set priorities" etc. The cooperation between the competent state authorities has often been uncoordinated, which has lead to long-running proceedings, which in turn resulted in inefficient preliminary investigation. Time was wasted unnecessarily in practice and the investigation in certain cases was even split. As a part of the interdepartmental project "Establishing National Investigation Bureau"[7] (hereinafter: the project) at the beginning of 2009, Slovenian police closely analysed multidisciplinary cooperation in the process from the moment the information on suspicion that a criminal offence had been committed is received to the moment of writing up a criminal charge. The analysis showed that it was necessary to seriously address the issue of changing the whole process in order to improve the preliminary investigation and render them more efficient eventually, which would in turn lead to a successfully argued indictment by the prosecution during the criminal proceedings. In order to render this process more efficient, it was necessary to change the legal framework enabling a multidisciplinary approach in the process of uncovering and proving the most serious types of crime, and especially economic crimes and corruption.

3. Establishing Specialised Investigation Teams

As a part of the project, amendments to the Art. 160 of the CPC were prepared. Article. 160a enables the prosecutor to manage the joint efforts of the state authorities and institutions whose scope of activities includes taxes, customs operations, financial transactions, securities, protection against anti-competitive conduct, prevention of money laundering and corruption, fight against the abuse of narcotics without a written order to establish specialised investigation teams (hereinafter SIT). At that stage, since less complex cases are involved, an initial agreement on joint investigation for a longer period of time is unnecessary. Should the competent prosecutor decide the case is more complex and requires a coordinated effort of several institutions over a prolonged period of time, he may order a SIT to be established which is to be led by the prosecutor. The provisions on the rules of the establishment of joint investigation teams include the provisions on the cooperation of the State Attorney's Office, the police and other competent authorities and institutions with regard the process of detection and prosecution of criminal offenders

7 The author of this article was appointed as the project manager by the Government of the Republic of Slovenia.

and the operation of specialised joint investigation teams.[8] The provision which was passed after Art. 160 of the CPC had already been passed allows the State Attorney General to establish a SIT by a written decision/order *ex officio* or at the motion of the prosecutor (State Attorney) in charge of the case in question or at a written request by the police. When the State Attorney General receives a written request, he notifies the representatives of the authorities and institutions who are expected to cooperate with the SIT. If the request is granted, along with a written notification, the Chief State Attorney shall send to the representative of the authority or institution a proposal of a written decision/order containing a list of team members who are to form a SIT. The representative of the said authority or institution must inform the Office of the State Attorney General within three days whether they agree (including the data on the communication with specific officers who are to be involved) or refuse to cooperate. If the representative of the authority refuses to cooperate with the State Attorney's Office, the competent minister must be notified thereof. The State Attorney's Office in such a case informs the Attorney General and the Minister responsible for the judiciary. The Minister responsible for the judiciary may request that the Government should decide on the legality of the said Authority's or Institution's refusal to cooperate. The written decision on the establishment of SIT defines its purpose, specifies the authorities that are to be involved, tasks, who is going to lead the team, who is going to be the operations officer and his tasks, members of the SIT and their tasks, work procedures and time frame for its operations.

Specialised Investigation Team shall operate according to a schedule which may be supplemented as the investigation progresses. It is vital that the members of the SIT and their representatives are assigned the task set before the team as their first priority in order to ensure unimpeded operation of the SIT. Similarly, other authorities and institutions and other prosecutor's offices as well as police units must assist the SIT when necessary. Furthermore, since the SIT is led by the State Attorney, other participants must provide the State Attorney with all of the information and documentation, which then become a part of the prosecution file (Bobnar, 2013)

In the beginning, after the SIT was first regulated, there was little interest for establishing such teams. The reason was the negative perception by the representatives of the institutions and authorities that this just additionally increases the workload of the employees and adds more administrative work. However, it was soon proven in practice that this was not the case and that the use of SITs actually reduces the amount of bureaucracy involved (Deželak, 2012). Vast knowledge and experience that the members of SITs have in their respective fields and constructive exchange of information results in both faster and more efficient operation in the process of uncovering the most serious types of criminal offences. The knowledge and experience is shared within the team and by working together the members have the opportunity to get acquainted more closely with the field of expertise of other members of the SIT.

Considering that SITs investigate the most serious criminal offences, their organisation puts their investigation as priority. Since the operation is led by and coordinated with the State Attorney, motions for the issuance of authorisation by the court are processed faster, because they are typically better prepared and do not require amendments. Certain difficulties have been identified in practice with regard to the operations of SITs. Occasionally, the issue of assigning highly

8 Art. 24 through 29 of the Decree on the Involvement of the State Attorney's Office, the Police and other Appropriate State Authorities and Institutions in the Detection and Prosecution of Perpetrators of Criminal Offences and the Operations of Specialised Investigation Teams, *Official Gazette of the Republic of Slovenia*, no. 84/10.

motivated and specialised professionals to SITs by the authorised person arises. It is well-known that every organisation or institution is reluctant to give up their hardest working employees because they need them to ensure the work of the said authority or institution is more successful and their involvement in the SIT for several months would deprive their employer of their services. Members of the SIT may feel frustrated or "unhealthy rivalry" may arise in terms of which individual member or which institution is more important for the work of the SIT. It is therefore the role of the State Attorney to be a good leader and manage and head the members of the SIT in such a way that such negative incidents are eliminated as much as possible. Although it may sound unimportant, successful operation of the SIT is helped by the fact that the team is working together on the same premises. These premises must have access to databases of the institutions whose representatives are cooperating with the SIT. Thus, the members of the team are able to obtain the necessary data within the scope of legal competencies for the purposes of the investigation according to the principle "one stop office". In addition, this means the members of the SIT directly exchange information and participate in the investigation which ensures increased efficiency of their operations.

Conclusion

The prosecutor (State Attorney) assumes the function of the team leader by setting up the SIT and together with the operations officer he is responsible for its operations. As the *dominus litis,* the prosecutor *de lege* and *de facto* leads and manages the course of the investigation and the team. Namely, the State Attorney is able to manage the police work well only if his information is reliable and recent, which often is not the case. When SIT is set up, the State Attorney is allowed to have at his disposal at any given moment experts in specific fields – such as taxes, customs, securities, protection against anti-competitive behaviour, prevention of money laundering and corruption etc. On the other hand the members of the SIT are enabled to investigate as experts in different fields in a coordinated fashion throughout the preliminary investigation. It is crucial that the members of the SIT have the original authorisation under law at the time they are assigned to the SIT which they are to exercise during the investigation (Deželak, 2012). Since the purpose of the preliminary investigation is to clarify the suspicion that a criminal offence has been committed to such an extent that the State Attorney is able to decide if he should charge the suspect, temporarily defer the prosecution or desist from prosecution, the establishment of the SIT is undoubtedly an instrument which enables the prosecutor to do this in a relatively short amount of time and in such a way that if the charging document is filed, he would be able to argue the case successfully at the main hearing. However, on the other hand it may be concluded that the possibility of establishing SIT pursuant to the CPC of the Republic of Slovenia is just a gradual step towards the reform of the preliminary investigation and the transfer of the investigation into the hands of the State Attorney. It is our opinion that it would take many more gradual steps not only in terms of changing the legal framework but also (or especially) in terms of strengthening human and institutional resources in order to secure efficient and successful transfer of the investigation into the hands of the State Attorney's offices in the Republic of Slovenia.

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Initiation and Control of Prosecutorial Investigation
(with a particular view of the Serbian criminal procedure)

1. Impact of Investigation's Nature on the Structure of Criminal Proceedings

As regards the model of criminal procedure in civil law jurisdictions, investigation is a phase that comes before the stage of the main criminal proceedings in which the court adjudicates on criminal matters. Its character has changed as it developed throughout history and today it is regulated in various manners in comparative law. Even though there are many differences in details of statutory regulations, it can be noticed that there are only few models of investigation that are different in nature judging by their substantial, essential characteristics common to all of them. It can be held that substantial elements that define the nature of an investigation are *authorities* that have powers or duty to conduct this phase of the proceedings, the *form* of investigative actions and the investigation's *purpose*.[2]

(1) Three models of investigation are found in comparative law in respect of the *authority* which has been entrusted with it – an investigation can be organised as a (a) police, (b) prosecutorial, or

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2 Some are of the opinion that the following typical elements of an investigation are necessary for carrying out an analysis of comparative law: 1) authorities and relationships among them; 2) unity or plurality of proceedings; 3) structure of actions; 4) characteristics of the system and special characteristics (Berislav Pavišić, *Europski sustavi kaznene istrage na početku trećeg milenijuma / European System of Criminal Investigation at the Beginning of the Third Millennium/*, in a collection of papers in memoriam of prof. dr sc. Franjo Bačić, Skopje-Zagreb, 2007, p. 330.

(c) judicial investigation.[3] The police investigation is characteristic of Finland,[4] some Scandinavian countries (Denmark and Sweden)[5] and countries of the original common law system (England).[6] If we look at the European legal space, in particular the countries that have inherited the mixed (continental Europe) type of criminal procedure, it can safely be said that prosecutorial investigation[7] is the predominant model created by driving out the investigating judge from preliminary proceedings or by turning police investigation into prosecutorial investigation, most commonly by placing the police under the control of public prosecutors. Considering that investigations are dominated by a heuristic activity, it is believed that the introduction of prosecutorial investigation *eo ipso* improves the efficiency of criminal proceedings. The third model or judicial investigation is being surrendered more and more to history – Slovenia is one of few countries in which the investigation is still judicial, conducted by an investigating judge at a motion by a state prosecutor.[8]

(2) The *form* of actions taken in an investigation will depend in the first place on the authority entrusted with this phase and the type of actions for whose undertaking the authority is empowered. In principle, when the investigation is entrusted to the court, all investigative actions are taken in the form laid down by the law; also, the very phase of the investigation is initiated by a formal court decision at the motion of an authorised prosecutor. Therefore, it can be said that when the investigation is judicial, the entire procedure is formal. Investigations are conducted by a single judicial officer – the investigating judge. Since investigations are conducted by the court as an independent, autonomous, and impartial authority and since evidentiary actions are taken in the presence of the parties who actively participate therein while adhering to the principles of orality, directness and adversariness – the results of undertaken evidentiary actions have the same probative force as evidence presented at the main hearing. As opposed to the judicial investigation, when the investigation is entrusted with the public prosecutor or the police, as a rule, formal (procedural) actions are not taken at this stage. Heuristic activities aimed at uncovering criminal offences and their perpetrators are typical of the said authorities, so any procedural formality would reduce their efficiency and effectiveness. When looking at statutory solutions found in comparative law, both the police and prosecutorial investigations are standardly non-formal, even though the reforms of criminal procedure in some countries demonstrate that it is not necessarily the case (as explained in more detail below).

In addition to the above, whether or not a certain action taken in an investigation will be formal or not depends on its type, *i.e.* its nature; for instance, police actions and measures are actual acts that require special knowledge of and experience in criminalistics in order to be undertaken in a successful manner and they have also proven unsuitable for being regulated by the law; on the other hand, other actions are strictly formal, such as decision-making actions or overseeing

3 For more on this topic, see: Vojislav Đurđić, *Komparativnopravna rešenja o prethodnom krivičnom postupku i njihova implementacija u srpsko krivičnoprocesno zakonodavstvo* /Concepts of Pre-Trial Proceedings in Comparative Law and their Implementation into Serbian Criminal Law/, Journal of Criminology and Criminal Law, no. 1/2009, pp. 39-62.

4 Police investigation is governed by the Pre-Trial Investigation Act – 1987/449 and the Coercive Means Act – 1987/450. *Amplius:* Matti Joutsen, Raimo Lahti and Pasi Pölönen, Criminal Justice Systems in Europe and North America – Finland, Helsinki, 2001, pp. 12-17.

5 In these Scandinavian countries, police investigation is also governed by separate laws and not the procedural code (see: Berislav Pavišić, *op. cit.* p. 331).

6 Police powers in respect of conducting enquiries and investigations into criminal offences are provided for in the 1984 Police and Criminal Evidence Act.

7 All the countries that have emerged after the break-up of the former Yugoslavia, with the exception of Slovenia, have reformed their criminal procedure laws and legislated prosecutorial investigation.

8 See Articles 167 through 191 of the Slovenian CPC (Criminal Procedure Code, *Official Gazette of the RS*, no. 32/2007).

the proceedings. However, both the manner in which evidentiary actions at this stage are provided for by the law as well as the authority to which they have been entrusted have bearing on the nature of an investigation. If it is laid down that evidence shall be presented in an investigation, no matter if the concept of this stage in the proceedings is such that all evidence is regularly presented therein (which is characteristic of judicial investigations) or evidence is only incidently presented (when its presentation may not be delayed), such evidentiary actions are strictly formal and evidence is presented in a manner analogous to the manner of its presentation at the main hearing. In contrast to that, if the concept of an investigation is such that evidence is only collected therein (*i.e.* sources of evidence are uncovered and secured), actions aimed at collecting evidence are non-formal and the investigation is, as a rule, entrusted to the public prosecutor and the police.

The form of evidentiary actions is of relevance to their probative value and effect they have on the final establishment of facts in a criminal matter and ultimately, to a judgment rendered by a criminal court. The results of actions by which evidence is presented and which are taken by the court as investigative actions in pre-trial proceedings in the form provided for by the law have probative value and may provide a factual basis for a judgment, without any additional requirements. Non-formal actions of gathering evidence in preliminary proceedings are undertaken by a public prosecutor and the police and they lack have probative force, which is why no judgment by a criminal court may be based on their results.

(3) The *purpose* of an investigation plays a crucial role in determining its nature, apart from its above-mentioned typical characteristics. Given the history and solutions found in comparative law, it can be said that legislators have framed two concepts of investigation. According to one model, the purpose of an investigation is to *collect* evidence based on which a prosecutor can decide *if he will issue an accusatory instrument or abandon* criminal prosecution. Such an investigation is non-formal (in principle, evidence is not presented therein) and the police or a public prosecutor are charged with it or both of those state authorities conduct this phase. According to the second model, its purpose is set much more broadly – the goal is that a public prosecutor can make a decision based on *presented* evidence *whether or not he will bring charges* and that the evidence serves as *a factual basis for a judgment*. When the investigation is thus conceived, the court is the one who conducts it and the evidence is presented in the form prescribed by the law; therefore, this phase, taken as a whole, is also formal.

In order to discuss any further the influence of the nature of the investigation on the structure of criminal proceedings, they need to be defined since the structural elements of pre-trial proceedings result from the investigation's nature and the conception of criminal procedure. In the doctrine of criminal procedure, either realistic or legal definitions of criminal proceedings, or simply both of them, are offered most frequently.[9] Criminal proceedings are commonly defined as *a system of court's and other participants' procedural actions* governed by the law that are undertaken by them within the limits of their rights and duties for the purpose of determining if substantive criminal law can be applied in a specific case (*i.e.* whether or not the act committed is defined under the law as a criminal offence; the identity of its perpetrator; whether or not he is

9 Two more theoretic views can be found in literature on criminal procedure – the idea of criminal procedure as a legal position (See: James Goldschmidt, Der Prozess als Rechtslage, Berlin, 1925) and the theory of three perspectives in criminal proceedings (Gateano Foschini, Sistema diritto processuale penale, Vol. I, Milano, 1956).

guilty and whether or not there are conditions for imposing criminal sanctions). The majority of those who support the idea of criminal procedure as a relationship take the view that criminal proceedings are essentially *a criminal procedure relationship that is formed, that develops and ends between the court and the parties* with the aim of correct application of criminal law to a criminal matter which is resolved in the proceedings.[10] The presented realistic and legal notions represent the definitions of *criminal proceedings in the narrow sense of the word*, *i.e.* definitions of court proceedings in which a criminal matter is finally adjudicated and which can be preceded by activities of state authorities that are governed by the law and aimed at making preparations for bringing charges before the court of law. Even this stage is procedural in character, which is why it constitutes, in a structural unity with criminal proceedings understood in the narrow sense of the word, *criminal proceedings in the broad sense of the word*.

If the above theories and constitutive elements which provide bases for the definitions of criminal proceedings are taken as a starting point, the conclusion to be reached is that only the judicial investigation with its typical characteristics in respect of the form of evidentiary actions and the very purpose of the investigation, can form a structural element of criminal proceedings in the narrow sense of the word. The court will, at a motion by the public prosecutor, institute an investigation against a defendant by its own decision, whereby a procedural relationship is established between the said participants. As a result, a legal duel between equal parties before the court of law has been facilitated and court's independence and impartiality are prerequisites that allow evidence to be presented in an investigation and to provide a factual basis for a judgment. By definition, neither prosecutorial nor police investigation may constitute a structural element of criminal proceedings in the narrow sense of the word, as opposed to judicial investigation. There is no legal relationship between the parties and the court in a prosecutorial or police investigation and therefore, there cannot be criminal proceedings understood in the narrow sense of that word. In addition, search actions of these state authorities are informal and thus lacking in probative value, so the goal of an investigation is limited: it serves only to the public prosecutor to decide is he will bring charges or abandon prosecution. As previously mentioned, such an investigation may form a structural element of criminal proceedings in the broad sense of the word, *i.e.* of pre-trial procedure.

From the perspective of theory, it could be concluded based on what has been said that the nature of an investigation directly impacts the structure of criminal proceedings. However, apart from two typical models of investigation whose nature determines if it is a phase, *i.e.* a structural element of criminal proceedings in the narrow sense of the word or if it cannot be such a phase, some hybrid models of investigation that are not consistent with theoretical views of the impact of investigation's nature on the structure of criminal proceedings have been created after the reforms of criminal procedure laws were carried out in the last few decades. Prosecutorial investigation has been legislated in certain jurisdictions, but it is regulated as a formal phase,[11] while in our criminal legislation it has even been expressly regulated as a stage in criminal proceedings in the narrow sense of the word. If we add to this the fact that public prosecutors undertake

10 For a definition of criminal proceedings, please refer to: dr Toma Živanović, *Osnovni problemi krivičnog i građanskog procesnog prava (postupka)*, I. odeljak, Beograd, 1940, p. 7, 8, 36, 49 and 50; dr Tihomir Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, Beograd, 1981, p. 5; dr Momčilo Grubač, *Krivično procesno pravo*, Beograd, 2006, p.27; dr Davor Krapac, *Krivično procesno pravo – Prva knjiga: institucije*, Zagreb, 2003, p. 4; dr Stanko Bejatović, *Krivično procesno pravo*, Beograd, 2008, p.48; dr Drago Radulović, *Krivično procesno pravo*, Podgorica, 2009, pp. 6-9; dr. Milan Škulić, *Krivično procesno pravo*, Beograd, 2009, p. 2; dr Snežana Brkić, *Krivično procesno pravo II*, Novi Sad, 2013, p. 3 and 4; dr Čedomir Stevanović – dr Vojislav Đurđić, *Krivično procesno pravo – Opšti deo*, Niš, 2006, p. 10; and others.

11 See Articles 216 through 239 of the Croatian CPC and Article 7 and Articles 295 through 312 of the Serbian CPC.

evidentiary actions in investigations or to put it more precisely, present evidence whose probative value is the same as if it were judicial evidence or presented before the court, it becomes clear that formal judicial investigation has been replaced with formal prosecutorial investigation simply by substituting the authority to which investigation is entrusted. Thus organised investigation, apart from not being in agreement with the theoretical understanding of the concept and structure of criminal proceedings, cannot stand the test of a fair trial,[12] nor does it enhance the efficiency of proceedings, the main reason for its legislation, since all the evidence is presented in a formal investigation and then later presented again at the main hearing given the fact that its purpose has not been modified.

2. Statutory Conditions for Initiating Prosecutorial Investigation

The prerequisite for a debate on statutory conditions for initiating investigations is that the investigation is organised as a stage in a formal criminal proceeding. Investigation is found in the mixed (continental Europe) type of criminal procedure as a formal phase of pre-trial proceedings, whereas in the adversarial model, there is no standard investigation at all. The reforms of criminal procedure law carried out in European countries[13] over the last decades have disproved a potential *a priori* position that solely judicial investigation can be a phase in the formal criminal proceedings, as discussed above.

In the criminal procedure of Serbia, prosecutorial investigation is defined as a stage in the formal criminal proceedings, which follows, as previously mentioned, from the provisions governing the initiation of criminal proceedings (Art. 7 of the Serbian Criminal Procedure Code) and the meaning of the notion of proceedings (Art. 2, para. 1, item 14). The law provides for two conditions for initiating investigations: 1) *grounds for suspicion* are laid down as a substantive condition; 2) *an order issued by the competent public prosecutor* on initiating an investigation has been set as the formal condition.

1) Although there is only one *substantive condition*, it has been defined in two different ways because the law allows public prosecutors to initiate investigations even against unknown perpetrators. In case that a perpetrator is known, the substantive condition is related both to the offence and the perpetrator: there need to exist *grounds for suspicion* that *a specific person* has committed a specific *criminal offence* (Art. 295, para. 1, item 1). When a perpetrator is unknown, the substantive condition is only associated with the criminal offence – a public prosecutor may initiate an investigation provided there are *grounds for suspicion* that *a criminal offence* has been committed (Art. 295, para. 1, item 2).

Grounds for suspicion are the lowest standard of being convinced of a crime and its perpetrator. Suspicion may not be arbitrary; instead, it must be based on evidentiary material obtained by prosecuting authorities. That means that this lowest degree of suspicion must be grounded in facts that exit in reality and not in unsupported assumptions.

12 *Amlius:* V. Đurđić *Normativne pretpostavke prava na pravično suđenje u krivičnim stvarima /*Normative Prerequisites for Right to a Fair Trial in Criminal Matters/, Legal Life - Journal of the Lawyers Association of Serbia, no. 9/2013, pp. 715-728.

13 Investigation is defined as a phase in the formal proceedings in the criminal procedure of Montenegro, Croatia, and Serbia.

The general concept and degree of suspicion of an offence and its perpetrator and consequently the grounds for suspicion are chiefly a theoretical issue. Different approaches to the scientific interpretation of those concepts can be found in the theory of criminal procedure, which is why they have numerous definitions.[14] Even though there was no widely accepted theoretical standpoint, the lawmakers have provided a legal definition of grounds for suspicion and thus imposed their own standpoint, quite questionable from the perspective of theory. The statutory definition reads as follows: "'grounds for suspicion' is a set of facts which indirectly show that a certain person is the perpetrator of a criminal offence" (Art. 2, para. 1, item 17). In addition to being deemed unnecessary, the definition has been met with very harsh criticism coming from the scientific and professional community for several reasons.[15] The main shortcoming of the definition of grounds for suspicion (and reasonable suspicion) is that the assessment of evidence and its classification into direct and indirect have been introduced into the statute. Under the letter of the law, the facts that indirectly point to an offence or its perpetrator, i.e. circumstantial evidence, have the value of grounds for suspicion, whereas the facts that directly point thereto, i.e. evidence, have greater value – the value of reasonable suspicion. In that manner, the legal evaluation of evidence, as the one found in the inquisitorial model of criminal procedure,[16] has been introduced into the criminal procedure which aspires to be accusatorial as devised by the lawmaker, even though such an evaluation was surrendered to history a long time ago together with that general model of procedure. It can be inferred from the statutory definitions of the above-mentioned degrees of suspicion that direct evidence may not provide grounds for suspicion nor may reasonable suspicion (and even degrees higher than it) be founded on a chain of facts – circumstantial evidence, which is incompatible with the reality of proceedings and judicial discretion based on which judges assess evidence (Art. 16, para. 3) and establish legally relevant facts. As a result of those shortcomings, the statutory definition of grounds for suspicion is not useful when it comes to applying the Code in practice. When establishing each individual degree of suspicion in practice of the courts, the totality of available evidentiary material is quite rightly assessed summarily, which implies the evaluation of both circumstantial and direct evidence.

The lowering of bar for factual basis for initiating investigations from reasonable suspicion to grounds for suspicion cannot be easily justified if we bear the established model of investigation in mind, which has led to theoretical and professional criticism of this condition for initiating investigations. The fact that degrees of suspicion of an offence and its perpetrator needed for pre-investigation and investigative proceedings have been made identical is not only illogical in itself; it is also inconsistent with the very etymology of the concept of proceedings[17] (trial) and its essence. Dynamics are at the heart of criminal proceedings – any rational proceedings should facilitate stage after stage, certain progress towards clearing up the degree of probability

14 For a detailed study and analysis of theoretical views of the general concept and degree of suspicion of a criminal offence and its perpetrator, please refer to: dr Đorđe Lazin, *In dubio pro reo*, Beograd, 1985, pp. 13-27.

15 See: M. Škulić – G. Ilić, *Reforma u stilu "Jedan korak napred - dva koraka nazad"* /Reform Along the Lines of 'One Step Forward, Two Steps Back'/, Belgrade, 2012, pp. 83-89; dr S Bejatović, *Radna verzija Zakonika o krivičnom postupku Republike Srbije i tužilački model istrage* / Draft Version of the Republic of Serbia's Criminal Procedure Code and Prosecutorial Model of Investigation/, Archive for Legal and Social Sciences, no. 1-2/2010, pp. 98-99.

16 A legal definition of grounds for suspicion can be found in the history of Serbia's criminal procedure legislation namely, the one that used to be in force at the time the inquisitorial type of criminal procedure was the dominant one, although it was not based only on circumstantial evidence. The following definition is provided under § 118 of the 1865 Criminal Procedure Code of the Principality of Serbia: "Grounds for suspicion shall denote *any circumstance* which is so closely linked to a specific person and criminal offence that if judged impartially, it could be deemed based on it that it is probable that the same person has committed the offence he is charged with or was involved therein".

17 Lat. *processus* = the way and manner in which something comes into existence or develops, course, development, growth.

whether or not a crime has been committed and who its perpetrator is.[18] Nor can such a legislative solution be justified if we bear in mind the nature of pre-investigation and investigative proceedings, their purpose and the character of actions undertaken therein.[19] Apart from that, laying down the same degree of suspicion of an offence and its perpetrator for initiating pre-investigation proceedings (which are informal and do not constitute a stage of criminal proceedings) and investigative proceedings (which are formal and form a phase of criminal proceedings in the narrow sense of the word under the letter of the law) has created a latent field for arbitrary prosecution instead of conditions for applying the principle of legality. Another shortcoming of the low standard of proof for an offence and its perpetrator is that it complicates the process of imposing detention given the fact that in order to apply this severest measure for ensuring defendant's presence, there needs to exist a higher degree of suspicion, namely reasonable suspicion.

2) The *formal* condition for initiating investigations is that a public prosecutor has to issue an *order* to conduct an investigation (Art. 296, para. 1). Mandatory contents of this formal decision by the public prosecutor have also been prescribed. The order must include as follows: suspect's personal information if his identity is known; particulars of the act from which the elements of a crime can be derived; legal classification of the offence and circumstances which provide grounds for suspicion (Art. 296, para. 3). All these formalities support the legislator's idea of prosecutorial investigation as a formal stage in the proceedings in the same manner as judicial investigation used to be as well as that it forms a structural element of criminal proceedings in the narrow sense of the word, which is incompatible with its nature.

While it is understandable that a formal decision on initiating investigation against a specific suspect needs to be issued since it allows prosecutors to undertake evidentiary actions[20] and suspects to attend those action, the purpose of rendering this formal decision against unknown perpetrators remains unclear. When a public prosecutor launches an investigation against an unknown perpetrator by issuing an order, he is free to take all the evidentiary actions as opposed to the possible perpetrator who is not in a position to be present thereat nor can propose that certain evidentiary actions be undertaken in his favour since he is not aware that an investigation has been initiated against him. The fact that investigations may be instituted against unknown perpetrators, in particular that evidence whose probative force is the same as if it were presented before the court at a main hearing may be presented by a public prosecutor without any participation from the defendant's side,[21] puts defendants at such a disadvantage vis-à-vis public prosecutors (who are transformed into an "equal" opposing party) at the later stages in the proceedings, that such proceedings may not even come close to a fair trial, let alone be referred to as fair.[22]

18 Dr Gordan Kalajdžijev, *Позначајни концепциски разлики во реформата на истрагата во Хрватска и во Македонија* /Main Conceptual Differences in the Reform of Criminal Investigation in Croatia and Macedonia/, Collected Papers of the Zagreb Faculty of Law, Vol. 61, 2/2011, p. 474.

19 Dr Stanko Bejatović, */Radna verzija Zakonika o krivičnom postupku Republike Srbije i tužilački model istrage* /Draft Version of the Republic of Serbia's Criminal Procedure Code and Prosecutorial Model of Investigation/, Archive for Legal and Social Sciences, no. 1-2/2010, p. 99.

20 It follows from a provision contained in Art. 297, para. 1 of the CPC that the issuance of the order to conduct an investigation is a statutory condition for undertaking evidentiary actions in the course thereof since it is required that the order shall be served on a defendant "together with the summons" to attend *"the first* evidentiary action".

21 Defendant's position is not improved in the least despite the public prosecutor's duty to apply for an approval from the judge for preliminary proceedings prior to taking evidentiary actions such as questioning of witnesses or expert witnesses (Art. 300, para. 6). The fact that the public prosecutor has obtained judicial approval does not create conditions for a defendant to cross-examine prosecution witnesses, expert witnesses, or even witnesses for the defence, while their statements given in the course of the investigation may be used as a factual basis for rendering a judgment without any legal impediments.

22 For more on this topic, see: Vojislav Đurđić, *Normativne pretpostavke prava na pravično suđenje u krivičnim stvarima* /Normative Prerequisites for Right to a Fair Trial in Criminal Matters/, Legal Life - Journal of the Lawyers Association of Serbia, no. 9/2013, pp. 715-728.

Even though it is not subject to appeal, it is provided that the order to conduct an investigation shall be served on a defendant provided his identity is known (Art. 297, para. 1). The Code does not specify if the order is served immediately upon its issuance, nor has the maximum time limit for its service been defined, whereby conditions have been created allowing public prosecutors to use manipulation in respect of the point in time at which they will issue a formal order to launch an investigation. Public prosecutor's duty to serve on the defendant and his defence attorney the order and the summons to be present at the time of first evidentiary action, which they are allowed to attend under the law, does not change the state of affairs very much since the prosecutor decides which evidentiary action will be taken as well as the order thereof, so he can always leave those actions to be undertaken last. Thus, a suspect is placed in a situation in which he does not learn that there is an investigation against him until its very end,[23] which in effect prevents him from raising any defence and he is denied the right to equality of arms. It seems as if the lawmakers formulated a concept of a secret investigation by the public prosecutor by drawing their inspiration from the solutions found in the inquisitorial procedure of the Middle Ages.

Directions for making improvements in statutory regulations can be discerned in the critical analysis of statutory conditions for initiating investigations. One direction to be taken would include keeping the lowered degree of proof for the offence and its perpetrator, *i.e.* investigations would be initiated when there are grounds for suspicion; in terms of its concept, a non-formal investigation would correspond to such a solution, so the formal decision to initiate an investigation would have to be abolished. Another possible direction would imply keeping the initiation of investigations formal, but with two changes made to its concept: a) the degree of factual basis for initiating investigations should be raised to the level of reasonable suspicion and b) the form of the decision to initiate an investigation should be amended in order to allow for its review in the second instance and defendant's right to access to court. In either case, public prosecutors have to be divested of their right to present evidence (any possible presentation of evidence which may not be delayed must be the prerogative of judges – within the court's functional jurisdiction).

3) No special conditions have been provided for initiating investigations against unknown perpetrators; there must be grounds for suspicion that a criminal offence has been committed (the substantive condition) and a public prosecutor needs to issue an order for conducting an investigation. There are no additional conditions. What this means is that a discretionary power of public prosecutor has be established whereby he is allowed to decide at his own discretion if he will, in the course of pre-investigation, undertake any search actions with the assistance from the police for the purpose of discovering a potential perpetrator when there are grounds for suspicion that a criminal offence has occurred or he will issue an order for conducting an investigation and then take investigative actions for the same purpose. The primary aim of such an investigation is to collect "evidence necessary for establishing the identity of the perpetrator"; however, that does not prevent the undertaking of any evidentiary action in accordance with the general purpose of the investigation (Art. 295, para. 2). In addition to the lack of logic behind conducting formal proceedings against an unknown perpetrator, the main shortcomings of such an investigation include the fact that evidence presented therein may constitute a factual basis for judicial decisions rendered in the subsequent phases of proceedings and that there are no guarantees that would protect defendants' rights in the course of and after the investigation – no defence counsels are

23 Dr Snežana Brkić, *Krivično procesno pravo II*, Novi Sad, 2013, p. 90.

appointed *ex officio* (which the authority that conducts the proceedings has a duty to do when a defendant is tried *in absentia*)[24] nor are there guarantees that a defendant will be given an opportunity to cross-examine witnesses and expert witnesses in subsequent phases of the proceedings.[25] The introduction of the investigation against an unknown perpetrator has been strongly criticized on account of the above-mentioned essential shortcomings.[26] Since the prosecutorial investigation is formal and forms a structural element of the general make-up of criminal proceedings, it is rightly believed that it is impermissible to conduct a modern criminal proceeding against an unknown perpetrator.[27]

3. Moment at Which Criminal Proceedings are Initiated

The initiation of an investigation implies that there is a moment at which the prosecutorial investigation begins. If the investigation constitutes a structural element of criminal proceedings, that moment represents a demarcation line between criminal proceedings and the preliminary investigation. As opposed to this, when the investigation is organised as informal and precedes criminal proceedings, the moment of its initiation is not so significant, although it may be relevant to the possibility of imposing coercive measures. An issue of the moment at which criminal proceedings begin in cases in which there is no investigation, either in some general or simplified form, arises in that regard.

From historical perspective, statutory provisions governing the commencement of criminal proceedings had not been a characteristic of criminal procedure laws. It used to be a subject dealt with in theoretical studies; however, the commencement of criminal proceedings became the subject of statutory regulations in certain countries in the process of reforms undertaken in the filed of procedural law in the past decades.[28]

The inherent differences between two general models of criminal procedure, in the first place in respect of their nature and structure, as well as different modalities of the preliminary stage in the mixed model, in addition to a number of simplified forms of procedure – all have led to the fact that criminal proceedings do not begin at the same moment. As a result, there are various theoretical views of the commencement of criminal proceedings that resulted from various solutions found in the positive law of individual countries at a given time, as well as from various theoretical interpretations of positive law and understandings of criminal proceedings. There are those who are of the opinion that criminal proceedings begin the moment *the first action* aimed at discovering a criminal offence or its perpetrator *is taken*.[29] In contrast to that opinion, in which the commencement of criminal procedure is associated with the earliest moment at which the state

24 Even the European Court of Human Rights is of the opinion that a defendant must have a defence counsel when he is tried *in absentia* (the case of *Pelladoah v. Netherlands*, decision of September 22, 1994).

25 For more on this topic, see: Vojislav Đurđić, *Normativne pretpostavke prava na pravično suđenje u krivičnim stvarima* /Normative Presumption for Right to a Fair Trial in Criminal Matters/, Legal Life - Journal of the Lawyers Association of Serbia, no. 9/2013, pp. 722-724.

26 For instance, see: Dr Stanko Bejatović, *Radna verzija ZKP Republike Srbije i tužilački model istrage* /Draft Version of the Republic of Serbia's CPC and Prosecutorial Model of Investigation/, Archive for Legal and Social Sciences, no. 1-2/2010, pp. 97-98.

27 S. Brkić, *Krivično procesno pravo II*, Novi Sad, 2013, p. 9.

28 See Art. 17 of the Croatian Criminal Procedure Code (*Official Gazette of Croatia*, no. 152/08 and 76/09 – consolidated text) and Art. 7 of the Serbian Criminal Procedure Code (*Official Gazette of Serbia*, no. 72/2011).

29 The opinion was expressed at an international seminar held in Noto, Sicily from Septembar 27 to October 2, 1982 (See: dr Davor Krapac, *Pripremni stadijum krivičnog postupka u komparativnom pravu* /Preparatory Stage of Criminal Proceedings in Comparative Law/, Yugoslav Journal of Criminology and Criminal Law, 1983, no. 1-2, p. 235).

reacts to a committed criminal offence, a majority opinion is found in Serbian literature on criminal procedure in which, when determining the beginning of criminal proceedings, one should focus on the moment a certain individual is at least *to a large extent believed to be the perpetrator of an offence*, although that moment is differently defined. From one perspective, it is the *moment at which an accusatory instrument is issued*,[30] whereas others hold that criminal proceedings begin *by a decision of the court.*[31]

Similarly to other European legislations, there had been no provisions on the commencement of criminal proceedings in the history of Serbian laws that governed criminal procedure until the latest reform of criminal procedure law implemented in 2011. The lawmakers have included a definition of the commencement of criminal proceedings into the new procedural code among a number of theoretical definitions. The general form of procedure, *i.e.* regular criminal proceedings begin either "by the issuance of an order for conducting an investigation" or "by the confirmation of an indictment that has not been preceded by an investigation" (Art. 7, para. 1, items 1 and 2). Summary criminal proceedings begin "by the issuance of a ruling ordering detention before the filing of a motion to indict" and "by scheduling the main hearing or a sentencing hearing" (Art. 7, para. 1, items 3 and 4). Nevertheless, the manner in which the commencement of proceedings is provided for by the law has no theoretical foundation neither in respect of its general form nor summary proceedings, which is why it has been met with criticism in scientific and professional papers; it is not clear if it can be any useful in the practice of the courts.

What is regarded as the moment at which proceedings begin depends primarily on the view of criminal proceedings and consequently on the structure of a specific type thereof. If we take as our starting point the theory of the legal notion of criminal proceedings, it follows that *the moment at which a procedural relationship is established marks the commencement of criminal proceedings*, as well as that there could be no criminal proceedings without all three participants between whom the relationship in question is formed. Hence, investigative actions undertaken prior to that moment, before a relationship between the court and the parties has been established, cannot be regarded as actions undertaken in criminal proceedings. (Such actions are anticipative and may acquire evidentiary value only after being accepted after the commencement of criminal proceedings.) For the same reasons, any phase of proceedings which is conducted by a state authority other than the court and precedes court's proceedings in which the parties discuss the principal matter thereof may not be regarded as criminal proceedings. Even when the notion of criminal proceedings understood realistically as a set of procedural actions governed by the law and taken by the court and parties with a specific procedural aims is taken as a starting point, the point at which proceedings begin is the same. Because of the adherence to the accusatory principle, the court will never institute proceedings *ex officio*; nevertheless, there may be no proceedings without a court's decision. Hence, the moment at which a prosecutor files a motion with the court to initiate proceedings or a certain action is undertaken for the same purpose may not be regarded as the commencement of criminal proceedings since it is not yet certain that there will be any proceedings given that the court has to make a ruling thereon. Actions taken by the prosecuting authorities before the court renders its decision do not belong to criminal proceedings even though have the same aim as criminal proceedings themselves. Such is

30 Dr Branko Petrić, *Pokretanje krivičnog postupka* /Initiation of Criminal Proceedings/, Legal Life - Journal of the Lawyers Association of Serbia, no. 2/1968, p. 3.

31 See: Dr Čedomir Stevanović, *Krivično procesno pravo*, Naučna knjiga, Beograd, 1994, p. 291; Dr Tihomir Vasiljević, *Sistem krivičnog procesnog prava SFRJ*, Beograd, 1981, p. 13.

the nature of actions taken in a prosecutorial investigation, as a result of which it cannot form a phase of criminal proceedings and in consequence, its beginning may not be regarded as the commencement of criminal proceedings. A conclusion drawn from the above is that it can be regarded pursuant to both the legal and realistic definitions of criminal proceedings that they begin by a court's decision, whereby it is established that statutory conditions for conducting proceedings have been satisfied.

As opposed to this theoretical view, the lawmakers have taken the doctrinal view of the commencement of regular criminal proceedings in which the investigation is judicial as if its nature was not changed by the introduction of prosecutorial investigation. However, the fact that investigation has been entrusted to non-judicial authorities must lead to a redefinition of the structure of criminal proceedings by definition thereof and therefore neither police nor prosecutorial investigation may be deemed a phase of criminal proceedings, which *eo ipso* means that criminal proceedings do not begin by initiating a non-judicial investigation, but after it. Specifically, in cases of non-judicial investigation, criminal proceedings begin by the confirmation of an indictment since the court finds by that decision that bringing a defendant before the court is both justified and legal (in any case, it is how the procedural code defines the commencement of criminal proceedings based on a direct indictment). Such a conclusion would have been reached by the lawmakers themselves had they read more carefully the procedural code they used as an example for introducing and defining the new model of criminal procedure. Namely, the Croatian Criminal Procedure Code from which a number of statutory solutions have been taken or inspiration was drawn by the lawmakers quite rightly lays down in respect of the general form of proceedings that "criminal proceedings shall commence by confirming an indictment" (Art. 17, para. 1, item 1 of the Croatian CPC) and no other manner of instituting such proceedings has been provided for.

In addition to the general form of proceedings, the Code provides for the moment at which summary proceedings and the procedure for imposing criminal sanctions without holding a main hearing commence. Given the fact that there is no investigation as part of the above-mentioned simplified forms, the moment at which they are initiated is quite rightly associated with a judicial decision – summary proceedings begin "by scheduling the main hearing or a sentencing hearing" (Art. 7, para. 1, item 4). In situations when a public prosecutor decides to undertake an evidentiary action prior to filing a motion to indict, criminal proceedings begin in the same manner. The lawmakers implemented their idea of prosecutorial investigation as strictly formal and absent from the structure of simplified forms in such a consistent manner, which is why proceedings begin by a court's decision and not by taking an evidentiary action prior to the filing of a motion to indict. Nevertheless, the initiation of regular criminal proceedings is in essence contingent on the first evidentiary action under the law: the order for conducting an investigation whereby proceedings are initiated under the letter of the law is issued "prior or immediately after the first evidentiary action" taken by the public prosecutor or the police. Thus, the moment at which regular criminal proceedings are initiated is in effect dependent on the first evidentiary action, whereas this is not the case with summary proceedings.

The moment at which summary proceedings are initiated is not dependent on the first evidentiary action; instead, it is contingent on the first action of procedural coercion prior to the filing of an accusatory instrument, which is a disastrous legislative solution. Namely, it is laid down that summary proceedings shall begin "by the issuance of a ruling ordering detention before the filing

of a motion to indict" (Art. 7, para. 1, item 3), which is unacceptable for a number of reasons. The main shortcoming of such a statutory regulation is that it is based on the idea that criminal proceedings may begin before a court of law without an accusatory instrument of the prosecutor's, which is in direct conflict with the accusatory principle that underlines the modern criminal procedure. In essence, an accusatory instrument is a prosecutor's request duly drawn up whereby the court is asked to bring a defendant to the main hearing and convict him pursuant to the law.[32] Where there are no charges, there can be no criminal proceedings (*nemo iudex sine actore*). The accusatory principle understood in such a manner dominates the modern criminal procedure, as a result of which no criminal proceedings initiated and conducted by the court without an accusatory instrument filed by a prosecutor can be found in comparative law. For the above reasons, it is impermissible that at this day and age criminal proceedings are regulated in a manner which allows them to be initiated *ex officio*, which lies at the heart of the given statutory solution. In that regard, it cannot be deemed that by putting forward a motion before the court to order detention against a suspect the public prosecutor has at the same time filed an accusatory instrument since such instruments are strictly formal in character. A motion for ordering detention does not meet the requirements for mandatory contents of an accusatory instrument set forth by the law, as a result of which it would have to be dismissed as invalid from the formal point of view even in the case it is presumed that it also represents a motion to indict. Even a further diachronic sequence of procedural actions is inconsistent with such a solution, as isolated as it may be thus far, according to which criminal proceedings may be initiated even without an accusatory instrument. When detention is ordered prior to the filing of a motion to indict, it is not yet certain if there will be any criminal proceedings. It is not impossible that the public prosecutor will abandon prosecution even after detention has been ordered for certain reasons permitted by the law or guided by the principle of discretionary prosecution. In such cases, a question arises about the person who will end the proceedings initiated under the letter of the law and the decision whereby they will be ended. In contrast to that, if the public prosecutor files a motion to indict after detention has been imposed, summary proceedings commence by scheduling the main hearing pursuant to the express rule found in another provision of the Code; this leads to a question: how can one and the same criminal proceedings begin twice.

Apart from being flawed in terms of its conception, the statutory solution according to which criminal proceedings commence by a court's decision imposing the measure of detention is inconsistent with the definitions of the notions of defendant and the accused found in the statute; it also contravenes the provisions governing summary proceedings as a special form (type) of criminal proceedings that also set forth the manner in which such proceedings are initiated without laying down that they are initiated by ordering detention (Art. 499, para. 1)[33] as well as the provisions governing who shall be deemed a person wrongfully deprived of liberty ("when /the person/ is deprived of liberty and no proceedings have been initiated" – Art. 584, para. 1, item 1).

32 Dr Čedomir Stevanović – dr Vojislav Đurđić, *Krivično procesno pravo – Opšti deo*, Niš, 2006, p. 175.

33 For more on this topic, see: V. Đurđić, *Redefinisanje klasičnih procesnih pojmova u Prednacrtu Zakonika o krivičnom postupku iz 2010 /* Redefining Traditional Procedural Concepts in the 2010 Draft Criminal Procedure Code/, Archive for Legal and Social Sciences, no. 3-4/2010, pp. 203-204.

4. Impact of Police Pre-Investigative Actions on Formal Initiation of Investigations

Public prosecutor's position in the proceedings has been strengthened by the introduction of prosecutorial investigation – he has become the *dominus litis* of both the preliminary investigation and pre-trial proceedings. Under the letter of the law, he is in charge of pre-investigation proceedings (Art. 285, para. 1) and he also issues the decision on conducting an investigation and conducts investigations (Art. 296, para. 1 and Art. 298, para. 1). Even though the police are in principle obligated to act in accordance with requests from public prosecutors for taking search and investigative actions, the fact that a time limit before which a prosecutor is bound to issue an order for conducting an investigation is made contingent on the police evidentiary action has called into question this general rule to a certain degree. Namely, it is provided that the public prosecutor shall issue an order to conduct an investigation "not later than 30 days after the date he is notified about the first evidentiary action undertaken by the police" (Art. 296, para. 2).

According to an interpretation from the lawmakers' side, the said time limit should give enough time for reaching a decision whether or not the police evidentiary action will be "authorised or its authorisation will be rejected."[34] However, due to imprecise wording by which the limit has been set, its purpose is unclear, which is why it has been given various interpretations.

In one opinion, by undertaking any evidentiary action, the police may "force" the public prosecutor to initiate an investigation, regardless of his assessment.[35] Since the police have at their disposal operational capacities which the prosecution lacks it is possible, looking from that perspective, that such forced investigations become a common practice, which is contrary to the prohibition of any form of influence on the work of the public prosecution service as established under the Law on Public Prosecution (Art. 5, para. 2 of the LPP).

From another perspective, even in such cases, after an evidentiary action undertaken by the police, the power to make decisions on whether or not an investigation should be launched is vested in the public prosecutor and not in the police on the basis of an assessment of statutory conditions in order to prevent the undermining of public prosecutor's leading role in pre-investigation proceedings as well as to preclude the placing of the police in the position of superiority over the public prosecutor to which the literal interpretation of the cited provision might lead.[36] The assessment could result in the public prosecutor's dismissal of a criminal charge(s) or issuance of an order to conduct an investigation.

There is another opinion in which both time limits are instructive in character – this refers to the actual time limit for issuing the order for initiating an investigation before or directly after the first evidentiary action as well as to the maximum time limit for issuing the order not later than 30 days from the date on which the public prosecutor is notified of the first evidentiary action of the police.[37]

34 G. Ilić et al., *Commentary to the Criminal Procedure Code*, Belgrade, 2013, p. 685.
35 Dr Goran Ilić, *Položaj javnog tužioca prema novom ZKP-u* /Position of the Public Prosecutor According to the New CPC/ in the proceedings: Current Issues of Criminal Law (normative and practical aspects), Belgrade, 2012, p. 164.
36 Dr Snežana Brkić, *Krivično procesno pravo II*, Novi Sad, 2013, p. 89.
37 Dr Milan Škulić, *Osnovi sumnje u krivičnom procesnom pravu Srbije*, Belgrade, 2013, p. 94.

In addition to the arguments put forward in favour of the above opinions, it should also be mentioned that the procedural code does not provide for any procedural consequences or sanctions in case public prosecutors exceed the said time limit of thirty days. That would imply that the time limit is instructive in character and that public prosecutors assess in each specific case whether or not statutory conditions for initiating an investigation have been met, even in cases when they are informed that the police have undertaken an evidentiary action in the course of pre-investigation. However, one should not lose the sight of the fact that when making interpretations, public prosecutors strictly observe the law and that observation of statutory time limits is assessed in the process of evaluating the quality of their performance. Therefore, the said provision should be amended and reworded pursuant to the procedural reality and nature of each stage in the proceedings.

5. Parties-Driven and Judicial Control of Initiation of Investigations and Investigative Actions

As regards the initiation of investigations, the code of procedure does not provide for any party-driven or judicial control of decisions rendered by public prosecutors. No appeal is allowed against the order for initiating an investigation issued by a public prosecutor. Also, such decisions are not even subject to review within the public prosecution service, otherwise structured on a manifestly hierarchical principle. As a result of such statutory provisions, the issue of some of the fundamental human rights of suspects' may be raised – the right to access to court and the right to legal recourse.[38] At the same time, the constitutionality of statutory provisions on initiating investigations has been called into question since the Constitution guarantees that everyone shall have "the right that… the tribunal… shall hear and pronounce a judgment on… *grounds for suspicion resulting in initiated procedure* and accusations brought against them" (Art. 32, para. 1 of the Constitution).

An efficient legal method of protection against unlawful and arbitrary initiation of investigations would be to establish the right to access to court and effective legal recourse. Subjection to the idea that the court must not be involved in investigations, imposed from the common law understanding of criminal proceedings as adversary proceedings, along with the fact that all the investigative actions have been given the same probative value as if they were undertaken in a fair duel at the main hearing before the court of law puts suspects at such a disadvantage vis-à-vis the other party to the proceedings to a point that it entirely strips preliminary proceedings of its attributes of fairness.

Unlike in the case of the initiation of investigations, the Criminal Procedure Code provides for a certain level of control of investigation actions. The following can be deemed to represent some types of control over the conduct of investigations by public prosecutors: a) suspect's and his defence counsel's right to be present during investigative actions; b) suspect's and his defence counsel's right to file a motion to a judge for preliminary proceedings that certain evidentiary actions should be taken; c) obligation to disclose evidence.

38 See: V. Đurđić, *Normativne pretpostavke prava na pravično suđenje u krivičnim stvarima* /Normative Prerequisites for Right to a Fair Trial in Criminal Matters/, Legal Life - Journal of the Lawyers Association of Serbia, no. 9/2013, pp. 717-721.

a) The suspect and his defence counsel have the right to attend evidentiary actions taken by the public prosecutor in the course of an investigation. In that process, they may propose to the public prosecutor that they pose questions to a witness or expert witness for the purpose of clarifying a certain matter; after having been granted permission from the public prosecutor, they are free to ask questions even directly (which means that suspects are entitled to cross-examine witnesses for the prosecution in the investigation); then, they are entitled to request that their objections to undertaking evidentiary actions which they are attending are entered on the record and they may propose that specific evidence is obtained.

b) In cases when they believe that a certain evidentiary action needs to be taken, the suspect and his defence counsel have the right to propose to the public prosecutor that he should undertake it. If the public prosecutor rejects their proposal or fails to make a decision thereon within eight days, the suspect and the counsel may file a motion to that end with the judge for preliminary proceedings who is obligated to decide thereon within eight days. When the judge for preliminary proceedings grants the motion, he shall order the public prosecutor to undertake the evidentiary action proposed by the suspect and his defence counsel and determine a time limit for its conduct (Art. 302).

Even though the law provides for the control of the conduct of investigative actions, it could not be said that it is an efficient control. Firstly, no procedural guarantees or sanctions have been laid down in case the public prosecutor fails to comply with the decision by the judge for preliminary proceedings. Moreover, even when the public prosecutor complies with the court's decision and undertakes an evidentiary action, its effects would be questionable since he is convinced that it is unnecessary, as he has already declared. Suspect's rights would be far better protected if it was provided that after the public prosecutor's rejection of the suspect's and his defence counsel's proposal of a certain evidentiary action, the final decision thereon would be rendered by the judge for preliminary proceedings and he would be the one who undertook the action which both parties could attend.

c) Prerequisites for party-driven control of undertaken evidentiary actions and the investigation in its entirety are created by laying down that public prosecutors are required to disclose collected evidence. The public prosecutor shall allow a suspect who has been questioned and his defence counsel to examine case-files and view objects which may be used as evidence (Art. 303, para. 1). Thereafter, the public prosecutor shall call on the suspect and his defence counsel to put forward their proposal for certain evidentiary actions. If the public prosecutor rejects their proposal or fails to make a decision within a statutory time limit, they may put forward their motion before the judge for preliminary proceedings. A mechanism set forth in Article 302 shall be applied next; it does not guarantee efficient protection of the suspect's right to defence as discussed above and therefore, it should be improved by introducing the judge for preliminary proceedings into the investigation process, as proposed above.

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Purpose of Investigation as a Factor of its Scope
(with a particular focus on Montenegro)

1. The investigation is the first stage in the pre-trial proceedings. It is not only characteristic of modern systems of criminal procedure; it is, so to speak, older than those systems having been the central phase in the investigation system of criminal proceedings. During its development throughout history, the investigation was changing its facets, starting with the persons in charge of it, then its purpose and scope, and all of its other practical and political distinctive qualities. It was true in former times as it is true now that problems connected with the investigation stem from two fundamental contradictions: a tendency towards increasing the efficiency of investigations (even the entire criminal proceedings) as much as possible and a tendency towards protecting citizens' rights and freedoms.

Therefore, the main requirement that the investigation needs to fulfil is to achieve a balance between those two tendencies. This is also required by the principle of fairness that underlines criminal proceedings and that has been taking over the central position among the principles of criminal proceedings under the contemporary criminal procedure laws.[2]

The structural problems of the mixed model of criminal procedure have been manifested more in the investigation than in any other institute. The fundamental problem is how to adapt the criminal procedure law to the changes in the sphere of substantive criminal law in which, under the influence of new schools of thought, the attention has shifted from the objective (criminal offence) to the subjective (perpetrator). This has resulted in strengthening the position of

1 Full professor, Faculty of Law, University of Montenegro, Podgorica The author has chaired all the working groups that have been engaged in the reform of criminal procedure legislation in Montenegro.

2 For more on this topic, see dr Vojislav Đurđić: Načelo pravičnog postupka, Review of Criminology and Criminal Law (RKK) no. 3, 2006, p. 67; dr Nikola Matovski: Princip pravičnog postupka u kodifikacijama evropskih država, in "Aktuelne tendencije u razvoju i primeni Evropskog kontinentalnog prava", Faculty of Law in Niš, 2010, pp. 553-567.

defendants as participants in the proceedings, in particular with regard to their right to defence. Considering all of the above-mentioned issues and problems that occur in investigations, it should not come as a surprise that in literature we can encounter opinions in which even criminal investigation strategies should be regarded as a new field of scientific study that would address "the planning and application of complex measures in investigations, as well as crime suppression and prevention."[3]

2. The reform of criminal procedure laws in Montenegro, which had lasted without interruptions from 2003, when the first Criminal Procedure Code of Montenegro was adopted[4] and the country was still part of the State Union of Serbia and Montenegro, until the passing of the new Criminal Procedure Code in 2009 (hereinafter: the CPC),[5] had also addressed the issue on investigation. In effect, the most important new moment in that process was the transition from the judicial to prosecutorial investigation. Thus, Montenegro followed the lead of many countries in continental Europe. However, the transition from the judicial to prosecutorial investigation was not easy because of the differences of opinion between theorists and even practitioners on the issue of which party should be entrusted with the investigation. The positions they took have become differentiated into those who supported the judicial investigation[6] and those who promoted the prosecutorial investigation,[7] and all of them have put forward arguments in favour and against either model of investigation.

The supporters of the judicial investigation present the following main arguments in favour of such a concept of investigation: judicial investigation is the best guarantor of defendants' rights and freedoms; the court, as an autonomous and independent authority is more objective than a state prosecutor who is an autonomous but not independent state authority; it is not suitable that state prosecutors collect information about defendant's personality, which is one of the objectives of any investigation; in addition, there is no single binding international instrument which requires that the model of prosecutorial investigation be adopted.

In contrast to the above opinion, the advocates of the prosecutorial model of investigation highlight its main advantages: the efficiency of prosecutorial investigation in contrast to the armchair work of investigating judges; reducing the possibility of unnecessary repetition of evidence; contribution of the prosecutorial investigation to more complete application of fundamental principles of criminal procedure, in particular the principle of directness; a negative effect of judicial investigation on witnesses who are questioned multiple times; harmonisation with contemporary comparative criminal procedure laws and international criminal law, and the like.[8]

3 For more on this topic, see: Lowe-Rosenberg, Die Stofprocessordnung und das Gerhstverfasunggeseetz, Groskomentar, 23 Auflage, Zweiter Band, Berlin, 1988, par 160-169; C. Roxin, Strafverfarhensrecth, 22, Auflage, Munchen, 2002.

4 *Official Gazette of the Republic of Montenegro*, no. 71, year 2003.

5 *Official Gazette of Montenegro*, no. 57, year 2009.

6 We highlight the names of dr Momčilo Grubač: Krivično procesno pravo, Beograd, 2011, p. 373, and dr Đorđe Lazin: Sudska istraga (dileme i problemi), RKK br. 2, 2006, p. 73.

7 We mention only some names: dr Stanko Bejatović, Koncept istrage i novi ZKP RS, in "Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena", Zlatibor, 2013, p. 131; dr Milan Škulić, Koncepcija istrage u krivičnom postupku, RKK, no. 1, 2010, p. 66; dr Vojislav Đurđić: Komparativna rešenja u prethodnom krivičnom postupku i njihova implementacija u srpsko krivično procesno zakonodavstvo, in "Zakonodavni postupak i kazneno zakonodavstvo", Beograd 2009, p. 137; dr Miodrag Simović and dr Vladimir Simović, Krivično procesno pravo II, Istočno Sarajevo 2011, dr Goran P. Ilić, et al.: Commentary to the Criminal Procedure Code, Belgrade, 2013, p. 692.

8 For more on this subject, see: dr Snežana Brkić: Krivično procesno pravo II, Third Edition, Faculty of Law in Novi Sad,, 2013, p. 84.

The subject matter of this paper does not give us enough room for a more detailed consideration of this relevant issue and opting for one or the other side. However, perhaps it is still too early to make any conclusions as to the advantages of prosecutorial investigation in our context since it was introduced into procedural laws of the countries that emerged after the break-up of the former SFRY only a short while ago; as a result, there are no relevant research projects which could support the arguments of the advocates of the prosecutorial model of investigation, starting with their assertion that such an investigation is more efficient as well as that it will not be so remote from practice as used to be the case with the judicial investigation. Furthermore, they do not make a valid point when claiming that the prosecutorial investigation would lead to a decreased possibility of repeated evidence. It is quite the opposite; all the evidence presented in an investigation by non-judicial authorities must be presented again at the main hearing because courts may found their decisions only on evidence given thereat. When the investigation used to be judicial, the court could also found its decisions upon evidence adduced in the investigation as it was adduced by the court in the form of an investigating judge. In contrast to this, when the investigation is prosecutorial, the court may not base its decisions upon evidence adduced in the investigation by a non-judicial body without having it presented again at the main hearing. In view of that, certain jurisdictions (Art. 276 of the Montenegrin CPC) provide for the so-called obtaining of evidence by the court.

Aside from this, it cannot be maintained that the prosecutorial model of investigation is the standard, simply because in comparative law and even in the European law, there are also other models, although it could be said that it makes a more and more prevailing trend.

3. As previously emphasised, Montenegro joined that trend when the new CPC was enacted. Nevertheless, it should be mentioned that the first post-war Criminal Procedure Code in the Federal People's Republic of Yugoslavia enacted in 1948[9] and modelled on the Soviet criminal procedure law also included prosecutorial investigation similar to the current one as well as preliminary investigation that to a certain extent corresponded to the preliminary investigation found in our present CPC. We know from history about the abuses and violations of human rights that occurred at the time the above Code was applied, so we will not dwell on that. This historical parallel could be even more significant in other terms, namely in terms of influences that foreign legislatures have on our own, with the only difference that in 1948 those influences came from the East, whereas today they come from the West.[10] We have failed to take into account our own legal tradition, culture, and the like.

A change in the concept of the investigation in the Montenegrin legislature and the fact that it has been placed in the hands of state prosecutors has an impact on a definition of the notion of criminal proceedings and on determination of their commencement. When defined in legal terms, criminal proceedings represent a procedural relationship that starts, continues and ends between participants therein. The main participants in criminal proceedings are the court and the parties and without them, there can be no procedural relationship or actions and thus no criminal proceedings. Taking as a starting point that criminal proceedings commence with an act (action) of the court, *i.e.* by establishing a procedural relationship, it can then be deemed that criminal

9 *Official Gazette of the FPRY*, no. 97, year 1948.

10 About a similar parallel drawn in Serbia, see: dr Goran Ilić: Poreklo i iskustva Srbije sa javnotužilačkom istragom, in "Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena", Zlatibor 2013, p. 95.

proceedings before a court of law (in the narrow sense of the word) commence when an indictment is confirmed (by the panel referred to in Art. 24, paragraph 7 of the CPC). The above proceedings should be distinguished from criminal proceedings in the broad sense of the word since the latter encompass both the prosecutorial investigation and the preliminary investigation. Both investigations have specific authorities that are in charge of them, their specific character, aim and rules. Even though the court does not take part in these proceedings - apart from an investigating judge (in Montenegrian - "*sudija za istragu*", which translates from the original term as judge for investigation) by way of exception -it figures as a controller who makes sure that human rights are respected and not as a participant in the proceedings. Actions undertaken by state prosecutors and the police in the course of preliminary investigation and investigation do not belong to criminal proceedings conducted before a court of law, which is why their value and procedural importance may not be the same as those of procedural actions undertaken by the court since at the time they are taken, a prosecutor has not yet put to the court his motion to indict and a procedural relationship has not yet been formed. Both preliminary investigation and investigation are aimed at nothing else that collecting the material necessary for bringing an indictment.

Thus, with the introduction of the prosecutorial investigation, a line dividing the judicial and the non-judicial criminal proceedings has been shifted to the moment at which the indictment is confirmed because only then are the essential prerequisites for establishing a procedural relationship satisfied.

4. The change in the concept of the investigation has brought about significant changes with regard to the initiation of investigations and in respect of participants and types of criminal offences, as well as in terms of the procedural instrument by means of which it is initiated. Investigations are initiated solely by state prosecutors, which means that that role may not be occupied by the injured party either as a subsidiary or private prosecutor. Investigations are conducted only in connection with criminal offences prosecuted *ex officio*. And finally, the third significant innovation in relation to the previous legislation is that investigations are initiated and conducted pursuant to an order issued by a state prosecutor as opposed to the previous solution, *i.e.* a ruling to conduct an investigation. The change with regard to the instrument based on which investigations are conducted will result in shorter proceedings, namely their part in connection with the appeal because orders may not be appealed.

Certain formal and substantive requirements need to be satisfied in order for an investigation to be conducted. The formal requirement entails the issuing of the order for conducting an investigation by the authorised state prosecutor. The existence of reasonable suspicion that a certain person has committed a criminal offence constitutes the substantive requirement. Therefore, the same degree of certainty (suspicion) is now required as at the time of the judicial investigation. In contrast to this, criminal procedure systems from the neighbouring countries (Serbia, BiH, Croatia) have adopted the lowest degree of suspicion (grounds for suspicion), required under the Montenegrin CPC for conducting a preliminary investigation as an activity that precedes the investigation. Even though our legislator has provided for several degrees of suspicion required for initiating preliminary investigations and investigations, there are opinions in literature that that difference is not a significant one since the court does not evaluate if the requirements for opening an investigation have been meet and according to the criteria applied by state prosecutors, there does not need to be any difference between grounds for suspicion and reasonable

suspicion.[11] It has not been laid down in the CPC what is deemed or implied by reasonable suspicion, nor has the "scope" of certainty about a criminal offence and its perpetrator been specified. Nevertheless, it has been accepted both in theory and practice that this concept involves situations in which facts and circumstances of a specific criminal event point to a conclusion and indicate that a certain person is the perpetrator of the crime he is charged with,[12] *i.e.* its existence is based on adequate evidence of greater quality and credibility than the evidence on which ordinary suspicion or grounds for suspicion are based.[13] Thus, reasonable suspicion may not be based on presumptions; instead, it must be based on actual and concrete information contained in a criminal charge, annexure thereto, in particular physical evidence, as well as in records of evidentiary actions undertaken in the course of preliminary investigation.

Investigations may be instituted and conducted only against specifically identified individuals and for a specific criminal offence. They may not be conducted against unknown perpetrators, which is possible in the neighbouring countries (Serbia, BiH, Croatia).

Prior to issuing an order for conducting an investigation, the state prosecutor shall interrogate a suspect if he has not interrogated him during preliminary investigation or if the delay thereof poses a risk. It is assessed in each specific situation whether or not such a risk exists. When the CPC specifies that a suspect shall not be interrogated if he has already been interrogated in the course of preliminary investigations, it is implied that the interrogation has been conducted by the state prosecutor, not the police. The purpose of such an interrogation is for a suspect to declare with regard to the charges against him, present his arguments, even to contest the charges against him and thus maybe prevent the investigation from being initiated.

5. Investigations are conducted by state prosecutors as a rule in the area which is within their own territorial jurisdiction, although the carrying out of certain evidentiary actions may be entrusted with a state prosecutor in whose territory those actions need to be taken. Similarly as the 1977 Criminal Procedure Code which introduced into our then legislation the so-called investigation centres (one court conducting investigations for several courts), which had never taken hold in practice, the new CPC has also reserved the possibility that one prosecutor's office conducts investigation for several prosecutor's offices. This concept has found its place in the new CPC as well, although more by inertia and we are certain that it will not be used in practice. In fact, one might ask if there will be an investigating state prosecutor in the prosecutorial investigation as there used to be an investigating judge in the judicial one. If investigation centres have been "copied" from the judicial investigation to the CPC, it could be inferred that there will also be investigating state prosecutors (deputies) and questioned if it was rational and practical for one deputy state prosecutor to conduct an investigation and for another to proceed with the issuing of an indictment and its further representation. In our opinion, the answer is no, since it would be more practical if each deputy state prosecutor would at the same time be both the investigating prosecutor and the prosecutor who "stays on" the case until its conclusion.[14]

11 Dr Momčilo Grubač et al.: Commentary to the Criminal Procedure Code of Montenegro, Tivat 2010, p. 660.
12 Dr Stanko Bejatović, Krivično procesno pravo, Posebni deo, Beograd 1996, p. 47.
13 Dr Milan Škulić, Commentary to the Criminal Procedure Code, Podgorica, 2009, p. 808.
14 For more on this subject, see: dr Drago Radulović, Nova rešenja u krivičnom procesnom zakonodavstvu Crne Gore, in "Nova rešenja u krivičnoprocesnom zakonodavstvu", Zlatibor, 2011, p. 314.

6. The central issue dealt with in this paper is the purpose of the investigation, which at the same time determines its scope. In normative terms (as governed by the CPC), there is no difference in how the purpose and scope of investigations were regulated when they used to be led by judges and how they are provided for now, when they are led by prosecutors; as if it had been the priority of the lawmaker to push the investigating judge out of the investigation (except in some cases) and leave other provisions untouched.

Besides, legislatures mostly act in two ways when determining the purpose of the investigation. The first way is to define by law what constitutes the purpose of the investigation (as done by our legislator in Art. 274) or they make it possible for the purpose of the investigation to be inferred from a number of provisions contained in the code. The issue of investigation's purpose is at the same time an issue of its justifiability as a stage in criminal proceedings. As previously mentioned, in Art. 274, paragraph 2, the legislator in Montenegro defines the purpose of the investigation, which could be differentiated into primary and secondary. The primary purpose can further be divided into a positive one (to collect evidence and information based on which it can be decided in favour of issuing an indictment) and a negative one (to discontinue the proceedings). In addition to this, it is necessary to collect information about a defendant (Art. 289). In such a context, the investigation protects defendants in a certain manner because it prevents them from being brought unfoundedly to the main hearing.[15]

Investigation's secondary purpose is to collect *a*) evidence for which there exists a risk that it could not be once again given at the main hearing or that its presentation would be rendered difficult, and *b*) other evidence that could be useful for the proceedings, but whose presentation, given the circumstances of the case, seems appropriate.

As previously mentioned, there is not a single difference between how the law defines investigation's purpose now that it is prosecutorial and how the law defined it when it used to be judicial. As a result, an issue arises, namely who will be the one to present evidence for which there is a risk that it may not be once again presented at the main hearing or whose presentation would be rendered difficult. At the time the investigation was judicial, those tasks used to be performed by the investigating judge. However, according to the prosecutorial model of the investigation, such evidence should be presented by the investigating judge in order for its use to be allowed at the main hearing without its repeated presentation since in principle, judicial evidence has greater strength.[16]

In such a context, it is left to the prosecutor to assess whether or not there is a risk that evidence may not be repeated at the main hearing and then include the investigative judge. Such a conclusion could also be drawn from Art. 276, paragraph 2, under which certain evidentiary actions in the investigation may be undertaken by an investigating judge if so requested by the parties[17] and if special circumstances obviously indicate that it may not be possible to undertake such actions again at the main hearing or if the presentation of evidence thereat would not be possible or would be rendered significantly more difficult.

15 Dr Snežana Brkić: op. cit., p. 89.
16 Milan Škulić shares this opinion, see in Škulić, Commentary, p. 806.
17 It was incorrect to use the term "parties" in this Article since there are no parties in an investigation until the moment an indictment is confirmed; also, state prosecutors do not act as a party in an investigation, instead they act as a state authority bound by the principle of truth to examine and establish with equal attention both the incriminating and exculpatory facts.

Even though the term "party" is used in the CPC, there are no parties in an investigation; instead we have a state prosecutor and a defendant. If a motion for undertaking an evidentiary action in terms of Art. 276, paragraph 2 is filed by the defendant, even though not specified in the CPC, it would make sense that he files it through the competent state prosecutor in charge of the investigation who should be familiar with the given fact. If an investigating judge does not grant the motion, the panel referred to in Art. 24, paragraph 7 shall rule on that issue within 24 hours. The CPC does not specify the manner in which or based on which instrument the pre-trial chamber gets involved in order to issue a ruling on this dispute. In our opinion, the investigating judge is obligated to inform the panel in writing and clearly state grounds based on which he has found that in that particular case it is not evidence that cannot be presented again at the main hearing.[18] Likewise, it would make sense that he informs the filer of the motion accordingly. If the panel should find that the undertaking of the evidentiary action by the investigating judge is justifiable, the panel shall inform the judge accordingly and he is obligated to take the requested evidentiary action. Even though the CPC does not provide for the format of the panel's decision, we believe that it should be a ruling which may not be appealed.

It depends on prosecutor's judgment, the judgement of the filer of the motion, of the investigating judge and of the panel rendering a final decision to assess when there is a risk that evidence may not be given again at the main hearing in each specific case; one of such cases may involve a risk that the injured party who has been severely wounded will not survive or a witness who is a foreign national, so it is to be expected that he will not appear at the main hearing.

7. In addition to the general purpose of the investigation, which basically amounts to the collection of required evidentiary information dealt with above, the state prosecutor shall also collect information about a defendant in case it is lacking or needs to be checked prior to the completion of an investigation (Art. 289 of the CPC). Contemporary theories about the need to question defendants or to collect as much as possible information about them are the result of the reorientation from the so-called classical and neoclassical individualisation as understood in terms of criminal law towards the individualisation in terms of criminal policy, which is increasingly based on the achievements of modern criminology and other sciences. Information about defendants is collected at the end of the investigation and classified into two groups: information which has to be collected and information collected when necessary.

Prior to embarking on the above task, state prosecutors should establish criteria to guide them in selecting the manner and means of learning about defendant's personality. It has not been specified from whom such information should be obtained, but there can be no doubt that it is requested from persons who are well acquainted with defendants and who can provide the requested information (such as their next of kin, household members, neighbours, colleagues at work, penal or correctional institutions, the police, and the like).

Is it allowed to use information about defendant's personality obtained by means of criminological assessment for establishing if there has been a criminal offence committed or for establishing guilt? Regardless of the fact that criminological assessment is a type of expert witness assessment, we hold that learning about one's personality serves the purpose of the individualisation of criminal sanction in the first place. It often happens that while information about defendant's

18 Milan Škulić shares this opinion, see Škulić, Commentary, p. 811.

personality is being collected, in particular when it is obtained through the so-called introspection, the defendant is under the impression that whatever he says about himself benefits him, which is why the authorities involved in criminal proceedings may not abuse or use such information for establishing that there is a criminal offence or defendant's guilt because it would constitute self-incrimination to a certain degree, which is not allowed.

The knowledge of law does not suffice on its own when it comes to finding out about one's personality and so state prosecutors should be familiar with forensic psychology, criminology, forensics, and the like.

A question arises about the role of defence attorneys in the collection of information about defendants, given that the statute prohibits their questioning as witnesses in connection with anything that defendants have confided to them. In our opinion, the issue does not concern any testimony that would have an impact on the establishment of a criminal offence and defendant's guilt and defence attorneys should portray their clients as they are and whose formation has been influenced by the environment in which they grew up, studied, worked and lived.

The information is obtained by state prosecutors and since it is relevant to the individualization of the sentence, a question may be asked about the extent of directness with which trial judges or panels make a finding of the state of defendant's personality as well as to the degree in which it is their act? Given that the court makes its finding based on a report prepared by the person who has assessed defendant's personality pursuant to a court order as well as based on witness statements, such a finding about the state of defendant's personality is more an acceptance of another's opinion, with limited possibilities for control, than forming of one's own opinion.

8. The purpose of an investigation also determines its scope, which has been discussed in theory a great deal. From one standpoint, all the evidence of a criminal offence and its perpetrator should be collected and presented in an investigation, after which it would only be repeated at the main hearing or in broader terms than provided for in the CPC.

From another point of view, more commonly found in literature, only evidence and information relevant to making a decision as to whether prosecution should be brought or proceedings should be discontinued ought to be collected in the course of an investigation, as well as evidence for which there is a risk that it will not be possible to present it again at the main hearing. This means that investigations should be neither complete nor summary, but that they should be sufficient and proportional to the complexity rather than the severity of a case.[19] Thus, the focus of criminal proceedings has been shifted to the main hearing, which is even more manifest in the prosecutorial concept of the investigation. The issue of the scope of an investigation is a delicate issue and there are no patterns to be copied since every case is specific. The investigation should not be such that the main hearing amounts to its reprise (even though this happens often in practice). Nevertheless, it neither should be such that it causes delays in criminal proceedings, adjournments or stays of the main hearing or even erroneous adjudications. State prosecutors should not limit themselves only to simple registering and processing of what has been discovered by the police in the course of their forensic activities performed in preliminary

19 Dr Panta Marina: Krivična postupka na SFRJ, Skopje, 1977, p. 384.

investigation, without making any intellectual efforts to discover details by analysing already collected material and thus contribute to the establishment of actual facts.[20]

As some researches have indicated,[21] there has been a growing tendency towards thorough investigations under the influence of state prosecutors (who could opt for safe prosecution based on such an investigation) on the one hand and trial panels (who expect that the other will do their work) on the other.

Finally, what should a "good" or "sufficient" investigation look like? It should be an investigation in which the state prosecutor shall, in a completely original manner, without being liable to suggestions from the material obtained by the police, examine an event from all aspects, find and collect evidence in connection therewith, regardless of it being in favour of the prosecution or the defence (since they are bound to act in that manner by virtue of Art. 16 of the CPC). Such an investigation provides single judges and trial panels with a possibility to assess the collected evidence or present new one and to make findings of fact on which they are to base their judgements pursuant to their own findings.

9. The scope of investigations in respect of evidentiary material has been discussed above. In addition to this aspect, the scope of investigations can also be elaborated on in respect of the subject matter of investigations. Therefore, Art. 280, paragraph 1 lays down that an investigation shall be conducted only in connection with a criminal offence and against defendant cited in the order for conducting an investigation; this implies that investigations are limited in both subjective and objective sense. Investigations are also conducted in all the forms of connexity (subjective, objective, and mixed). As regards investigations, state prosecutors are limited by a certain event and person, not by the legal classification from the order for conducting an investigation.

If it becomes evident in the course of an investigation into a given criminal offence and its perpetrator that the investigation needs to be extended to encompass another offence or another defendant, the state prosecutor shall issue an order to that effect. Such an order needs not be issued in cases when it comes to light that there have been other actions by the defendant which form an integral part of the criminal offence already being investigated, for example in cases of continuing criminal offences.[22]

10. Also, the new system for issuing direct indictments established by the new CPC has an effect on the scope of investigations. Thus, there is no more differentiation between that type of the direct indictment brought in connection with a criminal offence is punishable with a term of imprisonment of up to five years (given that under the new CPC summary proceedings are conducted in connection with criminal offences punishable with a term of imprisonment of up to five years and the charging document is filed as a motion to indict) and direct indictment for criminal offences that carry a more serious sentence. Two conditions need to be met for a direct indictment to be brought: 1) there is no need for conducting an investigation on account of the fact that sufficient information has been collected over the course of a preliminary investigation and 2) the perpetrator has previously been interrogated. This previous interrogation can be

20 Dr Tihomir Vasiljević and dr Momčilo Grubač: Commentary to the Criminal Procedure Code, Belgrade, 2003, p. 432.
21 Milan Petranović i Ivo Josipović: Prethodni krivični postupak – neki praktični aspekti, Naša zakonitost.
22 Vasiljević and Grubač, Commentary, p. 475.

conducted either by the police pursuant to Art. 261, paragraph 5 or by the state prosecutor pursuant to Art. 268, paragraph 3 (when an investigating judge orders detention in custody in the course of an investigation).

When direct indictments are issues, evidentiary material has to surpass the material required for issuing orders for conducting an investigation both in terms of its quantity and quality.[23]

Direct indictments are issued with the aim of accelerating criminal proceedings. There have been concerns expressed in theoretical works about how the bringing of direct indictments under these new conditions involves a possible risk from presenting matters at the main hearing that could be settled in a different manner if investigations were carried out.[24] However, since direct indictments are also subject to the same review by a three-member panel as are the indirect ones, state prosecutors will take precautions to avoid their indictments being returned to them and investigations ordered in the review process.

As previously mentioned, one of the conditions for bringing a direct indictment is that sufficient evidence has been collected in the course of a preliminary investigation. Although preliminary investigations and investigations are led by state prosecutors, the police are in the focus of those activities. In that regard and pursuant to Art. 257, paragraph 1, where there are grounds for suspicion that a criminal offence prosecuted *ex officio* has been committed, the police shall take necessary measures with a view to a) discovering the perpetrator; b) preventing the perpetrator or his accomplice from hiding or fleeing; c) discovering and securing traces of the criminal offence and items which may be used as evidence; and d) gathering all information which could be useful for conducting criminal proceedings in a successful manner. However, as practice has demonstrated, the police often exceed, both in terms of their scope and intensity, the limits for collecting evidence and providing information set by the above-cited provision of the CPC. Sometimes, their activities turn into a *bona fide* investigation resulting in a "firmly established factual situation" as early as at the stage of preliminary investigation, even though the findings of fact should be made in judicial proceedings.

11. Finally, in lieu of a conclusion, I would like to state briefly that there is no a uniform solution to the issue of the scope of investigation; instead, each case is specific and the scope of an investigation is contingent on its purpose and a number of objective and subjective circumstances; also, main hearings should not be a reprise of an investigation; when matters are uncertain and questionable, investigations should not be conducted, let alone indictments brought or main hearings scheduled.

23 Momčilo Grubač et al., Commentary, p. 690.
24 *Ibid.*

Miljko Radisavljević[1] and Predrag Ćetković[2]

Special Evidentiary Actions in the Prosecutorial Investigation in Serbia

Introduction

Theoretical part of this paper deals with special evidentiary actions, which represent *punctum saliens* of the analysis, i.e. the actions which have been adapted through the new criminal procedure norms to the prosecutorial investigation, which has been introduced for the first time into the Serbian criminal law.[3] Although the public prosecutor influenced considerably the course and the direction of the investigation even when the investigation was conducted by the investigating judge in order to ensure that the potential charging document, which would be filed after the investigation[4], was firmly founded in facts, the prosecutorial investigation is expected to add to the prosecutor's actions by assigning him the leading role during the investigation, by entrusting the investigation to the authority which should naturally assume this role anyway. Entrusting the investigative function to the public prosecutor reopens the question of how to clearly define the public prosecutor's role within the legal system of the Republic of Serbia.[5] Finally, by transferring the investigation under the jurisdiction of the public prosecution, the process of strengthening the position of the public prosecutor during the preliminary and investigative proceedings

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3 Namely, the provisions of the Criminal Procedure Code passed in 2011 (Articles 295-312 of the CPC) which have introduced the prosecutorial investigation into the ordinary Prosecutor's Offices of the Republic of Serbia since October 2013, have abolished the term investigating judge after 123 years of its use, considering that the Law on Investigating Judges was passed on 17 April 1890 introducing the institute of investigating judge modeled after the Austrian Criminal Code of 1873. Milan Milošević and Tanja Kesić *Policija u krivičnom postupku*, Academy of Criminalistic and Police Studies, Belgrade, 2009, p. 32-

4 Dr Vojislav Đurđić and Danilo Subotić, *Procesni položaj javnog tužioca i efikasnost krivičnog postupka*, Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, 2010, p. 25.

5 A more detailed analysis of this issue would go outside of the scope set for this paper, so let it be just mentioned that the dilemmas which are related to placing the prosecutor on one of the two poles are whether the prosecutor is a judicial authority or the authority which leans toward executive power. This has been a recurrent theme in our practice and theory. See more on this in: Group of authors, *Javnotužilački priručnik,* Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, 2009, pp. 19-21.

(previously, preliminary investigation and preliminary criminal proceedings), which started with the Amendments to the Criminal Procedure Code (1953)[6] passed in 1973,[7] has been completed.

After the theoretical part, which provides some basic reference points regarding the theoretical aspect of special evidentiary actions, the paper focuses on the current regulations which regulate special evidentiary actions and on meticulous analysis of the applicable regulations while pointing out the differences compared to the provisions that used to be stipulated by the Criminal Procedure Code (2001).[8] The provided analysis of the current regulations represents an attempt to draw attention to some contentious issues which have arisen during the implementation of the Criminal Procedure Code (2011)[9] regarding the said special evidentiary actions and to demonstrate how the court decisions have dealt with the issues in question.

Special evidentiary actions –theoretical aspect

the evidence is defined in criminal procedure law as the factual data on the criminal offence and its perpetrator, which can establish or eliminate the relation between the facts and the law.[10] Therefore, the evidence is the element which connects the facts and the law, i.e. which enables the application of law to a particular state of facts. The evidence represents a source of information which follows a single general pattern which dictates that every activity in the outside world leaves certain traces which are either in the said outside world (material evidence) or in the consciousness of people (testimonial sources of evidence).[11]

Criminal Procedure Code stipulates more or less in detail which particular actions have probative value in criminal proceedings both under special regulations regarding particular activities which are related to evidentiary actions and under other provisions which regulate other activities which are relevant to evidentiary proceedings but are not related specifically to evidentiary actions.[12] Chapter VII of the Criminal Procedure Code (2011) is entitled "Evidence" as opposed to Chapter VII of the Criminal Procedure Code (2001) which was entitled "Evidentiary actions".

When it comes to special evidentiary actions in particular, they are often referred to as special evidentiary, i.e. investigative, techniques and they represent particular methods of collecting evidence which are not typical in themselves and therefore are only used with regard to certain criminal offences, which are on the one hand, very severe, i.e. serious, both in terms of the facts considering the real life consequences they cause and from the point of view of the criminal law, considering the sanction that is stipulated for the said offences while on the other hand, such offences are difficult to detect, resolve and prove through the use of regular evidentiary methods due to their characteristics as a phenomenon, as well as due to psychological and other attributes

6 Official Gazette of the Federative People's Republic of Yugoslavia no. 40/53
7 Dr Stanko Bejatović, *Krivično procesno pravo*, Savremena administracija, Belgrade, 2003, p. 94.
8 Official Gazette of Federal Republic of Yugoslavia no. 70/01, 68/02, Official Gazette of the Republic of Serbia no. 58/04, 85/05, 85/05, 115/05, 46/06, 49/07, 122/08, 20/09, 72/09, 76/10, 72/11, 121/12.
9 Official Gazette of the Republic of Serbia no. 72/11, 101/11, 121/12, 32/13, 45/13.
10 Dr Zagorka Jekić, *Dokazi i istina u krivičnom postupku*, Faculty of Law at the University of Belgrade, Belgrade, 1989, p. 47.
11 *Ibidem*, p.48.
12 Dr Milan Škulić, *Komentar Zakonika o krivičnom postupku*, Faculty of Law in Belgrade and *Official Gazette* of the Republic of Serbia, Belgrade, 2011, p. 336.

of their perpetrators.[13] This is what has led to the introduction of the so-called special investigative techniques, i.e. the special evidentiary actions, into the modern criminal procedure legislation as well as to the modification of the use of otherwise conventional evidentiary instruments with regard to such criminal offences. Conventional forms of collecting and securing the evidence have been proven to be insufficient for the prevention of the most serious forms of crime, therefore modern states have resorted to new procedural forms of gathering evidence even if it means infringing the right to privacy and other human rights.[14]

The most complex issue regarding the special evidentiary actions is the issue of their scope, i.e. type of the criminal offences which are subject to them and the conditions under which they are to be undertaken. Special evidentiary actions must not be applied too widely because they then infringe human rights and freedoms,[15] but they must not be to restrictively applied either, since they do not have any effect then. It is a matter of constant weighing what is more valuable: strengthening individual's freedoms and rights, which imposes limitations on the repression the criminal law necessarily entails, or strengthening the powers of the state ensuring the fight against crime is more efficient but at the expense of the individual's freedoms and rights.[16] However, the application of special evidentiary actions is not called into question when it comes to the most serious and the most complex criminal offences and especially regarding the criminal offences involving organised crime.

Organised crime undoubtedly represents one of the most dangerous forms of crime today. It may be said that organised crime has become some sort of a multinational industry which provides a huge opportunity for generating profit and it crosses national borders and does not recognise state sovereignty.[17] The damage organised crime causes to the state and its citizens is impossible to estimate and it may be judged from a political, social and economic point of view.[18] This is a special type of criminal activity which is characterised by numerous specific qualities compared to the other types of crime. One of its special features is certainly that it is difficult to prove if the criminal offences related to organised crime have been committed, particularly through the use of conventional evidentiary means. It is this evidentiary deficit, which is inherent to this type of criminal offences, that represents *ratio legis* for the introduction of special evidentiary actions.[19]

13 Dr Milan Škulić, *Komentar Zakonika o krivičnom postupku*, Faculty of Law in Belgrade and *Official Gazette* of the Republic of Serbia, Belgrade, 2011, p. 307.

14 Group of authors, *Priručnik za primenu Zakonika o krivičnom postupku*, Association of Public Prosecutors and Deputy Public Prosecutors and OSCE, Belgrade, 2013, p. 123.

15 When considering the rights which would be restricted by the use of special evidentiary actions, it must be taken into account that not all rights are at the same level when it comes to limiting them during the criminal proceedings. Ashworth and Horder, for instance, divide the rights into categories of non-derogable rights, such is the right not to be subjected to torture or some other inhumane treatment during the criminal proceedings, strong rights, such as the right to a fair trial or the right to liberty, and the rights which may be restricted (qualified rights) which include the right to privacy (to a private life). Dr Andrew Ashworth and dr Jeremy Horder, *Principles of Criminal Law*, Oxford University Press, 7th edition, 2013, pp. 50-51.

16 Dr Zoran Stojanović states that safe society and a safe individual within it require sacrifices and restrictions with regard to basic civil rights and liberties. When safety is the chosen direction in criminal law, it always means both toughening and expanding the repression of the criminal law. Dr Zoran Stojanović, *Preventivna funkcija krivičnog prava, Crimen* no. 1/2011, Belgrade, 2011, p.5.

17 Group of authors, *Borba protiv organizovanog kriminala u Srbiji*, Dosije, Belgrade, 2008, p. 31.

18 Organised crime incurs costs through the fight against it, reduces tax revenue of the state, incurs costs of medical treatment of drug addicts, causes citizens to feel unsafe because they can be endangered while using the Internet when they are completing transactions at ATMs or terminals for electronic payments, it disrupts the real estate market and causes many other consequences which are hard to quantify. Dr Slaviša Vuković and dr Nenad Radović, *Prevencija organizovanog kriminala*, Dosije, Belgrade, 2012, p. 125.

19 Dr Milan Škulić refers to special evidentiary techniques as special evidentiary actions, while the heading related to the special evidentiary actions in the Criminal Procedure Code (2001) reads: "Measures of Law Enforcement Authorities for Detecting and Proving Criminal Offences referred to under Article 504.a of this Code" whereas the heading under which the undercover investigator and cooperating witnesses are mentioned reads: „Special Measures of Law Enforcement Authorities for Detecting and Proving Criminal Offences referred to under Article 504.a, para. 3 of this Code", Dr Milan Škulić, *Komentar Zakonika o krivičnom postupku*, op.cit., p. 1228.

On the other hand, there are opinions that may be encountered in theory that it should be re-examined whether it was justified to allow the criminal law today to diversify so much and consequently the special evidentiary actions as well.[20] Despite the valid arguments regarding the protection of human rights, the Prosecutor's Office for Organised Crime holds that when proving that a criminal offence related to organised crime has been committed, the use of special evidentiary actions is necessary and it is worth mentioning that there are no registered abuses related to the use of such measures in practice.[21] The use of special evidentiary actions in particular should not be questioned when the powers of the prosecutors are not extended just during the investigation, in which the prosecutor is now the authority conducting the proceedings, but also at the main hearing during which the role of the court is now reduced to a minimum according to the common law tradition.[22] Depriving the public prosecution of the option to use special evidentiary actions would practically mean "tying the hands" of both the Public Prosecutor's Office and the state when it comes to combating organised crime.[23]

The lack of evidence is the result of the so-called conspiracy of silence, which is typical within the organised crime groups, and this does not just refer to the compact cohesion of the members of such criminal groups themselves, who remain silent after the arrest[24] but also the silence of the witnesses of the crimes committed by the organised crime groups since they are afraid they would be exposed to danger if they testified against the members of such a group. Furthermore, there are views that the number of reasons why ordinary citizens remain silent before the judicial authorities has multiplied recently.[25] How important is the application of special evidentiary actions may be confirmed by the fact that this issue was regulated over the last decade of the 20th century and the first decade of the 21st century at an international level, *inter alia* due to

20 For instance, dr Zoran Stojanović argues that modern tendencies, when it comes to response provided under criminal law, raise serious questions regarding the civil rights and liberties and the very state the citizens, who are affected by these, live in. He raises the question if organised crime, terrorism and corruption are really such forms of crime which disturb the very foundation of a society, which cannot be suppressed in any other way efficiently but through restricting and putting at risk the basic civil rights and liberties, and also if there is any truth to the allegations that special measures and departures from ordinary criminal law, above all else, serve the purpose of meeting certain political objectives instead of enabling the suppression of particularly dangerous forms of crime. Dr Zoran Stojanović , *Krivično pravo u doba krize*, Branič no. 1-2, Belgrade, 2011, p. 29.

21 In any case, every civil servant, and especially the one involved in combating organised crime, is expected to be aware of, understand and strictly observe the rights and freedoms guaranteed by the Constitution, especially to uphold the principle of the rule of law and to be loyal to the spirit of the Constitution and law. Efficiency and urgency of criminal prosecution of the most dangerous criminal and terrorist groups cannot serve as an excuse for not adhering to set ethical standards. This particularly applies to the use of intrusive methods and techniques such as covert operations, intercepted communication and secret audio and visual surveillance, which may be undertaken only if the suspicion that a particular individual is involved in criminal activities is firmly based on preliminary evidence and if they have been properly authorised through the procedure stipulated by law. Group of authors, *Etički standardi za kriminalističko-obaveštajni rad*, Security Studies Centre, Belgrade, 2011, pp. 14-15.

22 Group of authors, *Suprotstavljanje savremenom organizovanom kriminalu i terorizmu*, *Official Gazette of the RS, Belgrade*, 2012, p. 221.

23 Some authors describe this vividly by saying that the police and prosecutor's office, without rendering special procedural decisions regarding the evidentiary issues, would run the race with organised crime on legs made of lead, which is why they should be enabled to move more freely. Dr Darko Marinković, *Suzbijanje organizovanog kriminala –specijalne istražne metode*, Prometej, Novi Sad, 2010, p. 240.

24 The secrecy of a criminal organisation is certainly one of its fundamental features since the punishment for breaking the conspiracy of silence is not just death of those guilty of it but quite often of persons who are close to them as well. Dr Milan Škulić, *Organizovani kriminalitet, pojam i krivičnoprocesni aspekti,* Dosije, Belgrade, 2003, pp. 47-48.

25 Dr Jovan Ćirić in his text "Prosecutors and the Conspiracy of Silence in a New Guise" (*Tužioci i zavera ćutanja u novom ruhu*) argues that at a time of the current economic crisis, when it is extremely hard to get a job, the person who used to keep silent to avoid getting killed, now does the same to avoid losing his job which would endanger his livelihood and the livelihood of his family members. Group of authors*, Zakonik o krivičnom postupku i javno tužilaštvo*, Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, 2009, p.227. It is indisputable that money laundering is one of the criminal offences which is typically related to organised crime and that "dirty" money is often transferred to legal entities which employ a lot of people who have nothing to do with the criminal activities of the management of the said entity. Is it within the realm of possibility to expect them to report money laundering is taking place since even if they do so anonymously, thus excluding the personal sanction their employer would subject them to, according to the Law on Liability of Legal Entities for Criminal Offences (*Official Gazette* of the Republic of Serbia no. 97/08) the legal entity they work for may be sentenced to pay considerable fines, which may cause the said legal entity to go bankrupt, or *poena capitalis* may be pronounced folding the company? Who would choose legal action over securing their livelihood?

the realisation that organised crime cannot be successfully combated unless this is done on the international level.[26] As a result, the UN Convention against Trans-National Organised Crime (Palermo Convention),[27] which was ratified by the Republic of Serbia as well, regulates special investigative techniques under its Article 20. In any case, certain special evidentiary actions cannot be undertaken, by definition, without efficient international cooperation as is the case with the controlled delivery. It is no coincidence that the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention),[28] as the first international document which stipulated the use of some special investigative technique, has regulated under Article 11 the aforementioned controlled delivery.[29]

Special evidentiary actions in practice

Basic Provisions

It should be emphasised at the beginning that the CPC (2011) stipulates six special evidentiary actions in total as follows: covert surveillance and recording, simulated (business) deals, computer-assisted data searches, controlled delivery and the undercover investigator (undercover agent). The institute of the cooperating witness in the CPC (2001) was under the category of "Special Measures of Law Enforcement Authorities for Detecting and Proving Criminal Offences referred to under Article 504.a, para. 3 of this Code" together with the undercover investigator. However, this institute, with slightly modified content and under the term cooperating defendant is under the category "Agreements of the Public Prosecutor and the Defendant" and not under special investigative actions so this is not going to be discussed in this paper.

Special evidentiary actions were dealt with under a special chapter in the CPC (2001) while in the layout of the CPC (2011) they are moved under the general provisions on the evidence. There are views that moving special evidentiary actions under the general provisions on evidence is a significant change since this has extinguished a type of proceedings, which was special according to all of its characteristics, risking that special evidentiary actions, which should be used only under special circumstances due to the risk of endangering human rights, should become ordinary institutes used in the general criminal proceedings.[30] We are inclined to disagree since it is far more important in practice whether the civil servants employed by the authorities undertaking special evidentiary actions have high moral values and professional integrity than the issue of where exactly in the Criminal Procedure Code the provisions regulating how special evidentiary actions are to be undertaken are located. If they are honest and professional people, the potential for abuses should be reduced to a minimum, regardless of the placement of the provisions in the Code and *vice versa*, if the personnel is prone to corruption and unprofessional, the potential for abuses shall increase.[31]

26 Dr Đorđe Ignjatović and dr Milan Škulić, *Organizovani kriminalitet*, Faculty of Law at the University of Belgrade, Belgrade, 2010, p. 271.
27 *Official Gazette of the FRY* no. 6/01, Official Gazette of Serbia and Montenegro no. 11/05.
28 *Official Gazette of Socialist Federative Republic of Yugoslavia* no. 14/90.
29 Dr Zoran Stojanović and dr Dragana Kolarić, *Krivičnopravno reagovanje na teške oblike kriminaliteta*, Faculty of Law at the University of Belgrade, Belgrade, 2010, p.128.
30 Dr Momčilo Grubač and dr Tihomir Vasiljević, *Komentar Zakonika o krivičnom postupku*, Projuris, Belgrade, 2013, p. 317.
31 In accordance with the legal maxim *Quid leges sine moribus proficiunt*.

Article 161 of the CPC establishes substantive requirements for the use of special evidentiary actions. They may be used against a person for whom there are grounds for suspicion that he has committed a criminal offence referred to under Art. 162 of the CPC when it is not possible to collect the evidence for the criminal prosecution in any other way or if its collection would be extremely difficult otherwise. In addition, if there are grounds for suspicion that a particular criminal offence referred to under Art. 162 of the CPC is being prepared, while the circumstances of the case indicate that the said offence would not be detected in any other way, prevented or proven or if this would be extremely difficult and dangerous.[32] When deciding whether such evidentiary actions are to be undertaken and how long they should be in force, the authority conducting the proceedings shall assess in each case whether the same result may be achieved through some means which would restrict civil rights less.

Therefore, Article 161 of the CPC stipulates substantive requirements for the use of special evidentiary actions which may be broken down into:

1) the requirement regarding the type of the criminal offence – it is necessary that there are grounds for suspicion that a criminal offence referred to under Art. 162 of the CPC has been committed, and
2) the requirement regarding the difficulty of evidentiary proceedings which suggests that special evidentiary actions are some kind of evidentiary *ultima ratio* – it is necessary that the evidence for criminal prosecution cannot be collected in any other way or that the collection of evidence would be considerably more difficult otherwise.

It should be mentioned here that jurisprudence shows that having information obtained through the operations of the competent state authorities is not sufficient grounds for ordering special evidentiary actions, it is instead required to confirm the information and other evidence which can corroborate the information obtained through police work and only then the use of special evidentiary actions may be allowed. If no evidentiary action has been undertaken, the court shall not allow the use of special evidentiary actions in accordance with Art. 161 of the CPC which stipulates that special evidentiary actions may be used against a person when it is not possible to prevent or prove the criminal offence in any other way. In doing so, the court interprets the law accurately, bearing in mind that special evidentiary actions should be evidentiary *ultima ratio* and not *prima ratio*. From the aspect of human rights, such a position held by the court is significant since it does not allow special evidentiary actions to be ordered frivolously.

With regard to the aforementioned, the judge for preliminary proceedings of the High Court in Belgrade, Special Division, passed a ruling Pov Po1 no. 157/13 of 8 April 2013 denying the motion filed by the Prosecutor's Office for Organised Crime for an order to be issued for the use

32 It should be mentioned that apart from the fact that special evidentiary actions in themselves should be an exception to the ordinary course of collection of the evidence, the application of Art. 161, paragraph 2 of the CPC would have to be exceptional since incrimination of preparatory actions used to be typical of criminal legislations of ex-socialist countries while in modern societies sanctions for preparatory actions should be limited by the civil right to a personal, private sphere. See more on this in: Dr Zoran Stojanović, *Krivično pravo opšti deo*, Faculty of Law at the University of Belgrade, Belgrade, 2013, pp. 217-218. Škulić holds that the application itself of special evidentiary actions to the preparation should not be disputed since, according to him, the grounds for the use of secret surveillance are not culpability at a certain stage during the commission of a criminal offence but primarily the necessity to prevent the commission of a particular criminal offence. (See in: dr Milan Škulić, *Osnovne novine u krivičnom procesnom pravu Srbije – Novi Zakonik o krivičnom postupku iz 2011. godine*, Faculty of Law at the University of Belgrade, Belgrade, 201, pp. 49-50) Bearing in mind the significance of what is being protected, and that criminal offences subject to special evidentiary actions, which are specified under Art. 162 of the CPC, are extremely heterogeneous, such an approach taken by the legislator may be justified.

of covert interception and recording of the communication against a suspect. The justification for this ruling included the following: "...the judge for preliminary proceedings of the Special Division of the High Court in Belgrade holds that information resulting from police work, without further confirmation of such information and other evidence corroborating it, does not provide sufficient facts which would in turn provide grounds for suspicion that a criminal offence referred to under Art. 246 of the CC is being committed by the suspect,[33] especially since it is not evident that any evidentiary action has been undertaken although provisions of Art. 161 of the CPC stipulate that special evidentiary action may be used against a person when it is not possible to detect, prevent or prove the commission of the said criminal offence in any other way..." This position was confirmed as well-founded at the second instance of the High Court in Belgrade, Special Division, by a ruling Pov Po1 no. 157/13 Kv Po1 no. 328/13 of 26 April 2013. The same position was taken by the judge for preliminary proceedings of the High Court in Belgrade, Special Division, in the rulings Pov. Po1 no. 153/13, 154/13, 155/13 and 156/13, all of 08 April 2013, and it was confirmed by second instance rulings of the same court Pov. Po1 no. 153/13 Kv Po1 no. 324/13, Pov Po1 no. 154/13, Kv Po1 no. 325/13, Pov. Po1 no. 155/13, Kv Po1 no. 326/13 and Pov Po1 no. 156/13, Kv Po1 no. 327/13, all of 26 April 2013.

Special evidentiary actions may only be ordered if there are grounds for suspicion that the commission of a criminal offence referred to under Art. 162 of the CPC is being prepared and the circumstances of the case are such that the said criminal offence:

1) would otherwise be impossible to detect, prevent or prove, or
2) would otherwise cause disproportionate difficulty, i.e. grave danger.

Substantive requirements for the application of special evidentiary actions referred to under Art. 161 of the CPC (2011) are practically identical to the substantive requirements for the application of special evidentiary action of the CPC (2001), i.e. the basic criterion for the use of special evidentiary actions according to both the CPC (2001) and the CPC (2011) is the existence of the grounds for suspicion that a criminal offence has been committed or that a criminal offence which may be subject to these measures is being prepared.

From the point of view of legislative technique, it is certainly a better solution to list the substantive requirements generally under a single article rather than repeat the list of requirements when regulating each of the evidentiary actions individually as it was done previously. The provision, which sets as a general requirement for all special evidentiary actions an assessment by the authority conducting the proceedings whether the same result may be achieved through some means which would restrict the civil rights less, may also be commended as well formulated. A change in the use of terminology is also noticeable compared to the previous provisions where the investigating judge used to have a leading role when ordering these measures and now, this assessment is made by the authority conducting the proceedings which has been brought about by a new distribution of jurisdictions between the public prosecutor, who is now assuming the leading role during the prosecutorial investigation, and the judge for preliminary proceedings, who now has fewer prerogatives than the investigating judge used to have.

33 *Official Gazette of the Republic of Serbia* no. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13.

Article 162 of the CPC specifies which criminal offences are subject to special evidentiary actions. The first item of paragraph 1 stipulates that the use of such actions is allowed with regard to criminal offences which are under the jurisdiction of prosecutor's offices with special jurisdictions, which is regulated by special laws. The second item specifies a list of criminal offences which are subject to these measures while item 3 stipulates that the said measures may be used with regard to the criminal offence of preventing and obstructing evidentiary proceedings if it is related to criminal offences referred to under items 1 and 2 of this Article. Paragraph 2 stipulates that special evidentiary action involving the undercover investigator may be used only if the criminal offence in question is under the jurisdiction of the prosecutor's offices with special jurisdiction. Paragraph 3 stipulates that special evidentiary action involving covert interception of the communication referred to under Art. 166 of the CPC may also be used with regard to the criminal offences which are specifically listed under this paragraph.

Therefore, pursuant to Art. 162 of the CPC, the criminal offences which are subject to special evidentiary actions are: 1) criminal offences which are under the jurisdiction of the prosecutor's offices with special jurisdictions[34] according to a special law and 2) other explicitely specified criminal offences.[35]

Criminal offences which are under the jurisdiction of the Prosecutor's Office for Organised Crime are specified under Art. 2 of the Law on Organisation and Jurisdiction of Government Authorities in the Suppression of Organised Crime, Corruption and Other Severe Criminal Offences[36] whereas the criminal offences which are under the jurisdiction of the Prosecutor's Office for War Crimes are stipulated under Art. 2 of the Law on the Organisation and Jurisdiction of Government Authorities in the War Crimes Proceedings.[37]

With regard to the specifically listed criminal offences under Art. 162, para. 1, item 2 of the CPC some new criminal offences have been included which were not subject to special evidentiery actions according to the CPC (2001), such as the criminal offence of showing, procurement and possession of pornographic material and exploiting a minor for pornography (Art. 185, paragraphs 2 and 3 of the CC).

According to Art. 162, para. 3 of the CPC, the use of special evidentiary actions of covert interception of communication under Art. 166 of the CPC compared to the CPC (2001) is expanded to include criminal offences such as unauthorised use of a copyrighted work or an item subject to a related right (Art. 199 of the CC) and some criminal offences against computer data security (Art. 298, para. 3, Art. 299, Art. 301, para. 3 and Art. 302 of the CC).

It must be noted that with regard to some criminal offences, such as the unauthorised use of copyrighted work or an item subject to a related right (Art. 199 of the CC), a question may be raised

34 Article 13, paragraph 2 of the Law on Public Prosecutor's Office (*Official Gazette of the Republic of Serbia* no. 116/08, 104/09, 101/10, 78/11, 101/11, 38/12, 121/12, 101/13) stipulates that the prosecutor's offices with special jurisdiction in the Republic of Serbia are the Prosecutor's Office for Organised Crime and the Prosecutor's Office for War Crimes.

35 In comparative law there are provisions which stipulate a wide range of criminal offences which are subject to special evidentiary actions, for instance, the CPC of the Republic of Montenegro (*Official Gazette of the Republic of Montenegro* no. 57/09) stipulates an extensive catalogue of criminal offences which are subject to the said special evidentiary action since Art. 158, para. 1 of the CPC stipulates that the secret surveillance measures may be ordered for all criminal offences which are punishable under law by a term in prison of ten or more years.

36 *Official Gazette of the Republic of Serbia* no. 42/02, 27/03, 39/03, 60/03, 67/03, 29/04, 58/04, 45/05, 61/05, 72/09, 72/11, 101/11, 32/13.

37 *Official Gazette of the Republic of Serbia* no. 67/03, 135/04, 61/05, 101/07, 104/09, 101/11.

hether including them in the catalogue of criminal offences which are subject to special evidentiary actions referred to under Art. 166 of the CPC is justifiable. Namely, this criminal offence is not committed in practice by organised criminal groups but most commonly by persons who do not have any other source of income available to them but to engage in "off-the-books dealings" and to resell copyrighted work which has been illegally recorded. On the other hand, according to the prescribed sanctions all three forms of the commission of this criminal offence fall into the category of criminal offences subject to prosecutorial discretion, i.e. Art. 283 of the CPC, which is what is regularly applied by the competent prosecutor's offices. With regard to the aforementioned, a question is raised whether it serves a purpose to apply such an expensive special evidentiary action, which requires both equipment and personnel trained to use it, in order to obtain evidence for the commission of a criminal offence referred to under Art. 199 of the CC, which may be rightly categorised as petty crime according to the prescribed sanction. Regardless of the aforementioned objections, the legislator had to include this criminal offence in the catalogue of criminal offences which are subject to covert interception of communication in order to fulfil an obligation undertaken by the Republic of Serbia when it ratified international conventions.[38]

Article 163 of the CPC regulates how the material obtained through the use of special evidentiary actions is to be handled and the provisions of the CPC (2001) have been largely kept, according to the said provisions if the public prosecutor does not initiate the criminal proceedings within six months from the moment he examines the obtained material, or if he declares that he would not be using the said material or that he is not going to prosecute the suspect, the judge for preliminary proceedings shall destroy the obtained material. The judge for preliminary proceedings may notify the person against whom special evidentiary action has been undertaken pursuant to Art. 166 of the CPC if his identity has been established and if this would not compromise the possibility of conducting the criminal proceedings. If the provisions of the CPC or the order of the authority conducting the proceedings have not been adhered to when collecting such material, the decision may not be based on the obtained data while the obtained material is kept as unlawful evidence until the final conclusion of the court proceedings which are conducted regarding the collection of such evidence.

Therefore, pursuant to Art. 163 of the CPC, the judge for preliminary proceedings shall pass a ruling on the destruction of the obtained material in the following cases: 1) if a failure to initiate the criminal proceedings before the set deadline expires occurs – when public prosecutor does not initiate the criminal proceedings within six months from the day he examines the material obtained through the use of special evidentiary actions, 2) when the public prosecutor states that the obtained material would not be used in the proceedings and 3) when the public prosecutor states that he would not request proceedings to be conducted against the suspect.

A person who has been subject to special evidentiary actions may be notified of the rendering of the said ruling by the judge for preliminary proceedings if two requirements are met cumulatively:

1) if his identity has been established while the measures were being undertaken and
2) if it would not jeopardise the possibility of conducting the criminal proceedings

38 This specifically refers to Article 10 of the Convention on Cyber Crime (*Official Gazette of the Republic of Serbia International Conventions* no. 19/2009) which deals with the offences related to copyright violations and violations of related rights.

In order to notify the person who has been subject to special evidentiary actions of this, the CPC (2011) has introduced another requirement in addition to the established identity of the person in question, which was prescribed by the CPC (2001) as well. This requirement is that the notification of the said person on the undertaken special evidentiary actions does not jeopardise the possibility of conducting the criminal proceedings. *Ratio legis* behind the introduction of the additional requirement which must be met in order to notify a person of the measures which have been undertaken against him was ensuring the efficiency of the criminal proceedings and of the undertaken special evidentiary actions, which justifies the said provision of the CPC in this respect.

According to Art. 163, para. 3 of the CPC, which represents a change compared to the CPC (2001), it is stipulated that the evidence obtained illegally is to be kept until the final conclusion of the proceedings which are conducted with regard the collection of such evidence. In such a way, the destruction of evidence which has resulted from a potentially illegal use of special evidentiary actions is prevented, i.e. preservation of evidence which may be used in later criminal proceedings is enabled, so this represents a sound provision in this respect.

Finally, it should be pointed out that judging based on the legislative technique, this provision, which generally regulates how the obtained material is to be handled under a single article for all special evidentiary actions, seems to be better than the provision used in the CPC (2001) which dealt with this issue separately, specifying for each special evidentiary action how to handle the obtained material.

Another important issue which may arise with regard to human rights in practice when applying special evidentiary actions is the issue of how to treat the so-called accidental findings, i.e. what should be done if the use of measures of special evidentiary actions results not in evidence proving the criminal offence which led to the imposition of the said measures but evidence for another criminal offence instead, i.e. what should be done if the use of these measures in addition to the evidence regarding the criminal offence which has led to the imposition of the said measure results in evidence proving some other criminal offence.

Article 164 of the CPC upholds the position that the evidence obtained through the use of special evidentiary actions may be used to prove some other criminal offence apart from the criminal offence which has led to the imposition of the said measure if the said criminal offence is listed under criminal offences which are subject to such measures for evidentiary purposes. The same provision existed in the CPC (2001) as well.

It is clear that the legislator has just preserved continuity with the provision used in the CPC (2001) by keeping this Article, and the only change is the possibility to use the material not only if it is related to another criminal offence but if it is related to another offender as well, which is a sound provision in our opinion. If viewed from the criminal prosecution standpoint, there is no reason to limit the application of the obtained material just to new offences by the same perpetrator without including the new perpetrators of the criminal offences pursuant to Art. 162 of the CPC.[39] Here, too, the aforementioned remarks referring to the generalisation of the said provision to cover all special evidentiary actions apply.

39 The fact is that court practice also agrees that the material resulting from the application of the surveillance measure with regard to a defendant is admissible with regard to other perpetrators, who are not included in the order for communication surveillance, provided that all of the defendants, as well as the obtained evidence, are included in single criminal proceedings (Appellate Court in Belgrade, Kž1 Po1 no. 2/10 of 26 June 2010).

The confidentiality of the data stipulated under Article 165 of the CPC refers to the motion for ordering special evidentiary actions and the decision on the said motion, which are recorded in the special register and are kept together with the material obtained through special evidentiary actions in a special folder marked "special evidentiary actions", with an indication of the degree of confidentiality. All of the data on the motion, decision and conduct of special evidentiary actions are classified as confidential information and all those who are privy to it in any capacity have a duty to keep it secret.

Declaring the results obtained through the use of special evidentiary actions secret is a necessary requirement in order to allow the use of these measures to be effective at all. The only omission the legislator has made is leaving out the duty of the officer to warn any person who learns of the data in any capacity that they have a duty to keep it secret as it was stipulated by the CPC (2001). Namely, it is indisputable that this duty is prescribed explicitly by the law but it must be remembered that not all participants in the proceedings are familiar with the law and they may not be aware of this obligation. Since today there is a really great number of regulations, the principle *Ignoratio legis nocet* certainly cannot be applied in the same way it used to be applied in Roman law where this *dictum* originated from and where it was fully applied. Prescribing the obligation of the competent authority to warn each participant of the proceedings of this obligation the possibility of anyone offering an excuse that they were not aware of this regulation is eliminated and consequently the confidentiality of the use of special evidentiary actions shall be secured better. Due to the aforementioned reasons, the obligation stipulated by the CPC (2001) should have been kept *de lege ferenda* in the CPC (2011) as well.[40]

Although basic provisions do not regulate anywhere what is the procedure if the judge for preliminary proceedings denies the motion of the public prosecutor for the use of special evidentiary actions, in practice the provision under Art. 467, para. 3 of the CPC is applied, according to which an appeal against the ruling rendered by the judge for preliminary proceedings is to be decided by the panel of judges of the same court (this refers to the panel under Art. 21, para. 4 of the CPC). This has not been questioned in practice, although there have been opinions in theoretical writings that the ruling by the judge for preliminary proceedings which denies the motion for the use of special evidentiary actions may not be appealed.[41]

Covert Interception of Communication[42]

Before the CPC (2001) our criminal procedure law did not contain the provisions on covert interception of communication and recording of telephone and other conversations and communication through the use of other technical means. Today many criminal procedure codes stipulate this type of obtaining evidence. Now that the said procedure has been regulated by law and a

40 Some authors deem that regardless of the fact that it has not been explicitly stipulated by the CPC, there is an obligation of the authorities conducting the proceedings to advise all persons who become privy to confidential data referred to under the said Article, in any capacity, of the duty to keep an official secret. Dr Momčilo Grubač and dr Tihomir Vasiljević, *op. cit*., p. 324.

41 Group of authors, *Komentar Zakonika o krivičnom postupku*, *Official Gazette of the RS*, Belgrade, 2013, p. 422.

42 Secret surveillance of communication, if it is undertaken according to legally prescribed requirements, represents the evidentiary action in criminal legal systems of all modern states. However, in addition to criminal proceedings in particular states, intercepted communication is used as evidence before international courts as well. For instance, under Rules of Evidence of the ICTY, which refer to admissibility of evidence, it is stipulated that intercepted communication may be allowed as evidence provided that their probative force is to be assessed in the context of other presented evidence. Group of authors, A Guide through the Hague Tribunal – Regulations and Practice, OSCE, Belgrade, 2008, p. 256.

review by the court is ensured, human rights are guaranteed more fully than previously when it was not regulated through a legal norm.

At the elaborated motion filed by the public prosecutor if the requirements referred to under Art. 161, para. 1 and para. 2 of the CPC are met, the court may order surveillance and recording of communication done by telephone or by some other technical means, i.e. the surveillance of electronic or some other address of the suspect and the seizure of letters and other types of mail.

In the CPC (2011) the measure of surveillance and recording of telephone conversations or communication referred to under Art. 504e-z of the CPC (2001) has been divided into two measures, one being the covert interception of communication. Article 166 of the CPC stipulates that if substantive requirements have been met as referred to under Art. 161, paragraphs 1 and 2 at the elaborated motion filed by the public prosecutor, the court may order surveillance and recording of communication done by telephone or by some other technical means or the surveillance of electronic or some other address of the suspect and the seizure of letters and other types of mail.

Formal requirements for conducting special evidentiary actions of covert interception of communication pursuant to Art. 166 and Art. 167 of the CPC are the same as the ones in the CPC (2001) and there are two such requirements which need to be met cumulatively:

1) an appropriate procedural initiative in the form of the elaborated motion filed by the public prosecutor,[43] and
2) the decision (order) passed by the judge for preliminary proceedings (according to the CPC (2001) this was done by the investigating judge) ordering covert interception of communication.

An innovation compared to the provision used in the CPC (2001) is that surveillance of electronic and other addresses is explicitly stipulated. Thus, the practice already employed by competent authorities is merely legislated since the surveillance of electronic addresses has been in use for quite some time and it has been used as evidence in the proceedings. This probably refers to passive interception of communication,[44] although it is not specified by law. It is not clear what is meant under "other addresses", perhaps the legislator added this general norm in an attempt to prevent the legal regulation from constantly lagging behind the technological progress and thus avoid a legal vacuum *(lacuna iuris)* which might occur in practice.

The measure of covert interception of communication is imposed by an elaborated order issued by the judge for preliminary proceedings and the law prescribes the content of the said order as well. When it comes to the content of the order, it is important to point out that the terminology has been changed under Art. 167, para. 2 of the CPC (2011) compared to the provision of Art.

43 The motion by the prosecutor requesting special evidentiary actions to be undertaken is required in certain states where the police are the ones conducting the criminal investigation and not the public prosecutor. For instance, in Canada, the police do not have the obligation to notify the public prosecutor that they are conducting the investigation and in most of the cases there, the prosecutor receives the information on collected evidence only after the investigation is concluded. However, the law requires direct participation of the prosecutor in certain investigative procedures such as communication surveillance since in Canada, like in Serbia, the judge issues an order for communication surveillance only at the request of the public prosecutor but not the police. Group of authors, *Zakonik o krivičnom postupku i javno tužilaštvo, op. cit.*, pp. 357-358.

44 Passive interception entails requesting from the internet provider to submit a copy of computer traffic of the targeted subject to the competent authority whereas active interception entails developing techniques which are used to take over control over the subject's computer and the information is intercepted at the very source before the information is encrypted.

504e, para. 3 of the CPC (2001). Namely, the CPC (2001) stipulated that the order issued by the investigating judge had to contain, *inter alia*, "the data on the person on whom the measure is imposed", while the CPC (2011) stipulates that the order issued by the judge for preliminary proceedings must contain "available data on the person on whom the covert interception of communication has been imposed". This appears to be a slight change only *prima facie* since this change recognises the practical needs and lowers the standard of necessary collection of data on the person subject to special evidentiary actions. Instead of the earlier provision which required a detailed identification of the person who is subject to the said measure, according to the new provision it is sufficient to cite just the basic data which identify a certain individual, such as the first and last name and a nickname.[45] This has made the police work and the work of other services which are authorised to request from the prosecutor to file a motion for the use of special evidentiary actions considerably easier since these are imposed for criminal offences which are, by definition, difficult to prove and, consequently, so is the collection of other information, such as the personal data on persons involved in the commission of these criminal offences.

According to Article 167 of the CPC covert interception of communication may last for three months and if there is a need for further collection of evidence a time extension of another three months may be allowed. If it is stipulated by a special law that the criminal offences in question fall under the jurisdiction of the Prosecutor's Office for Organised Crime or the Prosecutor's Office for War Crimes, under special circumstances, a time extension may be allowed two more times, for another three months each time.[46] This means that the duration of the said measure shall not exceed twelve months according to both the CPC (2001) and the CPC (2011).

The said Article implies that issuing the order for the use of this special evidentiary action falls solely under the jurisdiction of the court, which now means of the judge for preliminary proceedings.[47] In contrast to the provision stipulated by the CPC (2001), no general time limit is set for the application of the said action with regard to all criminal offences, instead, the deadline is set for two categories. Up to six months the measure may be in force with regard to all criminal offences specified under Art. 162 of the CPC and between six months and a year with regard to the criminal offences which are under the jurisdictions of the Prosecutor's Office for Organised Crime and the Prosecutor's Office for War Crimes. Such a provision seems to be sound since the criminal offences stipulated under Art. 162, para. 1, item 1 of the CPC are implicitly set as priority and their detection carries greater importance than the detection of other criminal offences

45 Group of authors, *Komentar Zakonika o krivičnom postupku, op. cit.*, p. 425.

46 By allowing just the prosecutor's offices with special jurisdiction to impose this special evidentiary action for a year while others are not allowed to do the same, the possibility of unreasonably long use of this special evidentiary action has been restricted according to many authors. Dragan Obradović, M.A., *Najvažnije novine u Zakoniku o krivičnom postupku, Izbor sudske prakse* no. 1/2012, Glosarijum, Belgrade, 2012, p. 11.

47 Perhaps our legislator should consider the possibility of including in the text of the Criminal Procedure Code the right which the Italian prosecutor has, which allows the public prosecutor as well to issue an order for secret surveillance of communication in urgent cases provided that the judge for preliminary proceedings authorises this measure by a certain point in time, otherwise it loses its credibility as evidence. Such a provision would be in the spirit of the provisions regarding the new prosecutorial investigation according to which the prosecutor is the central figure during the investigation, so it is quite common that he must act with urgency but he is not allowed to order the secret surveillance without the judge for preliminary proceedings who has this exclusive right. By doing this, human rights would not be violated since, if the judge would decide that the prosecutor has not acted initially in accordance with the law, the judge would not authorise his order, thus denying the possibility of the use of the obtained material as evidence in the criminal proceedings. There is a similar provision in Germany as well, where the surveillance and recording of telephone and other types of conversations may be ordered just by the judge but if there is a risk of delay, the order for secret surveillance of communication may be issued by the state prosecutor as well. However, the order issued by the state prosecutor does not come into effect if the judge does not sign off on it within three days. Group of authors, *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta*, the Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade, 2008, p. 310.

listed under Art. 162 of the CPC, which has established a difference between the criminal offences listed under Art. 162 of the CPC, which is what should be done in practice. After all, prosecutor's offices with special jurisdictions have been established to criminally prosecute these criminal offences, which in itself shows that the legislator attributes great importance to the said offences. In addition, the legislator's change of the term "important reasons" into "need for further collection of evidence" with regard to the requirement for allowing the time extension of the said special evidentiary action is appropriate as it specifies the requirement for a time extension for the use of the measure more clearly.

Pursuant to Art. 168 of the CPC, the authorities competent to undertake special evidentiary actions of covert interception of communication are the police, Security Information Agency and Military Security Agency which have a duty to submit reports on their activities to the judge for preliminary proceedings and to the public prosecutor at their request. It is still stipulated that postal and telegraph services and other enterprises and companies and entities whose registered activities include information transfer must allow the said authorities to put under surveillance and record communication, in addition to handing over letters and other types of mail to them for which they a receipt shall be issued. The provision used in this Article has been copied from the CPC (2001) with the exception of prescribing an additional obligation of handing over the letters and other types of mail to the competent authorities, thus expanding the prerogatives of competent authorities which are conducting the said measure.

A point of contention has been in practice whether the Security Information Agency is competent to directly undertake the said special evidentiary actions for all criminal offences stipulated by the CPC or they have to do so through the police with regard to the criminal offences which are outside of the scope of the offences for which the Security Information Agency is authorised to act pursuant to Art. 12 of the Law on Security Information Agency.[48] For instance, the investigating judge of the High Court in Belgrade, Special Division, while interpreting non-criminal regulations, passed a ruling under reference number Kri. Pov no. 898/10 of 28 February 2011 terminating the use of the measure of surveillance and recording of telephone and other conversations or communication through other technical means and video recording of the individual in question. The justification of the court cited that Art. 12 of the Law on the Security Information Agency stipulates that the employees of the Agency shall detect, monitor, document, prevent, suppress and intercept the activities of organisations and persons related to organised crime and criminal offences with international elements, internal and international terrorism and the most serious forms of crimes against humanity and international law and against the order established by the Constitution and security of the Republic of Serbia. Article 16 of the Law on the Security Information Agency stipulates that the Agency may undertake and directly perform operations which are under the jurisdiction of the Ministry which is responsible for internal affairs provided that the said decision on this issue is jointly rendered by the Director of the Agency and the Minister of Interior. Accordingly, since in this particular case the criminal offence in question is not listed in the catalogue of criminal offences provided under Art. 12 of the Law on the Security Information Agency and that there has been no agreement with the Ministry of Interior pursuant to Art. 16 of the Law on Security Information Agency, the judge for preliminary proceedings held that the Agency in this particular case was not authorised to undertake the surveillance measure.

48 *Official Gazette of the Republic of Serbia* no. 42/2002, 111/2009.

However, when deciding at the second instance the appeal of the Prosecutor's Office for Organised Crime, the High Court in Belgrade, Special Division, set aside the first instance ruling by rendering its own ruling under the reference number Kv Po1 no. 105/11, Kri Pov no. 898/10 of 7 March 2011, upholding the prosecutor's appeal. The court found that the judge for preliminary proceedings had applied inaccurately the provisions of Art. 12 and Art. 16 of the Law on Security Information Agency considering that the provision of the Art. 504ž, para. 1 of the CPC prescribes that the order of the investigating judge for surveillance and recording of telephone and other conversations and communication through other technical means and video recording of the suspects shall be executed by the authorities of the Security Information Agency. According to the court decision, it may be concluded that the Security Information Agency's prerogative to undertake a special evidentiary action referred to under Art. 166 of the CPC is derived directly from the Criminal Procedure Code and therefore, there are no restrictions for SIA to undertake a special evidentiary action with regard to the catalogue of criminal offences which are subject to such special evidentiary actions apart from those stipulated under Art. 162 of the CPC.

Article 169 of the CPC stipulates that if competent authorities learn that the suspect is using another phone number or the address during the use of the measure, the authority which is undertaking covert interception of communication shall expand the said measure[49] to include the aforementioned phone[50] number or the address and immediately notify the public prosecutor thereof. Immediately upon notification, the public prosecutor must file a motion for expanding the measure of covert interception of communication which is decided by the judge for preliminary proceedings within 48 hours from the receipt of the motion. If the motion is granted, the judge for preliminary proceedings shall subsequently approve the covert interception of communication to be expanded, and if he denies it, thus obtained material is then destroyed.

The CPC (2001) did not regulate expanding the covert interception of communication. The legislator has opted to regulate this area as well, which is commendable, however, in our opinion, the way this has been dealt with in the CPC is another proof that the aforementioned provision according to which it would be allowed for the public prosecutor to order the surveillance if it is subsequently authorised by the judge has its justification since this situation is regulated similarly – the measure is automatically expanded, the prosecutor is notified thereof and he files the motion while the judge subsequently approves it or denies it.

Article 170 of the CPC regulates the obligation of the authorities which are undertaking the surveillance to submit a final report to the judge for preliminary proceedings, providing a detailed description of the elements which should be included in the report. The only addition is that the judge for preliminary proceedings is now under an obligation to ensure that the envelopes/

49 According to the aforementioned, it may be concluded that when it comes to expanding the scope, the authority undertaking the said special evidentiary action may automatically expand it even without a court decision, and the court may subsequently authorise it within 48 hours from the moment the public prosecutor has filed the motion. This provision is a paradox since the use of the said evidentiary action may not be ordered without a court order but it may be expanded without it. Precisely for this reason, there seems to be no impediment to stipulate by law that the said special evidentiary action may be ordered without a court order provided that the court authorises it later if it is determined that it is legal and purposeful, or to destroy the obtained material if the court finds that there were no grounds for ordering the measure of secret surveillance of communication.

50 Modern technology allows the location of individuals and their movement through the mobile phone so the Western literature has increasingly started to use the term "silent leash" for the mobile phone. Dr Žarko Sinđelić, *Primena savremenih tehnologija prilikom realizacije posebnih dokaznih radnji u cilju sprečavanja i suzbijanja organizovanog kriminala*, material from an international scientific conference organised by Hanns Seidel Foundation and the Academy of Criminalistic and Police Studies entitled "*Fighting Organised Crime – Legal Framework, International Standards and Procedures*", held from 27 May to 29 May 2013 on Mt. Tara.

wrapping and addresses are kept and that seals are not damaged when opening the letters and other types of mail. Material is submitted to the public prosecutor and now it is the public prosecutor who is ordering the obtained material to be partially copied and described. The provision banning the use of the material which has not been collected in accordance with the procedure stipulated under Articles 166-169 of the CPC has been kept.

Adding the provision which stipulates the obligation imposed on the judge for preliminary proceedings to take care that the envelopes/ wrapping and addresses are kept and that the seals are not damaged when opening letters and other types of mail represents logical elaboration of the provision under Art. 168 of the CPC, which prescribes a new obligation that the letters and other types of mail must be handed over to the judge for preliminary proceedings. It may be noted that the obligation which requires the material obtained through the use of the said measure to be copied and described is transferred from the investigating judge to the public prosecutor but this was just an option according to the provision of the CPC (2001) since the investigating judge could, but did not have to, order this which followed from the formulation " the investigating judge may order" whereas according to the provision used in the CPC (2011) the public prosecutor has an obligation to do so, which follows from the legal provision which states "the public prosecutor shall order".

With regard to this Article, a dilemma arose in jurisprudence who is allowed to receive audio recordings of the intercepted telephone conversations, especially if we bear in mind that the said conversations may refer to a third party who is not a participant in the criminal proceedings but also to various private matters both related to the defendants and to a third party. Consequently, special divisions for organised crime and war crimes of the High Court in Belgrade took a legal stand at the sessions held during 2012 that the defendant and defence attorney should be allowed to examine audio recordings of phone conversations since, in this particular case, the said item may be used as evidence (Art. 251, para. 1of the CPC) and the said evidence is not in a written form, which could be copied and delivered. In such a way, the court attempted to prevent any kind of potential manipulations and abuses regarding the material in question. However, the Special Division of the Appellate Court in Belgrade passed a ruling Kž 2 Po1 no. 45/14 of 6 February 2014 upholding an appeal of the defendant who had requested all audio and visual recordings which are to be used as evidence against him in the criminal proceedings, obtained at the order issued by the investigating judge, to be delivered to him in electronic format. The second instance court deemed that the protection from abuses provided by Art. 304, para. 1 of the CPC is sufficient, and that is for the court to order the persons copying or examining the file on the investigation to treat as confidential certain facts or data which they have thus had access to and to warn them that disclosing a secret constitutes a criminal offence according to the law if other requirements stipulated under Art. 304 of the CPC have also been met.

If we consider the fact that the greatest number of *causa criminalis* which are prosecuted before the Special Division of the High Court in Belgrade are cases which involve multiple defendants who retain a considerable number of defence attorneys so in accordance with the position of the Appellate Court in Belgrade each of the aforementioned persons should have the right to take or copy all of the audio recordings of the intercepted conversations, which turns the threat of criminal prosecution in case of the commission of the criminal offence of breaching the confidentiality of the proceedings referred to under Art. 337 of the CC into a mere proclamation. The reason is simple, disclosing the private content in such situations is easily done through depersonalised

channels, for instance by uploading the said content onto the Internet where it is difficult or almost impossible to determine who exactly, out of this great number of defendants and defence attorneys, has done this.[51] On the other hand, the Prosecutor's Office for Organised Crime has encountered in practice situations where the convicted persons have complained that their intercepted communication has been abused and uploaded onto the Internet causing them private problems. In the light of the aforementioned, we are inclined to share the view taken by the Special Division of the High Court in Belgrade.

It should be emphasised that in practice the use of this special evidentiary action is of great importance not only when it comes to providing evidence related to the criminal offences which are subject to the use of the said evidentiary actions but also when trying to prove the origin of proceeds from crime in the proceedings for the seizure of proceeds from crime. Namely, in the practice of this Prosecutor's Office, intercepted communication between the members of organised crime groups amongst themselves or with third parties has significantly contributed to proving that illegally obtained assets of the members of the organised crime groups have been transferred to third parties. This refers to the transfer of assets for the purpose of concealing illegal origin of the said assets in order to prevent the application of the Law on Seizure of Proceeds from Crime.[52] No problems have been encountered in practice concerning the use of the said evidentiary action as valid evidence in the proceedings for temporary or permanent seizure of proceeds from crime as the Special Division of the High Court has granted the motions filed by the prosecutor's office and it has considered thus obtained evidence. The legal grounds for the introduction of the CPC provisions into these proceedings, which are ancillary proceedings in relation to the criminal proceedings, may be found in the provision of Art. 4, para. 3 of the Law on Seizure of Proceeds from Crime which prescribes the application of the CPC provisions when appropriate if the provisions of the said law do not stipulate otherwise.

Regardless of the fact that the members of organised crime groups are aware of the possibility that their communication may be intercepted so they have always avoided to directly comment on the ownership over the illegally obtained assets, it was possible to conclude from the intercepted communication who is managing the illegally obtained assets as the owner and who is the actual owner since the intercepted communication showed that third parties would practically report back to the silent owners. The aforementioned position of the Prosecutor's Office was upheld by the Special Division of the High Court in Belgrade in its rulings under the reference numbers Poi Po1 no. 36/11 of 27 December 2011 and Poi Po1 no. 23/12 of 20 December 2012 regarding the temporary seizure of the proceeds from crime from third parties and one of the key pieces of evidence in both cases was the intercepted communication between the defendants and the third parties whose assets resulted from a transfer of the proceeds from crime.

51 Furthermore, any kind of attempt at censoring such content by the competent authorities might be seen as illegal since the Constitution of the Republic of Serbia prescribes a ban on censorship in the media, and that only under special circumstances the competent court may prevent dissemination of information and ideas through the public media provided that this is necessary in a democratic society in order to prevent the calls for violent overthrow of the constitutional order or in order to eliminate threats to territorial integrity of the Republic of Serbia, to prevent calls to war or inciting direct violence or in order to prevent advocating racial, national or religious hatred which incites discrimination, hostility or violence. See in: Tanja Kesić, M.A., *Odnosi policije i javnosti u oblasti izveštavanja u krivičnim stvarima,* Branič no. 3-4/2010, Belgrade, 2010, p. 74. Considering that, in practice, this situation can hardly be classified as one of the aforementioned exceptions listed in the Constitution, competent state authorities would practically have "tied hands" and they would be unable to prevent the dissemination of private information which may be found in the intercepted communication.

52 *Official Gazette of the Republic of Serbia* no. 32/13.

Covert Surveillance and Recording

Unlike the CPC (2001), the CPC (2011) no longer regulates audio and video recording under the same article of the Code, i.e. special rules are applied to video recording which are prescribed by Articles 171 to 173 of the CPC and it constitutes a separate evidentiary action. Special evidentiary action of covert interception of communication entails intercepting communication which is facilitated through the use of some technical means while covert surveillance and recording focuses on visual observation and surveillance of the person, while the second element of this special evidentiary action is communication surveillance *in vivo*.[53] It might be worth considering *de lege ferenda* to amend the legal provision so that a single special evidentiary action (covert interception of communication) covers the communication surveillance through the use of technical devices and communication *in vivo*, which would serve the purpose better, as this would allow a single special evidentiary action to cover the entire communication involving the person in question.

Pursuant to Art. 171 of the CPC covert surveillance and recording is ordered by the judge for preliminary proceedings at an elaborated motion filed by the public prosecutor. Its use allows the detection of contacts or communication of the suspect in public places with restricted access, or on other premises, except in his home, as well as the location of people or items or identification. When it comes to other places, premises and other people's transportation vehicles, they may be put under surveillance covertly and recorded only if it is likely that the suspect would be present there or that he uses the said transportation vehicles.

Article 171 of the CPC stipulates that the court may order covert surveillance and recording of the suspect at an elaborated motion filed by the public prosecutor if the substantive requirements referred to under Art. 161, paragraphs 1 and 2 of the CPC have been met in order to:

1) reveal contacts or communication of the suspect in public places and places with restricted access or on the premises other than his home;
2) locate the persons or items or for the purposes of establishing the identity.

When specifying the requirements for the use of the said measure, unlike in the provision of the CPC (2001), the legislator has stipulated special requirements for the use of surveillance and recording, which was probably why the measures of covert interception of communication and covert surveillance and recording are separated into two distinct measures. The requirements which need to be met in order to allow the use of the said special evidentiary action with regard to places, premises and transportation vehicles of other people are clearly defined, which was not the case with the CPC (2001). Since earlier provisions have been kept while new situations encountered in practice have been additionally regulated, i.e. the procedure applicable when the

53 It would be interesting to comment on how the foreign literature sees the intercepted communication. Before the modern communication channels appeared, the interception mainly used to target letters and parcels and no real dilemmas arose there. Today it is necessary to interpret the term correspondence more broadly so it includes nowadays telegrams, fax messages and letters, as well as the communication conducted over the Internet. In the practice of the British courts there were cases where handing over magazines was considered correspondence and communication certainly includes text messages and photographs sent over a mobile phone. With regard to the communication over the mobile phone or by a "walkie-talkie", British courts hold that this is partly communication and partly a manifestation of private life. **Stefan Treschel,** *Human Rights in Criminal Proceedings*, Oxford University Press, 2nd edition, 2006, pp. 541-542.

places, premises or transportation vehicles in question are owned by persons who are not subject to covert surveillance and recording, this provision seems to be better than the earlier one.

An opinion that types of recording which may be used as a part of this special evidentiary action should have been specified is sometimes encountered in theoretical writings. The objection raised is that the existing legal formulation does not clearly state whether the recording includes just the video recording or audio as well.[54] Regardless of the fact that the legislator intended to include both visual and audio recording according to teleological analysis, it might be better in terms of nomotechnics if the legislator had used the formulation which is used with regard to the undercover investigator, i.e. that the recording refers to audio, video and electronic recording.

When it comes to determining what are the premises which might be subject to the use of this special evidentiary action and what is the residence which cannot be subject to this special evidentiary action, there have been some dilemmas in practice.[55] The Prosecutor's Office for Organised Crime has been filing motions for the use of this evidentiary action regarding residential units which were not occupied by anyone but used by the members of the organised crime group to communicate in secret, which have been granted in practice by the Special Division of the High Court. If, however, one of the persons in question even occasionally stays in such a residence, regardless of the fact that primary purpose of the said residence is to make deals regarding the commission of criminal offences there, the court denied motions of the prosecutor's office to use this special evidentiary action, as it did, for instance, in the ruling under reference number Pov Po1 no. 337/12 of 17 July 2012. The court decided in this ruling that it could be inferred from the enclosed documentation provided by the Security Information Agency accompanying the motion filed by the prosecutor's office that the suspect occasionally stayed at the said residence where the measure referred to under Art. 171 of the CPC was to be undertaken according to the motion and that legal requirements for undertaking this special evidentiary action were not met.

Pursuant to Article 172 of the CPC, undertaking the said evidentiary action is ordered by the judge for preliminary proceedings while the content of the said order is prescribed by this Article. The duration of the said special evidentiary action is limited to six months (in two granted terms of three months each) but with regard to the offences referred to under Art. 162, para. 1, item 1 of the CPC due to the need for further collection of evidence, a time extension may be allowed for another six months at most (also in two three-month intervals).

Pursuant to Article 173 of the CPC, the order of the judge for preliminary proceedings is enforced by the police, Security Information Agency and Military Security Agency and the results the said evidentiary action yields are subject to reports which are to be submitted to the public prosecutor and the judge for preliminary proceedings. When the use of the measure is terminated the provisions of Art. 170 of the CPC are applied accordingly to the said special evidentiary action as well.

54 Dr Milan Škulić and dr Goran Ilić, *Novi Zakonik o krivičnom postupku Srbije – Kako je propala reforma, šta da se radi*, the Association of the Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2012, p.101.

55 As far as the international legal regulations are concerned, the European Convention on the Protection of Human Rights and Fundamental Freedoms passed in 1950 defined the residence (home) as any place where someone is staying. The jurisprudence of the European Court of Human Rights has expanded the aforementioned definition of the concept of home so that it may include some office spaces (see *Niemitz vs. Germany*, ECHR, App. no. 13710/88) Group of authors, *Ljudska prava u Srbiji*, Belgrade Human Rights Centre, Belgrade, 2011, p.132.

Considering that the provisions stipulated by Articles 172 and 173 of the CPC are identical to the ones stipulated under Articles 167-170, there is no need to specially comment on them. It should be mentioned that some authors have argued that it is necessary to legally regulate the procedure for removing the devices used for secret recording as well.[56]

Simulated (Business) Deals

If the requirements stipulated under Art. 161, paragraphs 1 and 2 of the CPC have been met, the judge for preliminary proceedings may allow, at the motion filed by the public prosecutor simulated purchase, a sale or rendering of business services and simulated offering or acceptance of bribes pursuant to Article 174 of the CPC. Such a special evidentiary action allows an otherwise illegal activity to become *ad hoc* legal but exactly due to the specific nature of it, it must never be routinely used by the authorities authorised to use it.[57]

According to Article 174 of the CPC substantive and formal requirements for the use of the said evidentiary action are the same as the ones stipulated under Art. 504i, paragraphs 1 and 2 of the CPC (2001). The difference is that this measure according to the CPC (2001) used to consist of:

1) providing simulated business services and
2) providing simulated legal services

while according to Art. 174 of the CPC (2011) this measure consists of:

1) simulated purchase, sale or rendering of business services
2) simulated offering and acceptance of bribes.

The requirements for the use of special evidentiary action of simulated business deals have been stipulated under Article 174 of the CPC. Unlike the provision of the CPC (2001), the title of the special evidentiary action of simulated business deals leaves out the simulated services but it is clear from the content of the said Article that they are still an integral part of the said evidentiary action, however the law does not specify which services these might be. What must be underlined as an important change is the restriction of simulated business deals to purchases, sales and offering and acceptance of bribes. It is debatable if such a decision by the legislator to determine *numerus clausus* of the transactions which may be included in the scope of the said evidentiary action was well-founded since there is a wide range of real life situations which require closing all sorts of simulated deals which might secure the material which might be used as evidence in criminal proceedings. However, the fact remains that the concept of "providing business services" is not clearly defined and distinguished from the concept of legal services, therefore, it might be said that the legislator has established the term of business services as a general norm which can include all these various real life situations which might be encountered in practice.

56 The argument for the said objection is based on the fact that these devices are installed pursuant to a court order and afterwards they are left on the premises where they have been installed indefinitely, which is unacceptable, even if they are never to be used again. Dr Milan Škulić, *Osnovne novine u krivičnom procesnom pravu Srbije – Novi Zakonik o krivičnom postupku iz 2011. godine, op. cit.*, p. 58.

57 Aleksandra Minić, *Specifičnosti krivičnopravnog procesuiranja krivičnih dela organizovanog kriminala*, Belgrade District Court Bulletin no. 78, Belgrade, 2008, p. 101.

According to Article 175 of the CPC the said evidentiary action is undertaken at the order of the judge for preliminary proceedings, the content of which is stipulated by this Article. The said action lasts generally with regard to all criminal offences specified under Article 162 of the CPC six months at most (3 months +3 months) while the criminal offences specified under Article 162, para. 1, item 1 of the CPC the said measure may last for another six months (also 3 months +3 months) provided that the implementation of simulated business deals is terminated as soon as the reasons for their use cease to exist.

Compared to the provision of the CPC (2001), a change has been introduced with regard to the time restrictions imposed on the use of the said evidentiary action. Instead of a general deadline of maximum nine months (6 months + 3 months) for all criminal offences stipulated under Art. 504a of the CPC, the time frame is defined in such a way so that when it concerns all of the criminal offences stipulated under Article 162 of the CPC, it does not exceed six months (3 months + 3 months) whereas with regard to the criminal offences stipulated under Art. 162, para. 1, item 1 of the CPC, the set deadline may be extended for another six months (also 3 months + 3 months). Similarly to Article 167 of the CPC, the change by which the legislator stipulates that the grounds for allowing a time extension regarding the use of this special evidentiary action are "the need for further collection of evidence' rather than "valid reasons" was justifiable since this defines to a certain extent the requirement for a time extension more precisely. Furthermore, it was justifiable for the legislator to replace the phrase "providing" simulated services used in the CPC (2001) which seems to refer to a single action with the term "implementation" of simulated business deals which implies multiple actions, i.e. closing several deals.

Pursuant to Article 176 of the CPC, special evidentiary action of simulated business deals is executed by authorised police officers, SIA and MSA and if it is required by specific circumstances of the case other authorised persons as well, and they shall write reports on performing such transactions submitting them to the judge for preliminary proceedings and the public prosecutor. It is stipulated that the person conducting the simulated transaction is not committing a criminal offence if such action is stipulated as a criminal offence under the Criminal Code. Moreover, the person who conducts simulated transactions must not incite someone else to commit a criminal offence.

This special evidentiary action is undertaken by the same authorities which were stipulated by the CPC (2001) but the difference compared to the CPC (2001) is that Article 176, para. 3 of the CPC expressly stipulates that it is banned and punishable under law that the person concluding the simulated transaction should incite someone else to commit a criminal offence.

Providing simulated business services and concluding simulated legal contracts must not have elements of provoking another person to commit a criminal offence. Namely, this action may inevitably have certain similarities with provocation but it must not become "pure" provocation of a criminal offence which under criminal law constitutes instigation. The point is that the activity of the officer who is participating in a specific simulated purchase of an item or a person ("the purchaser") or simulated offering and acceptance of bribes must not generate the will in the other person to commit a criminal offence.

Article 177 of the CPC stipulates that when the use of the measure ends, the authority undertaking the special evidentiary action submits to the judge for preliminary proceedings documentation

on the undertaken action, video, audio and electronic recordings as well as other evidence in addition to a special report the content of which is stipulated in detail under Art. 177 of the CPC and subsequently the judge submits the said report to the public prosecutor. The provision under Article 177 of the CPC has been copied from the CPC (2001) without any significant changes.

The experiences of the Prosecutor's Office for Organised Crime regarding the use of this special evidentiary action allow several conclusions to be drawn. Ordering the special evidentiary action of concluding simulated business deals in practice entails ordering a special evidentiary action of using an undercover investigator. If this were to be done differently, if the simulated business deals were to be concluded using a natural person's real first and last name, the name of the person in question would be "blacklisted" by the banks due to simulated criminal transactions. Therefore, the said person would encounter great difficulties later on when applying for a credit or any other bank service regardless of the fact that the transaction which he is being sanctioned for was authorised by the court and performed at the request of the prosecutor, i.e. in every respect in accordance with the law. For this reason, and primarily in order to protect the identity and ensure the safety of the person who is concluding the simulated legal transaction with the members of an organised crime group, in practice, the conclusion of simulated business deals should be entrusted solely to undercover investigators. The Prosecutor's Office for Organised Crime has acted in this way in the prosecution's case under reference number Str. Pov. no. 71/11, filing the request with the court for the simulated business deals to be concluded by undercover investigators whose false identities were included in the request which was allowed by the Special Division of the High Court in Belgrade and an order Pov. Po1 no. 1214/11 of 17 November 2011 was passed granting the conclusion of simulated legal contracts by undercover investigators which resulted in a successful collection of evidence and the initiation of criminal proceedings against the suspects.

The problem which has emerged in practice with regard to the use of simulated business deals posed a question what should be done with the money which was transferred by companies of organised crime groups into the accounts of simulated companies. This issue has been dealt with in practice by seizing such money pursuant to Art. 92, para. 2 of the CC as the proceeds from crime of the legal entity who received it free of charge or after effecting a payment which clearly does not correspond to the actual value received.

Computer-Assisted Data Searches

When the requirements stipulated under Article 161, para. 1 and para. 2 of the CPC have been met, the judge for preliminary proceedings may order pursuant to Art. 178 of the CPC the use of a special evidentiary action of computer-assisted data searches upon the receipt of the elaborated request filed by the public prosecutor. The action consists of computer-assisted searches of personal data which has already been processed as well as cross-checking thus obtained data against the data related to the criminal offence and the suspect.

This investigative technique consists of automated (computerised) searches through the identification data of certain individuals, which have circumstantial relevance, i.e. they either narrow the number of potential suspects or they point to the potential perpetrator of the criminal offence. In comparative jurisprudence, regarding the use of the said measure, terms like automated

computer searches of personal and other types of data, computer-assisted collation of data, raster scans, etc. may be found as well.

This special evidentiary action is termed raster scan derived from the word *raster* which is used to denote a controlled feature. Raster scanning is the use of data stored in private or public data bases according to the pre-determined crime investigation criteria (rasters) for the purpose of detecting a suspect and locating other individuals and items. When various data bases are linked together creating integral data systems, it is possible to access information of all sorts (health insurance, tax balance, bank accounts, military service records, court proceedings records, etc.) on citizens thus piecing together a complete picture on their personality. The usual form this action takes is cross-referencing the available data through the use of automated processing with the existing data or with the new data which has been obtained through programmed scans.

Positive raster scan is used to determine who are the possible suspects based on certain registered characteristics.

Negative raster scan eliminates from further checks a certain individual who is not suspicious.

Access to computer systems and computer collation of data refers to cross-checking the personal data of citizens, which have been processed by appropriate data bases, or police records, against the information on the criminal offence and the offender.

Information on the wanted person or the criminal offences is run through the data bases in which the person who is under suspicion might be found. The result thus obtain may confirm or eliminate the suspicion that a criminal offence has been committed. Raster scan is not a manual scan of data bases or files but a computer-assisted search.

The action of computer-assisted data search according to the CPC consists of two parallel and interrelated activities:

1) automated (computer-assisted) search of already processed personal or other types of data, and
2) automated cross-checking such data against the data related to some of the cited criminal offences and to the suspect.

Article 178 of the CPC under the use of special evidentiary action of computer-assisted data searches eliminates the formulation according to which this evidentiary action was used in order to "eliminate the persons who are not likely to be linked to a criminal offence", i.e. the formulation which limited this evidentiary action just to the negative raster scan, which is a good provision.

In addition, under Article 178 of the CPC a formulation stating that this evidentiary action consists of automated search of other data related directly to the personal data has been eliminated from the definition of the said special evidentiary action, which is a sound provision since computer-assisted search is not limited just to the persons (i.e. it allows the possibility of the use of this special evidentiary action to perform a data search with regard to items, e.g. to locate a vehicle which has participated in a traffic accident).

The order issued by the judge for preliminary proceedings which imposes the said measure according to Art. 179 of the CPC must include a justification and the law precisely stipulates its content. The basic duration of this evidentiary action is three months but due to the need for further collection of evidence its duration may be extended for another three months two more times. As soon as the reasons for its use cease to exist, the said evidentiary action is terminated.

With regard to the deadlines, the provision has been copied from the CPC (2001) without any significant changes so there is no need to additionally analyse it. The difference compared to the provision used in the CPC (2001) is that the basic deadline is reduced from six to three months but the maximum duration of the action is still limited to nine months. Just like in Article 167 of the CPC, a change has been introduced regarding the grounds for allowing a time extension, the legislator has replaced the phrase "valid reasons" with the phrase "the need for further collection of data" thus specifying the requirement for a time extension better.

A problem arose in practice regarding the court's position that the said special evidentiary action may be undertaken only in connection with the data already stored in the data bases of competent authorities but not in connection with the data that is going to be entered into the data base while the special evidentiary action is being undertaken. We hold that this is not the right stand for the court to take and that the computer-assisted search may be applied to the future data as well, i.e. to the data which has been collected during the search and that such data must be submitted by the competent authority to the authority undertaking the said special evidentiary action. The argumentation for this is simple – if the legislator has intended to limit the use of the computer-assisted data searches just to retroactive application, why not stipulate the collected data to be submitted immediately but prescribe that the said action may continue for months? Such a legal provision was stipulated only because such a search may be applied to the data collected while this measure is being imposed, which means the future data, i.e. obtained after the moment the order to undertake computer-assisted data search was issued.

Pursuant to Article 180 of the CPC the order on undertaking this evidentiary action is enforced by the police, the Security Information Agency, the Military Security Agency, customs office and tax administration, or other services and other state authorities, i.e. legal entities with vested public authority pursuant to the law. Upon the completion of the said special evidentiary action, the authority which has undertaken it must submit to the judge a report, the content of which is specified in detail by law, after which the judge for preliminary proceedings is going to submit the said report to the public prosecutor.

The list of people who are undertaking the said special evidentiary action is the same as the one stipulated under the CPC (2001). The innovation is just the fact that the content of the report which is to be submitted to the judge and the public prosecutor is now stipulated by law which is in accordance with the procedure followed by the competent authorities with regard to other special evidentiary actions as well.

With regard to the use of this special evidentiary action in practice, a point of contention has emerged whether the prosecutor's office is allowed to obtain records of established telephone communication, data on the use of base stations and locations where the communication is taking place through the use of the computer-assisted data search, although pursuant to Art. 286, para. 3 of the CPC the prosecutor's office is authorised to order the police to collect the

aforementioned data itself. The judge for preliminary proceedings of the Special Division of the High Court in Belgrade has dismissed the motion of the Prosecutor's Office for Organised Crime requesting the use of the said special evidentiary measure for the purpose of collecting data concerning the records of established telephone communication, the use of base stations and locations where the communication was taking place as inadmissible in a ruling under the reference number Pov Po1 no. 546/13 of 8 August 2013. The Court stated in the said ruling that such data should not be collected through the use of the computer-assisted data search since pursuant to Art. 286, para. 3 of the CPC the collection of the said data is under the public prosecutor's jurisdiction.

However, at the appeal filed by the Prosecutor's Office for Organised Crime, the Special Division of the High Court in Belgrade has overturned the ruling rendered by the judge for preliminary proceedings finding that the appeal of the Prosecutor's Office is well-founded. In the justification of this ruling, the second instance has cited that Art. 16, para. 1 of the CPC stipulates that court decisions may not be based on the evidence which does not comply either directly or indirectly, in itself or in the way it was obtained, with the Constitution, the CPC or some other law and generally accepted rules of international law and ratified international agreements, except in the proceedings which are conducted due to obtaining such evidence. In addition, Article 41 of the Constitution of the Republic of Serbia prescribes that the confidentiality of letters and other means of communication cannot be violated and the exception to this rule is allowed only temporarily and at the court order if it is necessary in order to conduct the criminal proceedings or to protect the security of the Republic of Serbia as stipulated by law. The decision of the Constitutional Court of the Republic of Serbia under the reference number I UZ-1245/2010 of 13 June 2013 establishes that certain provisions of the Law on Electronic Communication do not comply with the Constitution and they have been rescinded but the provisions under Art. 128, para. 1 and para. 5 of the same Law have remained applicable, the provisions which allow the operators to withhold the data and submit it without any delay. Pursuant to the aforementioned, the court at the second instance concluded that the operator does not have legal grounds to submit the withheld data to anyone without a court order, not even the police at the public prosecutor's order. After this decision, in practice, the data concerning the records of established telephone communication, the use of base stations and locations where the communication is taking place has to be obtained solely through the computer-assisted data searches and not based on the authorisation by the public prosecutor referred to under Art. 286, para. 3 of the CPC.

Controlled Delivery

According to Article 181 of the CPC, if general requirements stipulated by Art. 162, para. 1 and para. 2 of the CPC have been met, the Republic Public Prosecutor or the prosecutor's offices with special jurisdictions may order, for the purpose of collecting evidence for the proceedings and detecting the suspects, a controlled delivery which allows illegal and suspicious shipments to enter, transit or leave the territory of the Republic of Serbia, i.e. allows such shipments to be delivered within the territory of the Republic of Serbia, under the supervision and with the knowledge of competent authorities. The public prosecutor orders this special evidentiary action to be undertaken.

Controlled delivery is a specific evidentiary action which actually is a special form of international legal assistance in criminal matters and entails the implementation of formal and actual

cooperation of competent authorities of different states in the field of suppression of certain forms of crime, which typically have international implications, so they are often in practice referred to as the so-called cross-border or trans-national crime.

According to Article 504l, para. 4 of the CPC (2001) substantive requirement for this special evidentiary action, i.e. for a controlled delivery, was met if the detection and arrest of the suspects involved in the commission of special criminal offences (offences referred to under Art 504 of the CPC (2001)) would otherwise not have been possible or would have been extremely difficult (a kind of *ultima ratio*).

According to Article 161 and Article 181 of the CPC (2011), the substantive requirement for the use of the said measure is formulated more broadly, i.e. in addition to the situations when the detection and arrest of the suspects involved in the commission of special criminal offences (offences which are referred to under Art. 162 of the CPC (2011)) would not be possible otherwise or would be extremely difficult, this measure may also be applied if there are grounds for suspicion that a criminal offence referred to under Art. 162 of the CPC is being prepared while the circumstances of the case indicate that such a criminal offence would otherwise:

1) not be detected, prevented or proven, or that
2) it would cause disproportionate difficulty, i.e. grave danger.

Formal requirement for this special evidentiary action is different compared to the other special evidentiary actions. Both according to the Article 504l, para. 1 of the CPC (2001) and according to the Article 181 of the CPC (2011) the use of this measure does not require an order by an investigating judge, or the judge for preliminary proceedings, but an authorisation, i.e. the public prosecutor's order. Article 181 of the CPC stipulates that the said measure may be ordered by the Republic Public Prosecutor or the prosecutors with special jurisdictions (the Prosecutor for Organised Crime or the Prosecutor for War Crimes), which means that in those cases which do not fall under the jurisdiction of the Prosecutor for Organised Crime or the Prosecutor for War Crimes (Art. 161, para. 1, item 2 of the CPC draft bill), the said measure shall be ordered by the Republic Public Prosecutor.

Unlike Article 504l, para. 6 of the CPC (2001), Article 181, para. 2 of the CPC (2011) specifies that the public prosecutor shall authorise, i.e. impose, the said measure in the form of an order. Bearing in mind that according to the CPC (2001) there were no procedural situations where the public prosecutor issued orders, in practice the prosecutor's office acted *per analogiam* rendering a decision on the use of the special evidentiary action of controlled delivery in the form of a ruling.

According to Article 181 of the CPC controlled delivery means that illegal and suspicious shipments are, with the knowledge and under the supervision of state authorities:

1) delivered within the territory of the Republic of Serbia
2) allowed to enter, transit or exit the territory of the Republic of Serbia.

Ruling referred to under Article 181 of the CPC enables the shipments to be delivered within the territory of the Republic of Serbia, which broadens the scope of the use of the special evidentiary

action. Such a provision seems adequate since in practice a need may arise to deliver the shipment in the Republic of Serbia but the legal formulation of the CPC (2001) is too restrictively formulated and does not cover the said situation, therefore, this is a sound change.

Suspicious shipments may refer to narcotics, cash, weapons, ammunition, etc. Any vehicle may be placed under supervision and tracked (a boat, a truck, an air plane, etc.) in any type of traffic (road traffic, air traffic, river traffic, railway traffic, mail traffic, etc.). The objective of any special evidentiary action is to discover the main perpetrators and organisers apart from the already known and, as a rule, lower-ranking ones.

It should be said that in practice it is often purposeful to simultaneously order this action and the special evidentiary action of covert surveillance and recording referred to under Article 171 of the CPC allowing a more complete record of the criminal activities and the collection of evidence relevant to the criminal proceedings. Miniature surveillance cameras are most commonly used, placed on the roof of the vehicle, which are no different than a radio antenna but other modern surveillance techniques are also used.[58]

Controlled delivery according to Art. 182 of the CPC is executed by the police and other state authorities as ordered by the public prosecutor. This action is undertaken with the approval of the competent authorities and on the basis of reciprocity, in accordance with the ratified international agreements which stipulate the content of such measures in more detail. Upon the completion of controlled delivery, the authorities which have undertaken it, shall submit a report to the public prosecutor, the content of which is precisely stipulated by law.

Such a provision is practically the same as the one used in the CPC (2001) apart from the fact that paragraph 5 of Article 504l of the said Code, which stipulated the requirements for the use of controlled delivery unless it was otherwise stipulated by the international agreement, has been omitted.

Undercover Investigator

Article 183 of the CPC stipulates that the judge for preliminary proceedings, after he receives the elaborated motion filed by the public prosecutor and if he finds that the requirements referred to under Art. 161, paragraphs 1 and 2 of the CPC have been met, may order the use of an undercover investigator if the evidence for criminal prosecution is impossible to collect or if it would be extremely difficult to collect through the use of other evidentiary actions.

Substantive requirements for the use of an undercover investigator according to Article 504m of the CPC (2001) and according to Articles 161, 162 and 183 of the CPC (2011) are practically identical but the CPC (2011) expands the catalogue of criminal offences which are subject to the said special evidentiary action. According to Article 162 and Article 183 of the CPC substantive requirements for the use of undercover investigator are:

58 Dr Goran Bošković, *Organizovani kriminal,* Kriminalističko-policijska akademija, Belgrade, 2011, p. 235.

a) the requirement related to the type of criminal offences – it is necessary that there are grounds for suspicion that a criminal offence which has been committed falls under the jurisdiction of the Prosecutor's Office for Organised Crime or the Prosecutor's Office for War Crimes (according to the CPC (2001) the use of this measure was possible only with regard to the criminal offences of organised crime stipulated under the Art. 504a, para. 3).
b) the requirement related to difficulties regarding the evidentiary proceedings, which imply that this special evidentiary action is some sort of evidentiary *ultima ratio* – it is necessary that the evidence for criminal prosecution cannot be collected through the use of other special evidentiary actions or that this would be extremely difficult.

An undercover investigator may also be used under special circumstances if there are grounds for suspicion that a criminal offence which is under the jurisdiction of the Prosecutor's Office for Organised Crime or the Prosecutor's Office for War Crimes is being prepared while the circumstances of the case indicate that such a criminal offence otherwise:

1) might not be detected, prevented or proven, or
2) might cause disproportionate difficulty, i.e. grave danger.

The catalogue of criminal offences which are subject to the use of special evidentiary action of an undercover investigator has been expanded as a result of the change in the formulation of the CPC (2001) which dealt with the criminal offences of organised crime whereas the formulation used under Art. 162 of the CPC refers to all criminal offences which fall under the jurisdiction of the prosecutor's offices with special jurisdictions. It is questionable whether this change may be justified by the actions in practice if we bear in mind the type of evidentiary material that is being collected by the said evidentiary action. The fact is that it is now being used in practice when proving criminal offences of organised crime and it remains to be seen if there would be any situations at all to use it with regard to criminal offences which do not fall under the category of criminal offences of organised crime. It is particularly questionable what is *ratio essendi* of this special evidentiary action in the process of proving the criminal offences which are under the jurisdiction of the Prosecutor's Office for War Crimes and how it is possible to use it *post festum* in the work of the prosecutor's office considering that the last war crimes which fall under the jurisdiction of this prosecutor's office were committed in 1999.

Article 184 of the CPC prescribes that the judge for preliminary proceedings shall issue an order with a justification on this special evidentiary action, the content of which is regulated by law. The said order may allow the undercover investigator to use technical devices for photographing, audio, visual or electronic recording. The use of an undercover investigator may continue as long as there is a need to collect the evidence, and it must not exceed a period of a year, but under special circumstances the judge for preliminary proceedings may allow a time extension at the elaborated request filed by the public prosecutor for another six months. As soon as the reasons for the use of the special evidentiary action cease to exist, the use of the undercover investigator shall be terminated.

Formal requirements for the use of an undercover investigator referred to under Art. 184 of the CPC (2011) are the same as the ones under Art. 504m of the CPC (2001) apart from a technical

change according to which the order under the CPC (2011) for the use of the said measure is not to be issued by an investigating judge but the judge for preliminary proceedings.

Pursuant to Art. 184, para. 2 of the CPC it is rightly stipulated that the order (of the court) may allow the undercover investigator to use technical means for taking photographs, for audio, visual and electronic recording, so there are no limitations as there are under Article 166 of the CPC which stipulates that recording may be used only with regard to telephone conversations or communication through the use of other technical devices. This implies that the person, i.e. the undercover investigator, may be "wired" in order to record direct verbal communication. There are no restrictions implying that the use of such measures by the undercover investigator (audio, visual and electronic recording) does not apply to premises other than residences. This means that the undercover investigator may use such measures not only in order to "wiretap the premises" which are not defined as a residence, but also in order to wiretap a residence if he is authorised to enter it and the technology for wiretapping is brought in on his person.

Even the provision of Article 504n, para. 1 of the CPC (2001) allowed the undercover investigator to enter the residence and use technical devices to record conversations. However, when using this special evidentiary action, one should bear in mind two situations. The first situation is when the undercover investigator is authorised to enter (which means with the permission of the owner or the occupant of the said residence) and while inside, he installs the devices used for audio, visual and electronic recording, which are then used after he leaves the residence by the competent state authorities undertaking the said special evidentiary action in order to continue collecting the evidentiary material, which is to be used later in the criminal proceedings. If the formulation of Article 171 of the CPC is subjected to thorough critical analysis, it could be claimed that this Article prohibits any secret recording in the residence, which also applies then to the recording facilitated by the undercover investigator, therefore, this is an issue that is going to be raised in practice should the legal provision remain as is. It seems that ordering a special evidentiary action of the use of the undercover investigator in such a way would defeat the purpose of the prohibition stipulated by Art. 171 of the CPC which refers to the ban on covert surveillance in the residence.[59] In the second situation, undercover investigator is authorised to enter a person's home (which again means with the permission of the owner or the occupant) while wearing devices for audio, visual and electronic recording and gathers evidence during his stay in the residence in question. In our opinion, there are no legal impediments here to treat such evidentiary materials as valid evidence since the purpose of this special evidentiary action is to allow the undercover investigator to collect

59 Such actions would also go around the *ratio legis* of Art. 40 of the Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia* no. 98/2006) which stipulates under paragraph 1 that a person's home is inviolable., which "primarily means that no one, including the government, is allowed to enter a person's home and conduct a search in it against the will of its occupant." (Dr Ratko Marković, *Ustavno pravo i političke institucije,* Justinijan, Belgrade, 2004, p. 588). Paragraph 2 of Article 40 of the Constitution stipulates that a person's home may be entered solely on the basis of a court decision and specifies under what circumstances this may be done, and under paragraph 3 of the same Article it is also stipulated under what circumstances it is allowed to enter without a court's decision. Paragraphs 2 and 3 of Art. 40 of the Constitution of the Republic of Serbia actually list the exceptions to the rule of inviolability of a person's home but none of them allow the interpretation that a person's home may be entered based on the stipulated exceptions for the purpose of planting devices necessary for audio, visual or electronic recording in order to collect the evidence in such a way. Since neither the Constitution of the Republic of Serbia nor the Criminal Procedure Code grant explicit authority for entering a person's home for the purpose of secret recording, and every norm that restricts human rights should be restrictively interpreted, we hold that it should not be allowed for the undercover investigator to enter a person's home in order to plant a technical device for secret recording. In view of the aforementioned, we disagree with some authors who deem that the possibility that a judge for preliminary proceedings could authorise the undercover investigator to enter a person's home and premises in order to plant technical recording devices should be allowed. (See: Group of authors, *Komentar Zakonika o krivičnom postupku, op. cit.*, p. 443).

the evidence in this way wherever he happens to be and therefore, even if he finds himself in the residence in question as well. Due to these reasons, *de lege ferenda*, a line should be clearly drawn between these two situations in the Criminal Procedure Code and it should be defined more precisely how the undercover investigator may use in practice audio, visual and electronic recording, thus eliminating any future dilemmas.[60]

The duration of the said measure is identical in both Criminal Procedure Codes. It remains in force as long as it is necessary to collect the evidence (actual deadline) and it must not exceed a year (a formal maximum duration).

At the elaborated request filed by the public prosecutor, the investigating judge, i.e. the judge for preliminary proceedings, may extend the duration of the measure for no more than six months (additional formal deadline which extends the formal maximum deadline). This means that the use of an undercover investigator on the same case may last a maximum of 18 months.

In the USA a separate issue regarding wiretapping concerns the cases where secret agents infiltrate criminal groups. Their clothes and luggage often hide microphones or small transmitters which enable listening and recording of the conversations with the individuals they come in contact with. The US Supreme Court has decided that this practice is permissible, treating it according to the rule which allows listening in on the communication as long as one of the participants in the conversation has consented to it, which is why this type of communication surveillance does not require a special court approval.

Article 185 of the CPC stipulates that the undercover investigator is assigned, under a pseudonym or a code, by the Minister of Interior[61], Director of the Security Information Agency, Director of the Military Security Agency or by a person they authorise. As a rule, the undercover investigator shall be one of the officers from the law enforcement, SIA, MSA and if special circumstances require it, some other person who may also be a foreign citizen. In order to protect the identity of the undercover investigator, competent authorities may alter the data in the data bases and issue the undercover investigator personal identification documents with the altered data and such data shall be treated as an official secret. The undercover investigator is still banned from inciting others to the commission of a criminal offence.

According to Art. 504n, para. 5 of the CPC (2001) it was stipulated that the undercover investigator, as a rule, was an authorised officer and under paragraph 6 it used to be explicitly stipulated that the persons with regard to whom there was a certain degree of suspicion that they

60 In Croatian CPC (*Official Gazette of the Republic of Croatia* no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13), the rights of the undercover investigator regarding the entrance into somebody's home are clearly defined. Therefore, Article 337, para. 4 of the CPC stipulates a general requirement that an undercover investigator may enter a person's home if the requirements stipulated by law for the police to enter a person's home without a court order have been met. If there is evidence that a particularly serious criminal offence referred to under Art. 334 of the CPC is going to be committed, or if some of these offences have already been committed, the investigating judge may order by a ruling upon the request filed by the public prosecutor that an undercover investigator may use technical devices for recording non-public conversations when entering someone else's home.

61 It would have been a better solution if the law had stipulated that the undercover investigator was assigned by the Chief of Police instead of the Minister of Interior since the Chief of Police is much closer to the operations by virtue of his position and authority than the Minister of Interior, while assigning the undercover investigator is an operative task and requires certain understanding of this field of work.

had been involved in criminal activity, or if this had already been proven, could not be the undercover investigators, and these persons were:

1) persons against whom criminal proceedings were being conducted
2) persons who had been convicted in a final judgment for a criminal offence prosecuted *ex officio*, and
3) persons for whom there were grounds for suspicion that they were members of an organised crime group.

According to Art. 185 of the CPC it is stipulated that the undercover investigator as a rule would be an authorised officer, but there is no provision which explicitly prescribes who is not allowed to be an undercover investigator, which is a sound provision.

Namely, the restriction imposed by Art. 504, para. 6 of the CPC (2001), which stated that undercover investigators may not be members of the organised crime groups, means that such persons are not allowed to use measures which are otherwise allowed for an undercover investigator, primarily the measures regarding the use of technical devices for recording the conversations, i.e. the devices for photographing or audio and visual recording.

Since such persons are already inside the structure of an organised crime group and consequently they enjoy the trust of other members of the said group, and especially of the organisers, in front of these persons they would not hesitate to talk about already committed criminal offences or the criminal offences which are being planned and prepared, so by wiring some of the members of the said group who are acting as undercover investigators, the chances for collection of valid evidence necessary during the criminal proceedings would increase, especially when it comes to the organisers of the criminal group.

Due to the aforementioned reasons, perhaps it should be considered to allow the members of organised crime groups to be awarded the status of an undercover investigator under the same conditions under which they are allowed to acquire the status and benefits of a defendant collaborator.[62] Article 185 of the CPC leaves room for such a possibility.[63] The possibility that an undercover investigator may be a person who comes from a criminal background exists in the US law where it has yielded some good results.

The CPC (2001) and the CPC (2011) share the same provision regarding the protection of the undercover investigator. For the purpose of protecting the undercover investigator, while this special measure is being undertaken, the competent authorities may undertake certain formal measures in order to conceal the real identity of the person who is acting as an undercover investigator, which comes down to:

62 The conditions under which the member of an organised crime group may be awarded the status of a defendant collaborator is regulated under Articles 320-326 of the CPC.

63 There are views in theory which suggest that omitting the provision by which the legislator provides for a possibility that a person with a criminal background may be used as an undercover investigator should be interpreted as an expression of the legislator not to do so. Group of authors, *Komentar Zakonika o krivičnom postupku, op. cit.,* p. 444

1) changing the data stored in data bases, as well as
2) issuing personal identification documents with altered data for the purpose of protecting the identity of the undercover investigator and in order to conduct the said measure. Such data, which means both the altered data and the data concerning the real identity of the undercover investigator are an official secret.[64]

From a practical point of view, the undercover investigator shall have the greatest protection if prior to his infiltration into an organised crime group, data is properly collected on the profiles of the members of the said organised crime group, their mentality, habits, etc., which requires painstaking operative police work as well as the work of other state authorities on the collection of such data. The said information is important in order to allow the undercover investigator to prepare himself for becoming a part of the criminal organisation in question successfully, enabling him to start collecting the data and evidence necessary for their subsequent criminal prosecution after the trust of the members of the said organised crime group has been gained. Bearing in mind that organised crime is becoming increasingly international so the members of the same organised crime group are often citizens of different states, and even from different continents, while all of them function as a single group, it is necessary that the undercover investigator possesses adaptability, i.e. he must be able to adapt to different mentalities and characters of the members of the group. The undercover investigator is certainly not expected to approach in the same way the members of an organised crime group who come from, say, the territory of former Yugoslavia where there is no language barrier between the undercover investigator and them, and members who come from some other European countries (e.g. Netherlands or Germany) and whose conduct and habits are different.[65]

According to an explicit legal provision under Art. 504nj, para. 5 of the CPC (2001) and Art. 185, para. 4 of the CPC (2011) the undercover investigator must not act as the so-called *agent provocateur*. It is forbidden and punishable under law for the undercover investigator to incite someone else to commit a criminal offence.[66]

Instigation should be understood to mean what it is usually interpreted to mean in substantive criminal law (Art. 34, para. 1 of the CC), i.e. any type of action which is intended to lead to or strengthen a decision of another person to commit a criminal offence. The liability of the undercover investigator in such a case is based on the general rules of the criminal law and his role in the committed offence would be manifested in two forms:

64 Building a cover story (false identity) of the undercover investigator is a very important segment when preparing the activities of the undercover investigator. How well the cover story is prepared directly impacts the possibility of later exposure of the undercover investigator's identity. The cover story must be appealing to the criminal organisation so it must be determined what kind of services would be appealing to that particular organised crime group based on the collected data. Dr Goran Bošković, *op. cit.,* p. 221.

65 For instance, there was a case in the practice of this prosecutor's office where the undercover investigator who was working on a particular case, had gained the trust of the members of an organised crime group, who were originally from the territory of former Yugoslavia, after having been drinking with them night after night in pubs whereas the members of the same criminal group from one of the European states did not go out with him even once and treated him in a more formal manner and confided in him less about the activities of the members of the said organised crime group. It was not necessary to insist on establishing a closer relationship since their behaviour was not the result of distrust towards the undercover investigator but was the result of their typical manners and that was how they treated other members of the said organised crime group as well.

66 Dr Zoran Stojanović holds that the CPC should have prohibited explicitly not only instigation but also assisting the perpetrators of criminal offences since he is more likely to be in a situation to assist them if he infiltrates an organised crime group as a member than to incite them to the commission of a criminal offence. Dr Zoran Stojanović, Komentar Krivičnog zakonika, Official Gazette of the Republic of Serbia, Belgrade, 2012, p. 185.

1) he might be charged as a perpetrator of a particular criminal offence when instigation alone is a separate criminal offence, i.e. when the act of instigation to the commission of a criminal offence is at the same time an action which constitutes the commission of a criminal offence[67]
2) he might be charged as an instigator in two forms:
   a) if he has incited someone to commit a criminal offence which has been then committed
   b) if he has incited someone to commit a criminal offence which has not been even attempted but the offence in question is punishable even if it is just attempted, in which case he is being sanctioned for an attempt to commit a criminal offence (Art. 34, para. 2 of the CC).

In accordance with Art. 186 of the CPC, the undercover investigator must submit reports periodically to his immediate supervisor in the course of his involvement. Upon completing his service, the undercover investigator must submit all of the obtained evidence as well as the report, the content of which is stipulated by law, to the judge for preliminary proceedings who then forwards all of these to the public prosecutor.

According to the provision of Art. 186 of the CPC, the undercover investigator must submit reports periodically to his supervisor during his involvement in the case, i.e. while he is undertaking specific actions as an undercover investigator.

Upon the completion of this special evidentiary action, the supervisor must submit a report to the judge for preliminary proceedings. This refers to a "final" report on the undertaken evidentiary action which should contain the following elements:

1) the time when the special evidentiary action started and ended
2) the code or the pseudonym of the undercover investigator
3) a description of the used procedures and technical equipment
4) the data on the number and identity of those who were subject to this special evidentiary action and a description of the results.

Article 186 of the CPC omits the exception when an undercover investigator is not under an obligation to file reports periodically to his immediate supervisor, i.e. when his or someone else's safety is at risk.[68] Such a provision is questionable since it prescribes a constant obligation of the undercover investigator to report periodically to his supervisor, therefore, even if filing the said report might lead to exposing his identity or direct endangerment of his or someone else's safety. Namely, it is not unheard of that criminal groups are suspicious of newcomers in their group, which is why they monitor their movement and activities.

67 For instance, with regard to a criminal offence of inducing someone to suicide and assisting the commission of a suicide referred to under Art. 119 of the CC, or with regard to the criminal offence of avoiding to serve in the military as a conscript referred to under Art. 394 of the CC which stipulates a more serious, qualified form when someone calls on or incites several persons to the commission of this criminal offence (para. 4), i.e. the legislator deemed it justified to prescribe a considerably more severe sentences for such an instigator than the perpetrator.

68 This refers to a part of the provision of Art. 504n, para. 2 of the CPC (2001).

Article 187 of the CPC stipulates that under special circumstances an undercover investigator may be examined under a code or pseudonym during the criminal proceedings as a witness. The said examination shall be conducted in such a way so that the undercover investigator would not expose his identity to the parties or the defence attorney. The undercover investigator is summoned through his supervisor who confirms the identity of the undercover investigator prior to the examination in a statement given before the court since the data on the identity of the undercover investigator is an official secret.

Article 187 of the CPC (2011) has kept identical provisions regarding the examination of an undercover investigator to those used under Art. 504nj of the CPC (2001). Under special circumstances an undercover investigator may be examined under a code or pseudonym during the criminal proceedings as a witness while the examination shall be conducted in such a way so that his identity is not disclosed to the parties or the defence attorney, i.e. so that he is not exposed. This is the only instance in our criminal procedure that a completely anonymous witness is used, i.e. a witness whose identity is not known even to the parties to the proceedings.

The identity of an undercover investigator shall be established immediately before his testimony through the statement made before the court by the supervisor who is responsible for the undercover investigator, who is also a liaison for summoning the undercover investigator as a witness. The data on the identity of the undercover investigator who is being examined as a witness is an official secret.

Once the undercover investigator is questioned as a witness, which should occur extremely rarely in practice and under extraordinary circumstances, his statement serves as evidence but it must not be exclusive evidence, i.e. the only evidence upon which a court decision is based in a case subject to criminal proceedings. A court decision must not be based solely on the testimony of an undercover investigator or must not treat such testimony as a deciding factor in the said decision.

Ratio legis of the said legal rule (which essentially represents a form of a special exception to the principle of free assessment of the evidence, which is thus reasonably restricted) is not based on some sort of presumed distrust regarding this type of a witness but it is instead based on a general view that when a statement is given by a witness who is anonymous to the parties to the proceedings, the principle of fairness dictates that such evidence in itself is insufficient without any other evidence for a court decision to be based on it, and following this logic, it is insufficient primarily for a judgment of conviction.

Unlike Art. 504nj of the CPC (2001), Art. 187 of the CPC (2011) does not stipulate that the examination of an undercover investigator is conducted according to the rules for examining protected witnesses when appropriate, which might be an omission and a cause of future problems in practice.

Conclusion

This analysis is an attempt to shed some light on certain ambiguities which might potentially emerge during the application of the Criminal Procedure Code with regard to the special evidentiary actions and it provides a legal analysis of the relevant provisions of the Code. In addition to the analysis of current procedure regulations regarding the special evidentiary actions, which have been adjusted to suit the prosecutorial type of investigation, a comparative analysis has been provided of the provisions that were used in the Criminal Procedure Code (2001) which have been adapted to serve the concept of the prosecutorial investigation. Furthermore, wherever there was room to do so, we have tried to draw attention to practical experiences of the Prosecutor's Office for Organised Crime which are the result of a two-year-long application of the said legal provisions, as well as to the dilemmas stemming from such experiences, while at the same time suggesting how these dilemmas could be resolved, and whether certain parts of the Code should be amended *de lege ferenda*. We hope that the experiences we have encountered, presented and analysed in this paper shall have repercussions in terms of a more adequate application of the Criminal Procedure Code (2011) in the segment which deals with the special evidentiary actions.

Finally, it may be concluded that the provisions of the CPC (2011) represent a step forward in regulating the subject matter of special evidentiary actions whereas the whole subject matter of the CPC (2011) which concerns the activities of the Prosecutor's Office for Organised Crime is better regulated than it was the case with the provisions used in the CPC (2001). This especially applies to certain initial provisions which were stipulated with regard to the fight against organised crime and which were deemed to be regressive by some authors.[69]

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69 Slobodan Šoškić, *Nejasna i nazadna rešenja u odredbama krivičnog zakonodavstva u oblasti krivičnih dela organizovanog kriminala*, Branič no 1-2/2008, Belgrade, 2008, p. 74

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The Crime Scene Investigation as an Evidentiary Action in the New Serbian CPC and its Relevance to the Investigation

1. Introduction

In addition to the already known evidentiary actions such as the interrogation of the defendant, questioning of the witnesses, obtaining expert opinions, crime scene investigation, reconstruction of the events, inquiries into accounts and suspicious transactions, temporary seizure of items and searches, the new Criminal Procedure Code[2] of Serbia has introduced two more evidentiary actions, and these are: using an official record as proof and obtaining samples (biometric samples, samples of biological origin and samples for forensic DNA analysis). However, despite the significance of the new methods and techniques of the collection of physical evidence, we believe that the crime scene investigation deserves special attention as an evidentiary action. Namely, the crime scene investigation is conducted, in the majority of cases during the pre-investigation proceedings, immediately after the commission of a crime due to the risk of delay, both when the perpetrator is identified and when he is unknown; its purpose is to discover, secure and describe the items and traces of the criminal offence as well as the other facts and circumstances which may be of significance for the subsequent clarification of the crime since it is difficult later on to make up for what has been omitted during the crime scene investigation.

The legislator stipulates under Article 133, para. 1 of the Criminal Procedure Code: "The crime scene investigation is conducted when direct observation of the authorities conducting the proceedings is necessary in order to establish or clarify a certain fact during the proceedings." It cannot be disputed that such a definition is imprecise and incomplete since the legislator does not

1 Deputy Appellate Public Prosecutor in Belgrade.
2 *Official Gazette of the Republic of Serbia*, no. 72 of 28 September 2011.

prescribe formally the legal grounds and the requirements for undertaking the crime scene investigation, nor is it prescribed how the crime scene investigation should be conducted, instead, it is only prescribed that the crime scene investigation is to be conducted when the authority conducting the proceedings makes a discretionary decision that direct observation is necessary in order to establish or clarify certain facts during the proceedings. Upon interpretation of this provision a conclusion may be reached that the phrase "direct observation" implies sensory observation, primarily by looking, then listening, smelling, tasting or touching. Sensory observation has to be undertaken during the proceedings and in the way stipulated by law in order to constitute a crime scene investigation. However, the crime scene investigation is a very complex activity as it combines the concept of direct observation and methods used in criminalistics. Direct observation is complemented by measuring and counting methods, comparison and experimenting, designation, detection, securing and recording of the traces which have been found, making sketches, etc. The definition of the crime scene investigation in criminal procedure comes down to the legal qualification of the crime scene investigation as direct, sensory observation while its definition in criminalistics is much more complex and elaborate since it certainly is not just observation. Namely, the crime scene investigation represents a system of various actions related to criminalistics through the use of which the scene of the incident is observed pursuant to the provisions of the Criminal Procedure Code (directly or indirectly – with the participation of experts or through the use of special instruments of the CSI equipment) in order to determine all of the relevant circumstances related to what has transpired, after which traces and items related to the committed criminal offence are located and processed in accordance with the technical rules of criminalistics, which is accompanied by a mental reconstruction of the criminal event, all for the purpose of collecting and registering (in a report with enclosed CSI documentation – sketches, photographs, video recordings, etc.) all of the relevant information so that the criminal offence can be clarified and all of the available evidence collected.[3] Therefore, it is with good reason that certain authors claim that the interest of the procedure specialists when defining the crime scene investigation, as a rule, is limited to the analysis of the current criminal procedure provisions while the crime scene investigation is viewed as an evidentiary instrument which is not looked at through the lens of criminalistics at all or such analysis does not go much further from its surface.[4] There is no uniform definition of the crime scene investigation in theory[5] but it may be said that the crime scene investigation is looked at in a procedural (narrower) sense and in a wider sense (including procedural and criminalistics aspects).

The new Serbian Criminal Procedure Code has introduced a significant change by stipulating for the first time that, apart from the court, the public prosecutor or another state authority before which the proceedings are being conducted may be in charge of undertaking the crime scene investigation as an evidentiary action as the authority conducting the proceedings. The authority conducting the proceedings, in addition to direct observation of the visible traces, also creates a mental reconstruction of the events in an attempt to piece together the whole case based on the

3 Aleksić, Ž., Škulić, M. (2002), *Kriminalistika*, Belgrade, Dosije, p. 63.
Škulić, M. (2007), *Komentar Zakonika o krivičnom postupku*, Službeni glasnik, Belgrade, p. 429.

4 Žarković, M. (2005), *Krivično-procesni i kriminalistički aspekti uviđaja na mestu događaja*, Belgrade, Academy of Criminalistic and Police Studies, p. 5.

5 Vasiljević, T. (1981), *Sistem krivično-procesnog prava SFRJ*, Belgrade, p. 347: "The crime scene investigation is an direct sensory observation undertaken in a legally required form by the authority conducting the proceedings regarding the facts which are relevant to the resolution of a particular legal criminal case and the indemnification." Žarković, M. Bjelovuk, I. Kesić, T. (2012), *Kriminalističko postupanje na mestu događaja i krdibilitet naučnih dokaza*, Belgrade, Academy of Criminalistic and Police Studies, p. 63: "The crime scene investigation is an evidentiary action through which the authority which is conducting it observes, reflects on it analitically, professionally processes and documents the facts relevant to the criminal proceedings through the use of appropriate criminalistic actions."

observed and undetected evidence. During the pre-investigation proceedings, the public prosecutor is the one who is primarily responsible for the crime scene investigation and he is in charge of conducting the pre-investigation proceedings pursuant to Art. 43 of the CPC. It should be noted that Article 46, para. 2, item 1 of the previous Criminal Procedure Code[6] also stipulated, with regard to the criminal offences prosecuted *ex officio*, that managing the preliminary investigation was under the jurisdiction of the public prosecutor. This provision proved to be just a declaration as public prosecutors inexcusably failed to use this power granted to them by law. Specifically, the crime scene investigation was undertaken by the court when the establishment or clarification of some important fact during the proceedings required direct observation (Art. 110 of the CPC). In accordance with the said provision, the investigating judge, who was in charge then, wrote a report on the conducted crime scene investigation and gave the instructions to the crime lab technician while the crime scene investigation was taking place whereas the public prosecutor most often acted as a mere passive observer. Accurate interpretation of the legal provisions leads to a conclusion that the court was in charge of conducting the crime scene investigation whereas the public prosecutor was in charge of managing the preliminary investigation and, consequently, the crime scene investigation, which used to be the most important evidentiary action during the preliminary investigation. However, regardless of the interpretation who should conduct the crime scene investigation, i.e. who should be in charge of it, whether it be according to the old or according to the new Criminal Procedure Code, we hold that the staff of the professional criminal investigation service plays a key role during the crime scene investigation considering that neither the public prosecutor nor the judge possess the necessary expert knowledge in the field of criminalistics. Therefore, the public prosecutors (as well as the judges) should attend mandatory training in the field of criminalistics in order to be able to exercise this power by professionally managing the pre- investigation proceedings. In order to conduct crime scene investigations, it is necessary to be familiar with certain techniques and preparation and organisation of the crime scene investigation in addition to having certain legal knowledge. The method used during the crime scene investigation depends on what is subject to the crime scene investigation. Namely, the crime scene investigation is a complex evidentiary action which is conducted successfully only if the CSI team is well-trained and technically equipped and the dominant role belongs to the crime lab technician.

It is significant that the Criminal Procedure Code stipulates that the authority conducting the proceedings which is in charge of the crime scene investigation shall "as a rule" request assistance from an expert in forensics, transport and traffic, medicine or some other field, who will, if necessary, detect, secure or describe the traces, perform the necessary measuring and recording, draw sketches, take the required samples for testing or gather other data. An expert is a person who possesses the required specialised professional knowledge for the execution of the said evidentiary actions. They are primarily crime investigation experts, i.e. crime lab technicians, who provide expert assistance to the authority conducting the proceedings during the crime scene investigation. Depending on the type of the criminal offence, the said experts may be engineers, medical doctors, pharmacologists, etc. The point is that the said experts are only providing assistance to the authority responsible for managing the crime scene investigation and consequently for giving them tasks as to what actions need to be undertaken, what questions need to be answered, etc. The legislator goes on to stipulate that an expert witness may be invited to be present during the crime scene investigation if his presence could be useful when presenting

6 *Official Gazette of the Republic of Serbia*, no. 72 of 3 September 2009.

his findings and opinion (Art. 133, para. 4 of the CPC). It is important to emphasise that neither the expert nor the expert witness are there to conduct the crime scene investigation, nor offer an expert opinion, instead they just provide assistance to the authority conducting the proceedings and the said authority is conducting the crime scene investigation. This is not to say that certain expert opinions cannot be provided according to the general rules but if this is the case, two reports must be drafted. Although the law mentions the assistance of the professionals, the fact is that crime lab technicians in the majority of cases undertake actions regarding the detection, discovery and designation of the traces and items related to the criminal offence independently due to the aforementioned reasons.

2. The Aim and the Purpose of the Crime Scene Investigation

The aim of the crime scene investigation is the discovery and the collection of evidence which proves that the criminal offence has occurred, of the circumstances relevant to the legal qualification of the criminal offence, the evidence relevant for the location of the perpetrator and establishment of his criminal liability, the data relevant to determining whether any damage was incurred and what is the value of such damage, checking other evidence, etc.[7] In order for the crime scene investigation as an evidentiary action to achieve its aim, it must be in accordance with the following principles:

- *the principle of timely reaction*, which means that the crime scene investigation is conducted at the moment when the need for it arises, i.e. when it is most useful to conduct it, which, as a rule, means immediately after the commission of the criminal offence while the state of the scene or the object in question are undisturbed. If this is not possible, the crime scene must be secured;
- *the principle of impartiality* which implies that all of the possible versions of events are examined with equal attention during the crime scene investigation and that the person in charge of it will not be influenced by any preconceived notion regarding the fact whether the incident constitutes a criminal offence or is an accident or a suicide;
- *the principle of active involvement* which means that the crime scene investigation is conducted *ex officio* and that the authority conducting the proceedings when undertaking evidentiary actions should demonstrate creative initiative;
- *the principle of methodical approach* implies that the crime scene investigation should unfold according to a plan, i.e. the necessary instruments and procedures are applied as planned and according to a predetermined schedule through the use of all of the scientific methods and information available.

The crime scene investigation is an action of criminal procedure which is conducted in accordance with the rules of criminalistics. It belongs under criminal procedure since it is regulated by the Criminal Procedure Code as one of the evidentiary actions whereas if it is viewed from the aspect of criminalistics, the crime scene investigation serves the purpose of investigating and providing evidence. Therefore, it may be said that the crime scene investigation is an evidentiary action which is planned and undertaken on the basis of the "gold standard questions" of criminalistics: what (happened), where (did it happen), when (did it happen), how (did it happen),

7 Vasiljević, T, Grubač, M. (2002), *Komentar Zakonika o krivičnom postupku*, Službeni glasnik, Belgrade, p. 215.

what instrument was used (for the commission of the act), who with (who else was involved), who (was the target of the assault), why (was the act committed), who (is the perpetrator). In the course of the crime scene investigation the answers to all or some of these questions are provided allowing the authority conducting the proceedings to create a mental reconstruction of the events and, as a rule, reach a conclusion on the events in question.

The aforementioned leads to a conclusion that the purpose of the crime scene investigation is:

- to determine if the incident in question constitutes a criminal offence which is prosecuted *ex officio*;
- to determine the key elements of the criminal offence, the place, the time, the method, instruments used for the commission of the said offence, motive, etc.;
- to establish the indications which allow the identification and location of the perpetrator, if he is unknown, and possible accomplices;
- to discover, secure, designate and interpret all of the traces which are found at the scene of the crime, as well as the items, in order to collect physical evidence which would enable the criminal proceedings to be conducted successfully, or indirectly collect testimonial evidence;
- to establish the identity of the victim, the scope and significance of the consequences suffered by the injured party, possible contribution of the victim to the criminal offence (victimological factor), whether the criminal offence is fictitious, and
- to verify the evidence already collected during the criminal proceedings (if the crime scene investigation involves a reconstruction of the events).[8]

3. What is Subject to Crime Scene Investigation?

During the crime scene investigation a person, an object or a location may be examined in accordance with the Code which stipulates examination of a person (Article 134 of the CPC), examination of an object (Article 135 of the CPC) and an examination of the location (Article 136 of the CPC).

Such examination of the defendant shall be undertaken even without his consent if it is necessary in order to establish the facts relevant to the proceedings. Other persons may be thus examined without their consent only if it is necessary to determine if there are some traces or consequences of the criminal offence in question on their bodies. If the requirements stipulated under the provisions of Art. 141 of the Code for obtaining the samples of biological origin from the defendant and other persons have been met, the said samples may be obtained for the purpose of running biological and forensic DNA tests.

The examination of an object is undertaken with regard to movable and immovable objects belonging to the defendant or other persons. Examination of a cadaver is performed if there is a suspicion that the death of a certain person is the direct or indirect consequence of a criminal offence or if the person was under arrest at the moment of death or if the identity of the person who died is unknown (Art. 129, para. 1 of the CPC). The legislator stipulates that everyone is required

8 Krivokapić, V. (2005), *Kriminalistička taktika*, Police Academy, Belgrade, pp. 473-474.

by law to allow the authority conducting the proceedings access to objects and to provide necessary information. The objects which are to be seized pursuant to the Criminal Code or which may be used as evidence in the criminal proceedings may be seized temporarily by the authority conducting the proceedings and the said authority shall arrange for their safekeeping (Art. 147 of the CPC). If it is necessary to enter a building, a residence or other premises for the purpose of a crime scene investigation, it is necessary to obtain a search warrant from the court upon the elaborated request of the public prosecutor (Art. 155 of the CPC) but the public prosecutor or an authorised police officer may under special circumstances enter a residence and other premises without a court order and perform a search of the said residence or other premises or persons found there without the presence of witnesses:

1) with the consent of the occupant of the residence and other premises;
2) if someone calls out for help;
3) in order to directly arrest the perpetrator of a criminal offence;
4) for the purpose of enforcing a court decision on placing in detention or bringing in the defendant;
5) for the purpose of eliminating an immediate and serious threat to persons or property (Art. 158, para. 1, item, 1 of the CPC).

The examination of a location is performed at a crime scene or some other location where the objects or traces of a criminal offence are located. The authority conducting the proceedings may detain a person found at the location where the crime scene investigation is taking place if the said person might provide relevant information for the proceedings and if it is probable that the said person could not be interviewed at a later time or if this would entail considerable delays or other difficulties. Such a person may be detained at the scene of the crime for no more than six hours (Art. 290 of the CPC). The legislator states that the crime scene is being examined while in criminalistics studies the crime scene investigation involves the examination of the scene of the event which is considered to have a much broader meaning than the crime scene. The scene of a criminal incident is a term used in criminalistics to denote not only the place of the commission of a crime, in terms of criminal procedure, but a place where the perpetrator has undertaken an action related to the commission of the offence, or where he has omitted to do something which he was under an obligation to do, as well as the place where the consequence ensued, i.e. where the consequence was supposed to ensue or might have ensued according to the perpetrator's plan in the case of an attempt or preparation to commit a criminal offence, as well as any other location where the traces and objects related to the criminal offence might be found.[9] This means that crime scene investigation as an evidentiary action may be conducted not only on the location where the criminal offence was committed but on any other location where it is possible to establish certain relevant facts which are established during the criminal proceedings through direct observation (apart from the inspection of the defendant and other persons, external inspection of the cadaver, it is possible to examine plants and animals, documents, etc.).

The examination of the location is the most important source of physical (macro and micro) traces and objects related to the criminal offence as well as of the relevant information, which is why securing the scene by the police officers is of enormous importance. The crime scene investigation must be conducted according to a plan, gradually and meticulously through the use of

9 Aleksić, Ž., Škulić, M., *op. cit.*, p. 64.

adequate scientific methods and instruments used in criminalistics as tactics and techniques or in other fields in order to preserve and mark what is found at the scene in the best way possible. If this is not done as planned, i.e. if the crime scene is disturbed, if traces are either damaged or destroyed, the authority conducting the proceedings shall have difficulty in rectifying the omissions and errors which have been made, which will certainly affect how efficient the crime scene investigation is going to be. Disturbing the crime scene, damaging, destroying or contaminating the traces at the scene may all be prevented through the use of the powers of the first police officer at the scene and appropriate procedures.

The first police officer[10] is the police officer of the Ministry of Interior who is sent out to the crime scene for the purpose of securing it or the officer who happens to be there, and he shall be in charge of securing the crime scene until the arrival of the CSI team. The powers and the duties of the first police officers may be executed by another police officer as well who is assigned by the immediate supervisor. Other police officers, who arrive at the crime scene for the purpose of undertaking other official actions must comply with the orders of the first police officer until the arrival of the CSI team in order to preserve the crime scene intact. The first police officer must undertake all of the actions necessary to preserve the crime scene but his actions must be governed by the principles of humanity and personal and general security. Specifically, if there are injured people at the scene, he must call an ambulance. If a person's life is threatened, he must provide first aid even if by doing so, physical traces would be destroyed. After the ambulance arrives, he shall escort their team to the place where the injured persons are, if it is possible, using a path which was prepared for passage. The path for passage is a part of the crime scene which is assumed to be without any traces or to have the least amount of physical traces and it is used when people must enter the crime scene before the CSI team arrives so as to prevent disturbing the crime scene and destruction of physical traces at the scene.

According to the aforementioned Instructions, the first police officer must first inspect visually the crime scene and make sure that there is no immediate danger for his personal safety and the safety of the people who are present at the scene; inform the competent supervisor on the event and on what the scene looks like in order to undertake further measures and actions; define the path for passage; restrain from entering the crime scene and touching anything unless it is necessary, define the perimeter of the crime scene; enclose the scene by putting up physical barriers (stop tape, rope, etc.); warn people including the police officers that access to the crime scene is not allowed and if necessary remove them from the crime scene until the arrival of the CSI team. The CSI team shall take over from the first police officer at the scene further protection of the crime scene and proceed to examine it. The first police officer shall notify the head of the CSI team orally of the undertaken measures and actions and include them in the written report. The CSI team includes: the public prosecutor, the police officer who specialises in criminalistics or forensics (crime lab technician), transport and traffic, or some other field, an expert witness or some other person who is assigned by the authority conducting the proceedings. The first police officer shall undertake other measures and actions which are stipulated by the Instructions as well as for the purpose of protecting the crime scene (he should set up a place for providing information and temporary restriction of the freedom of movement, run identity checks of certain individuals and if necessary temporarily restrict their movement, check if there are any persons

10 Instructions on the Procedure to be Followed by the First Police Officer at the Crime Scene, Draft by the Ministry of Interior of the Republic of Serbia, 2014.

or vehicles connected to the event in the vicinity of the scene, etc.). The first police officer at the scene is responsible for the implementation of the said Instructions in accordance with the provisions of the Law on the Police and other regulations. A written report on the undertaken measures is filled out on a special form which is an integral part of these Instructions.

4. The Phases of the Crime Scene Investigation

Due to its complexity, the crime scene investigation goes through three phases:[11]

1) the phase when verbal information is received;
2) static phase and
3) dynamic phase.

The authority conducting the proceedings during the first phase, as it is clear from its description, collects verbal information on the key elements of the criminal event by talking to a police officer who is securing the scene of the event (crime scene) or other persons who are present, thus collecting the information on the characteristics of the scene of the event, whether to their knowledge someone has touched anything and left traces, etc.

During the static phase, which is referred to as "hands in pockets" phase, nothing is touched or moved at the scene of the event, instead, the scene is inspected in detail, items and traces are found and marked using various symbols, usually numbers, to make the recording of evidentiary material easier when it is entered in the technical documentation used in criminalistics, photographs are taken, i.e. a video recording of the scene of the event is made, special sketches are made, etc. It is important to mark the items and traces as it is possible that they could be destroyed through reckless movement on the scene or due to a sudden change of the weather conditions.

As opposed to the static phase when the scene is viewed in an undisturbed condition, during the dynamic phase the items and traces of the criminal offence are typically moved, they are further inspected and analysed, certain traces are taken off the surface, if necessary, an expert opinion is obtained at the scene of the event (the so-called situational expert analysis), the found items and traces are collected and various tests are run (traces of papillary lines, traces of blood or blood stains and other biological traces, footprints, traces of fire weapons, etc.).

In any case, the authority conducting the proceedings shall submit a report on the crime scene investigation which should list all the relevant facts which have been established and the undertaken actions at the scene truthfully, completely, objectively and in detail. The report which should be an objective document must not contain any personal observations based on assumptions. The content of the said report should be a true reflection of the crime scene, i.e. of the situation which was established through direct observation or through undertaking other actions by the authorities conducting the proceedings or by other participants in the crime scene

11 Petrović, B. (2006), *Uvod u kriminalistiku*, Faculty of Criminalistic Studies at the University of Sarajevo, pp. 133-134. "The views of authors who deem that there are two phases (static and dynamic), i.e. three phases (informative, static and dynamic), are not acceptable from the standpoint of modern criminalistics. According to Modly, the crime scene investigation, in theory, may be divided into five phases as follows: informative and orientational and organisational phase, static and identification phase, dynamic, review phase and final phase."

investigation. Modern procedural and criminalistic theory suggests that the report on the crime scene investigation should be divided into three segments: introduction, description and concluding part.[12] It should be noted that the Criminal Procedure Code stipulates neither the form nor the content of the report on the crime scene investigation.

5. Reconstruction of the Incident

Unlike the way it was regulated by the previous legal provision, the reconstruction of the incident is now stipulated under a separate Article 137 of the CPC which reads: For the purpose of checking the presented evidence or establishing the facts which are important for resolving the matter which is subject to evidentiary proceedings, the authority conducting the proceedings may order a reconstruction of an incident, which is performed by repeating actions or situations under the conditions under which, according to the presented evidence, the incident took place. If actions or situations are described differently in statements made by some of the witnesses or defendants, as a rule, a reconstruction of the incident shall include a separate re-enactment of each of their accounts. A reconstruction of the incident is performed, if possible, at the location where the incident has actually taken place, but it may not be performed in a manner offensive to the public order and morals (it is not allowed to re-enact a rape) or which is threatening to human lives or health (reconstruction of a serious traffic accident, reconstruction of events resulting from arson, etc). During the reconstruction, certain evidence may be repeated (examination of the defendant, questioning of witnesses or expert witnesses, etc). There is a distinction between the total reconstruction of the entire criminal incident and partial reconstruction of particular segments of the incident. The reconstruction of an incident is, as a rule, performed under artificially created conditions, at the scene where the criminal incident took place, so it is a simulation of the said criminal event. If it is possible, the defendant, the injured party and other participants of the incident shall take part in the simulation. Generally, although the Code stipulates it as its purpose, the reconstruction rarely establishes the facts which are important for resolving the matter which is subject to evidentiary proceedings and only the facts which have already been established are checked instead. The reconstruction of the incident is a later re-enactment of the way in which the criminal offence has been committed. However, since the events from the past cannot be repeated in exactly the same way, the results obtained through the reconstruction of incident should be corroborated and complemented by other relevant evidence.

When performing a reconstruction of the incident, human rights should be observed and physical damage that might be caused should be taken into account. Ethical norms regarding the crime scene investigation and reconstruction of the incident impose an obligation on the public prosecutor, the judge, the police, as well as on all of the other participants to observe human rights. Ethical approach implies that during the examination and collection of physical evidence, it should be proceeded with care and professionally, objectively and impartially, as well as in accordance with the need to respect each individual, his privacy and human dignity.

12 According to the provisions of Art. 153, para. 3 of the CPC of BiH, the report on the crime scene investigation must always contain the data relevant both to the nature of such evidentiary action and the identification of particular items such as: a description, measurements and sizes of the items and traces, labels of the items, etc. The report should list and enclose sketches, drawings, plans, photographs, etc. The report on the crime scene investigation is drawn up while the said evidentiary action is taking place or immediately after it is completed, and it is signed by the person conducting the crime scene investigation and the person keeping the record.

The reconstruction of an incident shall be performed during the investigation stage or at the main hearing, when the evidence and data on the way the criminal offence has been committed are available, so that it is possible to set up the situation in which the offence in question has been committed based on the established facts more objectively in order to determine which version of events is the closest to reality. If the reconstruction is performed properly, it may fully justify its use.

Presenting evidence outside of the main hearing is stipulated under Article 404, paragraphs 2 and 3 of the CPC as follows: if it is necessary to conduct a crime scene investigation or a reconstruction outside of the main hearing, the panel shall authorise the presiding judge of the panel or the judge who is a member of the panel to do so. The parties to the proceedings, the defence attorney, the injured party and the expert consultant shall be notified when and where the said evidentiary actions shall take place.

The provision of the Article 261 of the CPC stipulates that the costs of the criminal proceedings include, among other things, the costs of the crime scene investigation as well. When the proceedings are conducted with regard to the criminal offences which are prosecuted *ex officio*, the costs of the crime scene investigation are paid from the funds of the authority conducting the proceedings in advance, and the persons who must compensate such costs pursuant to the provisions of the said Code shall reimburse the said amount. The authority conducting the proceedings must include in an inventory listing all of the expenses paid in advance and enclose the said listing with the file.

Conclusion

As has already been mentioned, the new Serbian Criminal Procedure Code has not redressed the omissions and ambiguities of the previous legal provision regulating the crime scene investigation as an evidentiary action (action conducted during evidentiary proceedings), which have been identified by professionals in the field. The provisions on the crime scene investigation have remained incomplete since the legislator does not stipulate formal legal grounds and requirements for undertaking a crime scene investigation, the manner in which the crime scene investigation should be conducted, or the obligation of the authority conducting the proceedings to render a report on the crime scene investigation, instead, it is only prescribed that the crime scene investigation shall be conducted when the authority conducting the proceedings decides that direct observation is necessary in order to establish or clarify certain facts regarding the proceedings. A significant innovation is that the public prosecutor, the court and other state authorities before which the proceedings are being conducted are defined as the authority conducting the proceedings in charge of the crime scene investigation. In the remaining part, the legislator specially regulates the examination of persons, objects and locations, as well as the reconstruction of the incident, which used to be an integral part of the previous provisions on the crime scene investigation although it does not introduce any fundamental changes compared to the previously used legal provision.

In order to apply the provisions on the crime scene investigation properly in practice and secure uniform procedures followed by the authorities conducting the proceedings, the Criminal Procedure Code needs to be amended and supplemented bearing in mind how important the crime scene investigation as an evidentiary action is.

Krsman Ilić[1]

Extending, Suspending and Discontinuing Investigation
(practical examples from Serbia and problems arising in application)

1. Initiation of Investigation

Under Article 295 of the Serbian Criminal Procedure Code adopted in 2011 (CPC), an investigation is initiated against a specific person for whom there are grounds for suspicion that they have committed a criminal offence as well as against an unknown perpetrator when there are grounds for suspicion that a criminal offence has been committed. The following is collected in the course of an investigation: evidence and information necessary for making a decision whether to file an indictment or discontinue proceedings; evidence necessary for establishing the identity of the perpetrator; evidence for which there is risk that it could not be repeated at the main hearing or that its presentation thereat would be hindered, as well as other evidence which could be beneficial to the proceedings and whose presentation, in view of the circumstances of the case, proves necessary.

A practical example provided below illustrates the course of an investigation into a case handled by the First Basic Public Prosecutor's Office in Belgrade and the factual situation that preceded it, and it is presented along with occasional citations from authentic decisions and records (including anonymised personal information). It has the purpose to show at first hand when and how prosecutors in Serbia initiate investigations and then render other decisions at this stage in the proceedings, in the first place those concerning extending, suspending, and discontinuing investigations.

1 Deputy Appellate Public Prosecutor, Belgrade.

Case of defendant M. M.

On February 28, 2014, a doctor on duty at the Accident and Emergency Department of the Clinical Hospital in Belgrade called an inspector with the emergency service unit of the City of Belgrade Police Department and informed him that P. M., aged 24 living in Belgrade, had been admitted to the A&E Department for treatment since she had suffered a serious bodily injury inflicted by an unknown perpetrator and that she had been advised to wait for a police inspector.

Having arrived at the A&E Department, M. M., a police inspector on duty at the Belgrade Police Department, established the identity of P. M. by examining her identity card issued by the Belgrade Police Department in 2009, thereby learning that she was born on 00/00/1990, her father's name was A., she had permanent residence at 00 N. Street, Belgrade, and worked as a bank clerk at a K.K. Belgrade branch office at 00 KM Street.

The police inspector drew up an official note about the information that he had collected from the citizen in terms of Article 286, para. 2 of the CPC.

When asked how she had sustained the injury, P. M. responded that she and M. M. had been living together as common-law spouses in N. Street for ten months and that they had had a quarrel the previous night because her common-law husband, even though he had promised to stop gambling, had returned from a casino without the money she had given him to buy dinner and without dinner. When she reproached him for that, *i.e.* told him that he could not act in such a manner and so forth, he started to insult her, hitting her on the face with a palm of his hand and twisting her left arm with his right hand, thus causing her terrible pain and so she pleaded with him to stop; at some point, a telephone rang, he released her, answered it, and then left the flat. Thereafter, feeling severe pain in her left elbow, she came to the A&E Department of the Clinical Hospital to receive medical aid.

She provided information about M. M. that, to the best of her knowledge, he was born in 1982 in M. near V. where his parents were still living, that he was a mechanical technician by profession and had had a job until three months before when he lost it and when altercations between them began; as far as she could tell, he had no relatives in Belgrade and the two of them had been visiting two of his friends at certain addresses.

The police inspector was informed by the A&E doctor on duty that P. M. had sustained an injury in the form of a spiral fracture of the left elbow joint.

The police officer on duty notified the public prosecutor on duty at the First Basic Public Prosecutor's Office in Belgrade about the above-mentioned incident on March 3, 2014 at around 8 a.m. and told him that he would deliver an official note about the incident drawn up in writing through the proper channels; he received an order from the prosecutor that the suspect must be located and brought before a deputy public prosecutor on duty at the First Basic Public Prosecutor's Office in Belgrade as soon as possible.

After receiving the above notification, the deputy public prosecutor on duty at the First Basic Public Prosecutor's Office in Belgrade drew up an official note that he received a notification from the police.

On March 5, 2014, an official note on an interview conducted with the citizen P. M. containing a medical report from the Belgrade A&E Department about her injury was received by the First Basic Public Prosecutor's Office in Belgrade; pursuant to an order from the public prosecutor, the note was entered in the KT Register /KT - Adult Criminal Offenders/ under the number 78/14.

When on that same day the KT case no. 78/14 was presented to a deputy rosecutor with the First Basic Public Prosecutor's Office in Belgrade, M. M., she issued the following order to conduct an investigation against M. M.

> Pursuant to Art. 296 of the CPC, after the First Public Prosecutor's Office in Belgrade received notification from the Police Criminal Investigation Department in Belgrade in connection with the case KU file no. 35/14 and following the first evidentiary action undertaken in the given pre-investigation proceedings, I hereby issue this
>
> **ORDER TO CONDUCT INVESTIGATION**
>
> Against M. M. father's name Đ., born June 5, 1982 in M. near V., with permanent residence at 00 N. Street in Belgrade because there are grounds for suspicion that:
>
> Late in the evening of March 27 in Belgrade, at 00 N. Street, in a flat number 4 in which he lived with his common-law wife P. M., while being capable of understanding the results of his acts and of controlling his actions and at the same time being aware of his acts and actions, wanting the criminal offence to be committed and being aware that his act was forbidden, he used violence to endanger the physical integrity and mental condition of a member of his family, his common-law wife and the injured party P. M., when a verbal altercation occurred between them because he had spent on gambling the money she had given him to buy dinner, during which altercation he told her that she could not do anything to him, hitting her several times on the face with a palm of his hand and then started twisting her left arm using his right arm, demanding she apologised to him for calling him a gambler because he was not a gambler, in which process he inflicted on her a serious bodily injury in the form of a closed spiral fracture of her left elbow recklessly assuming that no prohibited consequence would follow therefrom, whereby he would commit the criminal offence of domestic violence under Art. 194, para. 3 in conjunction with para. 1 of the Republic of Serbia's Criminal Code.
>
> **Statement of Reasons**
>
> Grounds for suspicion that the suspect M. M. had committed the criminal offence of domestic violence under Art. 194, para. 3 in conjunction with para. 1 of the Republic of Serbia's Criminal Code follow from the record

of an interview with the injured party P. M. conducted by the police inspector with the Belgrade Police Department, KU file no. 35/14 undertaken by the police on February 28, 2014 about which an official note had been drawn up, as well as from the report by the Accident and Emergency Department of the Belgrade Clinical Hospital, protocol number 320/22-014, dated February 28, 2014.

During the investigation, it will be necessary to interrogate the suspect M. M. and to question the injured party P. M., as well as to order that an expert witness specialised in forensic medicine carries out an expert evaluation of the circumstances in which the bodily injury sustained by the injured party P. M. occurred; also, other evidentiary actions might need to be taken for the purpose of establishing if an indictment should be brought or the investigation should be discontinued.

Deputy Public Prosecutor

Upon issuing the order to conduct an investigation, the Deputy Public Prosecutor sent a summons to the defendant M. M. through a process server to his known address in Belgrade, 00 N. Street, flat number 4, within the meaning of Art. 191 of the CPC and Art. 192 of the CPC to appear at the premises of the First Basic Public Prosecutor's Office in Belgrade on March 19, 2014 at 8.30 a.m.

On that same day, the Deputy Public Prosecutor assigned an *ex officio* defence counsel to the suspect within the meaning of Art. 74, para. 1, item 2 of the CPC and sent him a summons to appear at the same time as the suspect.

On March 19, 2014, neither the suspect nor his defence counsel came to the premises of the First Public Prosecutor's Office in Belgrade at the defined hour. Given that it was found based on the affidavit of service provided by the process server of the First Basic Prosecutor's Office in Belgrade who took the summons for service that the suspect had refused to receive it, after which the server left it at the flat number 4 at 00 N. Street in Belgrade whereat he found the suspect and made a record thereof in terms of Article 244 of the CPC, the Prosecutor believed that the summons had duly been served on the suspect.

Thereafter, the Public Prosecutor issued a written order to bring the suspect in pursuant to Article 195, para. 1, item 2 of the CPC.

In executing the order to bring in the suspect issued by the Public Prosecutor, police officers with the Savski Venac Police Station had established by going to the flat located at 00 N. Street and taking a statement from the injured party P. M. that the suspect was no longer living in that flat and that she did not know where the suspect was at that moment. After the police reported the above findings, the Public Prosecutor requested that the police try to locate the suspect and inform him about his address.

On March 26, 2014, a police inspector with the Crime Suppression Division of the Belgrade Police Department in charge of the case KU no. 35/14 informed a Deputy Prosecutor with the First Basic Public Prosecutor's Office both in writing and verbally that in connection with the issued call for information the suspect M. M. had not been found at any of the known addresses or locations at which he could have been. Based on that information, the Deputy Public Prosecutor concluded that suspect's temporary residence was unknown. For those reasons, the Public Prosecutor concluded that conditions for *suspending the investigation* against the suspect M. M. had been met in terms of Article 307, para. 2, item 1, due to the fact the location of his temporary residence was unknown.

In responding to the summons, the injured party P. M. reported to the premises of the First Basic Public Prosecutor's Office in Belgrade on April 10, 2014 in order to give a testimony as a witness in connection with the injury she had sustained in flat number 4 at 00 N. Street in Belgrade on February 27, 2014.

RECORD OF WITNESS QUESTIONING

M. P. of Belgrade, residing at 00 N. Street, born 00/00/0000 in Belgrade, father's name M., responded as a witness – injured party to the summons by the First Basic Prosecutor's Office in Belgrade; her identity has been established based on an identity card no. 00000 issued by the City of Belgrade Police Department.

The witness responded that she had fully understood the advice of rights and warnings, after which she made the following statement:

For ten months now I have been living in a common-law marriage with M. M. From the very start, we have lived in Belgrade, at 00 N. Street, in flat number 4 owned by my father. We supported ourselves from the income we earned, I as a bank clerk and he as a civil engineering technician at a firm called "RM". While we were living together, our relationship used to be very harmonious until 3 months ago when he was fired from his job. Ever since, he became excessively sensitive, he wanted to argue with me about any little thing. I was under the impression that he was dissatisfied about the dismissal and since he believed that he was the dominant one in our common-law marriage as someone who had a job, he felt that he had lost that position and I was under the impression that the purpose of those arguments that developed between the two of us, which he would start, was to prove that he was still the head of the family. I was not aware that he had been gambling until two months ago when I learnt that he had begun to gamble to compensate for the fact that he was unemployed. On February 27, 2014, I came home from work around 7.30 p.m., but he was not there. He came home around 11 p.m. He was angry that he had lost all the money gambling. I reacted in an angry manner as well, so we started quarrelling about when he would make an effort to change his life, at least to stop gambling, that we would together try to find a way to get him another job. He started hurling insults

at me, telling me that he did not need me for anything, that I was only burden to him, that he would know what to do if I were not in his life; he started cursing my mother and father who had made me the way I was, that I was only attacking and harassing him. At one point, I acted in rage and slapped him on the face. He pushed me away, I fell down and then he came up to me, grabbed my left arm with his right hand and started twisting it forcefully, which caused me a lot of pain. While twisting my arm, he was telling me, "apologise, you whore, for hitting a man." I would not apologise out of spite, and he went on twisting my arm, hurting me even more and insisting on my apology. A telephone rang at one moment, he stopped twisting my arm and suddenly left the flat; he had not returned there ever since.

My arm hurt so badly and started to swell up, so I took a taxi and went to the Accident and Emergency for help. They x-rayed my arm there and found out that I had suffered a fractured joint; they gave me this medical report about the injury.

It is herewith recorded that the witness has submitted to the Court a medical report by the Accident and Emergency Department of the Clinical Hospital in Belgrade on the examination performed by an orthopaedist *on March 27, 2014 at 11.50 p.m.*

When she was asked if she knew the current whereabouts of her common-law husband and if she had heard from him, the witness stated, "That he had not contacted her, that he had come to the flat when she was not there and took his belongings, which was why she had replaced a lock, after which she gave the addresses of their common friends in Belgrade, as well as the address at which the suspect's parents lived."

The questioning was concluded at 9.30 a.m.

Witness Recording clerk Deputy Public Prosecutor

On April 14, 2014, a courier delivered to the Deputy Prosecutor in charge of the above case an official letter from the Search Service of the Belgrade Police Department in which it was stated that they had attempted to locate the individual M. M. on several occasions at addresses given to them by the prosecutor's office, that persons they found there told them that the above-named individual had not called at them and the suspect's parents had told them the same thing. Therefore, the only address at which M. M. had registered both temporary and permanent residence was at 00 N. Street in Belgrade.

The First Basic Public Prosecutor found that conditions for issuing an order to take into custody the suspect M. M. had been met and he submitted the said order to the Search Division with the City of Belgrade Police Department.

Then, the Deputy Prosecutor with the First Basic Public Prosecutor's Office in Belgrade issued an order to perform expert evaluation, whereby he appointed Chief Physician L.L., an orthopaedist, as expert witness. In the order, he gave instructions that the expert witness shall, in addition to establishing the severity and type of the bodily injury sustained by the injured party P. M. identify in particular the mechanism of the injury based on the enclosed medical documents, as well as by examining the files. Then, he gave him a time limit of seven days for delivering his findings and opinion to the prosecutor's office in a sufficient number of copies for the court and the parties, warning him that any facts he might learn in the course of performing his expert evaluation represented a secret and advising him of the consequences of providing false findings and opinions.

Then, the Deputy Public Prosecutor issued *an order to suspend the investigation*.

2. Suspension of Investigation

Pursuant to Art. 307, para. 2, item 1 of the CPC, I herewith issue this

ORDER TO SUSPEND INVESTIGATION

Against M. M., father's name P. M., born 00/00/1982 in V.,

THE INVESTIGATION IS HEREWITH SUSPENDED.

Statement of Reasons

The First Basic Public Prosecutor's Office issued an order to conduct investigation KT no. 78/14 on March 5, 2014, whereby it initiated an investigation against the suspect M. M. because there were grounds to suspect that he had committed the criminal offence of domestic violence under Article 194, para. 3 in conjunction with para. 1 of the Criminal Code. In the course of the proceedings, the Deputy Prosecutor with the First Basic Public Prosecutor's Office attempted to serve a summons on the suspect at his single known address in Belgrade, at 00 N. Street, flat number 4; however, the suspect had moved away from the said address. Then, the Deputy Public Prosecutor requested through the Search Division of the Belgrade Police Department that the address of the suspect M. M. be checked and received a report that the suspect had a single address registered in the territory of Serbia, namely at 00 N. Street, flat number 4, in Belgrade, as well as that they had not been able to find the suspect at any of the addresses to which the prosecutor's office indicated. Based on the above reasons, the Deputy Public Prosecutor issued an order to bring in the suspect and referred it to the competent Police Department and in view of the fact that all the conditions provided for under Art. 307 of the CPC had been met, the Prosecutor issued the order to suspend the investigation.

Deputy Public Prosecutor

3. Remand in Detention

On April 20, 2014, police officers with the Lazarevac Police Station informed the Deputy Public Prosecutor that upon conducting a search they had been able to locate the individual M. M. at the house of one of his friends in the village of S. and on that occasion they had also found on his person a 7.65 mm *Zbrojovka* pistol with six rounds; in addition, they informed the Prosecutor that they would bring him before the public prosecutor on duty at the First Basic Public Prosecutor's Office in Belgrade on that same day around 4 p.m. together with criminal charges because there were grounds for suspicion that he had committed the criminal offence of unlawful possession and carrying of firearms under Art. 348, para. 1 of the Criminal Code.

Thereafter, the Deputy Public Prosecutor concluded that in that particular case he should issue a decision to remand the suspect in detention since he was considered a flight risk in order to be able after interrogating the suspect and based on the order to conduct the investigation, the order to extend the investigation, as well on the basis of other collected evidence to make a decision if there were grounds to move before the judge for preliminary proceedings that the suspect be remanded in custody.

Pursuant to Article 294, para. 1 and 2 of the CPC, I herewith issue this

DECISION

In pre-investigation proceedings conducted in the KT case number against the suspect M. M. in connection with the criminal offence under Article 394 etc. of the Criminal Code.

The suspect M. M., father's name P. and mother's name P., born 00/00/1982 without a permanent residence, the national of the Republic of Serbia SHALL BE REMANDED IN DETENTION for 48 hours because there is a reasonable suspicion that he has committed the criminal offence under Art. 194, para. 3 in conjunction with para. 1 etc. of the Criminal Code, as well as because there are circumstances indicating the risk of flight under Art. 211, para. 1, item 1 of the CPC.

The suspect's remand in custody shall begin on April 24, 2014 at 4 p.m. when he was deprived of liberty.

Rationale

The results of evidentiary actions undertaken in the course of pre-investigation proceedings – questioning of the injured party P. M., *i.e.* allegations made in her testimony, as well as the report on her bodily injuries issued by the Clinical Hospital in Belgrade – justify the suspicion that the suspect had committed the criminal offence of domestic violence under Article 194, para. 3 in conjunction with para. 1 of the CPC.

It is necessary to remand the suspect in detention because there are circumstances which indicate the risk of flight given that according to the report of the Search Division, Belgrade Police Department he has one registered permanent residence, at 15 N. Street in Belgrade, where he no longer resides, and he has no other registered residence in the territory of the Republic of Serbia. Furthermore, he has not given to anyone any other address at which a summons could be served on him to be accessible to state authorities. For the above reasons, the public prosecutor was even in a position to issue in this specific case the decision on suspension of investigation and the order to bring the suspect in, both of which have been executed by police officers with the Lazarevac Police Station.

An *ex officio* defence counsel has been assigned to the suspect from the moment of issuing this decision.

Police officers working with the Stari Grad Police Station are herewith authorised to enforce this decision.

***Legal remedy**:* The person held in detention has the right to appeal against this decision to the judge for preliminary proceedings with the First Basic Court in Belgrade within six hours from the service of the decision. An appeal does not stay the enforcement of the decision.

Deputy Public Prosecutor

On that same day, at approximately 4 p.m., acting pursuant to the order to bring the suspect in, the police officers with the Lazarevac Police Station brought to the premises of the First Public Prosecutor's Office the suspect M. M. along with a criminal charge and turned him over to the police officers with the Stari Grad Police Station entrusted with the enforcement of the decision to hold the suspect in detention pursuant to the prosecutor's order to enforce the said decision. The decision was served on the suspect and his defence counsel who had arrived in the meantime that same day at 4.15 p.m.

4. Extending Investigation

Having read the criminal charge KU no. 1264/14 of April 24, 2014 filed by the Lazarevac Police Station against the suspect M. M., as well as enclosures submitted therewith, the Public Prosecutor decided to issue *an order to extend the investigation* against the suspect M. M.

> Pursuant to Article 297 in conjunction with Art. 306 of the Criminal Procedure Code and having considered and examined the criminal charge filed by the Republic of Serbia's Ministry of Interior, Belgrade Police Department, Lazarevac Police Station, in the KU case file no. 511/14, I herewith issue in these pre-investigation proceedings the following
>
> **ORDER TO EXTEND INVESTIGATION**
>
> Against M. M., father's name P. M., mother's name D. M., born 00/00/1982, the national of the Republic of Serbia without a permanent residence,
>
> because there are grounds for suspicion that on April 24, 2014 in a house owned by P. P. in the village of S., while being mentally competent and acting with premeditation and awareness that his act was prohibited, he was in unlawful possession of a 7.65 mm *Zbrojovka* pistol, serial number 774562, in such a manner that he was found in the house of P. P. by the police officers from the Lazarevac Police Station carrying the above-mentioned handgun in his waistband even though he did not possess a firearm licence for it and authorisation to keep it, whereby he would commit the criminal offence of unlawful possession of a firearm under Art. 348, para. 1 of the Criminal Code.
>
> Statement of Reasons
>
> Grounds for suspicion that the suspect M. M. committed the above-cited criminal offence follow from the record of undertaken evidentiary action, search of the suspect's person when he was deprived of liberty carried out by the police officers with the Lazarevac Police Station on April 14, 2014, as well as from the certificate of objects seized from the suspect. Over the course of the investigation, it will be necessary to interrogate the suspect and question the witness P. P.; also, some other evidentiary actions may need to be undertaken, such as the expert witness examination of the said handgun to establish whether or not it corresponds to or constitutes a firearm within the meaning of the Firearms and Ammunition Act.
>
> All of the above-mentioned actions need to be undertaken so that a decision could be rendered in the above-cited case in connection with the above-mentioned criminal charge.
>
> Deputy Public Prosecutor

Thereafter, the Public Prosecutor served a copy of the order to conduct an investigation and a copy of the order to extend the investigation on both the *ex officio* defence counsel and the suspect. Then, the Deputy Public Prosecutor summoned the suspect M. M. for an interrogation, as well as his defence counsel to be present thereat, of which he made a record.

Record of the interrogation of the suspect M. M.

All the information about the identification of the suspect M. M. was entered on the record, as well as any other information a record of interrogation ought to include under the law. Thereafter, the Deputy Public Prosecutor advised him of the order to conduct an investigation and the order to extend the investigation, as well as that he had the right to remain silent, to refrain from answering certain questions, to present his defence freely, plead guilty or not guilty, that he had to be afforded professional assistance by a defence counsel in this particular case in accordance with the provisions of the Code, that he had the right to have his *ex officio* defence counsel attend the interrogation, as well as that was allowed immediately before the interrogation to read and become acquainted with the orders to conduct an investigation against him and to extend the investigation and to have a confidential conversation with his defence counsel. After having read what was alleged laid in the order to conduct an investigation and in the order to extend the investigation and upon concluding a confidential conversation with his defence counsel, the suspect stated that "he accepted professional assistance from the *ex officio* defence counsel appointed to him by the Prosecutor, as well as that he would freely present his defence."

In his defence, the suspect M. M. stated as follows: until February 28, 2014, he had been living for some ten or so months in a common-law marriage with M. P. at 00 N. Street flat number 4 in Belgrade; that he had been employed as well as she; that they had got on really well and even planned to marry when she gets pregnant. However, three months before the critical incident he was laid off from his job at the firm and was trying to find a new one, but he was not successful. The very fact that he was unemployed made him nervous, irritable, he was envious of his common-law wife because she had a job and it seemed to him that she had been doing everything she could to humiliate him and so frequent quarrels ensued between the two of them, sometimes for a reason, other times without any reason. Disappointed, he had recently begun to gamble. As a result, he would gamble away the money that the injured party would leave to him to buy what they needed for the household or for food, which in turn also hurt and offended him that she was the head of the household and not he; afterwards, frequent arguments and quarrels would break out. The same thing happened on the evening of February 28, 2014. He came home from the casino without buying groceries for dinner and without any money. The injured party started to quarrel with him, to offend him telling him that he was an excuse of a human being, that he was no longer a man, that she could not understand why she was still living with him; as far as he could remember, she had even tried to hit him, but he could not take it any more and so he just pushed her away, left the flat and went to stay at a friends' house for the night. The next day, when she was not in the flat, he returned there, took his belongings and went to his friends' house.

The Public Prosecutor presented the suspect with the findings – medical report of the injury sustained by the injured party issued by the A&E Department of the Clinical Hospital in Belgrade, based on which it could be established that on that critical night she had suffered a serious bodily injury in the form of a closed spiral fracture of the left elbow bone, as well as with the testimony

given by the injured party. After taking a moment to think about it, the suspect answered that he could not understand how the injured party got injured that night; maybe because he pushed her away and she fell down, but he could not tell, he had not seen that she had fallen down, whereas her allegations that he had been twisting her arm and insulting her were not true. He had no reason to insult her, she was completely in the right and he only wanted to leave the flat as soon as possible.

In respect of the criminal offence with which he was charged in the order to extend the investigation, he stated that the allegations made therein were not true. Namely, some five days before he had found a place to stay at, *i.e.* asked his friend's P. P. who lived in S. to help him by providing him with food and lodging at his house for several days; he had been helping his friend in his daily chores and had been looking for any kind of job to support himself. He was together with P. P. at the latter's house in the morning hours of that day. While the two of them had been talking, P. P. had mentioned that he had inherited from his father the handgun in question and that he had obtained a firearm licence for that handgun based on, he guessed, a probate decree of *heirship* and some other proceedings. Since P. P. had not done his military service and did not know how to handle a firearm, he asked him if he knew how to take apart, lubricate and clean the pistol because it had been lying around unused and P. P. was not interested in firearms; he planned to offer it for sale to someone who had a firearm licence when it was in a good condition and cleaned. When he had finished assembling the firearm, someone knocked on the door and he instinctively put the pistol away in his waistband so that the unknown person knocking on the door could not see it. When P. P. opened the door, policemen from Lazarevac were standing there; they asked P. if he was at his house, but he came forward himself; the policemen suddenly searched him and thereby found on his person the above-mentioned pistol, seized it, and let him sign a certificate of a seized object, after which they took him into custody at the Lazarevac Police Station.

He had nothing else to add in his defence and after having read the record of his interrogation, he signed it. Thereafter, the suspect's defence counsel proposed that P. P. of Stepojevac should be questioned as a witness in connection with the ownership of the handgun, as well as that he should bring before the court a firearm licence for the said handgun, if he owned one, or that it should be obtained from the competent law enforcement authorities. There was no new evidence.

Considering that urgent action was required, the Public Prosecutor called by telephone a police officer on duty at the Lazarevac Police Station and gave him information about the suspect M. M., as well as information he had about P. P., such as his permanent residence, firearm type and serial number, and asked that a firearm licence be delivered to him as a matter of urgency by the next day, the 25th at 12 a.m. if the ownership of the handgun concerned could be established based on the information and records kept by the Lazarevac Police Station about issued firearm licences; if that was not possible, he would send a summons for the questioning of the witness P. P. and an application that it be served by police officers with the Lazarevac Police Station.

Thereafter, the Deputy Public Prosecutor made a decision to put forward a motion for ordering detention against M. M. in terms of Art. 211, para. 1, item 1 of the CPC. Then, he sent the entire case file along with the motion to a judge for preliminary proceedings who was then on duty with the First Basic Court in Belgrade, with a note that suspect's detention time based on a decision to remand the suspect in detention issued by the Public Prosecutor would expire on April 16, 2014 at 4 p.m.

5. Discontinuance of Investigation

On April 24, 2014, the Deputy Public Prosecutor received a dispatch from the Lazarevac Police Station whereby it was confirmed that a firearm licence for the 7.65 mm *Zbrojovka* pistol, serial number 0017 had indeed been issued in the name of P. P. Thereafter, the Deputy Public Prosecutor decided to discontinue the investigation in connection with the criminal offence described in the order to extend the investigation against the suspect M. M.

In the investigation against the suspect M. M. initiated based on the grounds for suspicion that he had committed the criminal offence of unlawful possession of a firearm under Article 348, para. 1 of the Criminal Code, the First Basic Public Prosecutor in Belgrade herewith issues, pursuant to Art. 308 of the CPC on April 25, 2014 the following

ORDER

The investigation conducted against the suspect M. M. pursuant to an order issued by the Basic Public Prosecutor in Belgrade KT no. 78/14 of April 24, 2014 because there were grounds for suspicion that he had committed the criminal offence of unlawful possession of a firearm under Article 348, para. 1 of the Criminal Code IS herewith DISCONTINUED and any further criminal prosecution is abandoned.

Statement of Reasons

The Lazarevac Police Station filed a criminal charge KU no. 511/14 dated April 24, 2014 against the suspect M. M. because there were grounds for suspicion that he had committed the criminal offence of unlawful possession of a firearm under Article 348, para. 1 of the Criminal Code. Namely, while conducting a search for the suspect, police officers with the above-mentioned police station arrived at the house of P. P. on April 24, 2014 around 10 a.m. because they had learnt that the suspect was located there and P. P. pointed out a person who matched their suspect. In searching the suspect's person within the meaning of Art. 152, para. 2 of the CPC, the officers found a 7.65 mm *Zbrojovka* pistol in his waistband.

According to an official note about a statement taken from him as a suspect and a citizen, he declared that he did not have a firearm licence for the said pistol and that it had come into his possession by a chance; thus, the officers seized the pistol from him, for which they gave him a certificate of the seized object, and kept it as evidentiary material in the evidence vault at the Lazarevac Police Station.

When he was interrogated before the Deputy Public Prosecutor in connection with his possession of the handgun on April 25, 2014, the suspect M. M. explained how the handgun came into his possession, namely that its

owner with whom he had been staying gave it to him to disassemble, clean, oil, and reassemble it; also, the owner of the handgun told him that he had a firearm licence for that gun and P. P. said that he intended to sell the handgun concerned because he was not interested in firearms. Thereupon, police officers entered suddenly into the house and searched him; they found the gun and he explained that it was not his.

Upon checks conducted through the Lazarevac Police Station, it was established beyond doubt that the handgun did not belong to the suspect M. M. but to P. P., who possessed a duly issued firearm licence for it. In assessing the defence made by the suspect, I have found that it was truthful and the very fact that he was holding the gun concerned for a short while – as long as it was necessary to disassemble, clean, and oil it, does not represent such a danger to society that his actions would constitute the criminal offence defined under Art. 348, para. 1 of the Criminal Code, which is the reason why I have rendered the decision given in the operative part of the order.

The order shall be served on the suspect and the injured party.

Deputy Public Prosecutor

6. Concluding Remarks

The above example illustrates when and in which cases public prosecutors have an opportunity and duty to issue orders to extend, suspend and discontinue an investigation. Only some grounds based on which such orders may be issued are mentioned in the examples covered above, whereas the CPC governs in more detail all the grounds based on which any of the above orders may be issued in the course of an investigation.

Thus, Article 306 of the CPC provides that an investigation shall be conducted only in respect of the suspect and the criminal offence to whom or which the order to conduct an investigation pertains. If it is revealed in the course of the investigation that proceedings should be extended to encompass as well another criminal offence or another person, the public prosecutor shall *extend the investigation* by means of an order. Provisions contained in Articles 296 and 297 which govern the issuance of orders, elements they should include, and service on suspects also apply to the extension of investigations.

Under Article 307 of the CPC, *the suspension of an investigation* shall be ordered if: 1) after committing a criminal offence a suspect gets a mental disease or disorder or another serious illness which makes it impossible for him to participate in the proceedings; 2) there is no motion by an injured party or authorisation by a competent state authority for prosecution, or if other circumstances which temporarily prevent prosecution appear. An investigation may also be suspended if the suspect's temporary residence is not known or if he is at large or otherwise inaccessible to state authorities.

Prior to issuing an order to suspend an investigation, the public prosecutor shall collect all evidence about the criminal offence committed by a suspect that he is able to obtain. In the event an investigation has been suspended because the suspect is at large or otherwise inaccessible to state authorities (para. 2, item 2 of Article 307), the public prosecutor shall file a motion for ordering detention against the suspect.

When the obstacles which led to the suspension cease to exist, the public prosecutor will resume the investigation.

The discontinuance of an investigation is provided for in Article 308 of the CPC. Under that Article, during an investigation, the public prosecutor may discontinue the prosecution of a suspect and discontinue the investigation if: 1) the act which is the subject matter of the indictment does not constitute a criminal offence and the conditions for the application of a security measure do not exist; 2) the statute of limitations has expired or the offence has been covered by amnesty or pardon or there are other circumstances which permanently preclude criminal prosecution; 3) there is not sufficient evidence to issue an indictment.

In the case referred to in Article 308, paragraph 1 of the CPC (there is neither criminal offence nor are there conditions for imposing a security measure), the public prosecutor will issue an order discontinuing the investigation and notify thereof the suspect and the injured party within the meaning.

Tatjana Bugarski, PhD[1]

Direct Indictment

1. Introduction

The main characteristic of the methodical system which governs the actions of the authorities conducting the criminal proceedings is gradual procedure. Therefore, all criminal proceedings must go through certain steps which are called the stages of the criminal proceedings, with each stage having its own purpose and thus contributing to the fulfilment of the final purpose of the criminal proceedings.[2] Ordinary criminal proceedings which, as a rule, start with the investigation order may, under special circumstances, start by filing a direct indictment without having to conduct the investigation first.

The introduction of the prosecutorial investigation by the new Criminal Procedure Code passed in 2011[3] resulted in, *inter alia*, making the direct indictment a sole decision of the public prosecutor who is *dominus litis* in the investigation which is, pursuant to the new Code, an optional stage of the proceedings. The investigation is not a mandatory stage of the criminal proceedings, not only due to the fact that it is not being conducted, „ with regard to the criminal offences subject to summary proceedings, same as in the earlier criminal procedure code, but also because the public prosecutor may always, without any special requirements, file a direct indictment instead of conducting an investigation.[4] Namely, ordinary (general) criminal proceedings are intended for a trial involving a perpetrator of a criminal offence which is punishable under law by a term in prison of more than eight years and who is not under age. Such proceedings, according to the Code (Art. 7, para. 1, items 1 and 2) are initiated by issuing an investigation order (Art. 296) or by confirming the indictment which was not preceded by an investigation (Art. 341, para. 1). The provision according to which criminal proceedings start by confirming the indictment, otherwise accepted in the legal systems of a number of states where the investigation

1 Associate Professor at the Faculty of Law in Novi Sad.
2 Bayer V., *Jugoslovensko krivično procesno pravo , Volume I – Uvod u teoriju krivičnog procesnog prava*, Zagreb, 1972, p. 131.
3 *Official gazette of the Republic of Serbia (RS)* no. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.
4 Škulić M., *Osnovne novine u krivičnom procesnom pravu Srbije – Novi Zakonik o krivičnom postupku iz 2011*, Belgrade, 2013, p. 92.

is entrusted to the public prosecutor, is stipulated by the Code only if a direct indictment is issued (Art. 331, para. 5).[5]

Direct indictment may be considered to be a kind of procedural instrument, which allows the prosecutor to choose a special form of procedure which is simplified in terms of its structure. Direct indictment is classified as a special form of procedure and it is characterized by special grounds and special structure.[6] As it is in a way a simplified form of procedure, it does not have the investigation stage of the ordinary criminal proceedings but starts with the indictment stage. The possibility of a direct indictment may be a powerful instrument at the hands of the public prosecutor through which he influences the efficiency of the proceedings, which shall depend on the normative setting for the application of such an instrument. Criminal Procedure Code certainly provides "[...] normative grounds for the efficient operation of the authorities conducting the proceedings, and consequently the efficiency of the criminal justice system as a whole, which would be impossible if the public prosecutor's activities were not efficiently performed."[7]

2. Direct Indictment

Charges imply a charging document issued by an authorised prosecutor, which must contain all of the elements required by the Code, charging the defendant with the commission of a criminal offence based on the required degree of suspicion and requesting the competent court to schedule the main hearing regarding a specific defendant in order to try him according to the law. A charge is a generic term for all types of charging documents used in the criminal proceedings, which differ according to their names and contents, depending on the type of the authorized prosecutor and the type of the form of the criminal procedure they involve.[8] According to the new Criminal Procedure Code the charges are the indictment, motion to indict, private prosecution and motion to order security measure, i.e. the term is used as the general expression for the prosecutor's act of listing the elements of the criminal offence or unlawful conduct characterized by the law as a criminal offence (Art. 2, para. 1, item 10). The definition of the charges according the new Code is provided in a formal sense and not in a substantive sense, according to which the charges are understood to mean any type of official notification provided by the competent authorities to the suspect accusing him of having committed a criminal offence, which is the position held by the European Court of Human Rights (ECHR).[9] Criminal procedure law does not recognise the term direct indictment (it is a theoretical term), but it represents a type of the indictment which is filed in ordinary proceedings without conducting the investigation previously, if the legal requirements have been met, and, as such, it is covered by the term charge. With regard to the term direct indictment, which is not a term used in laws, it is important to mention that according to the Criminal Procedure Code passed in 2001 "[…], "the term motion to file a direct indictment" did not even exist, which means that this term is a theoretical construct which is an attempt to concisely express the substance of the said institute."[10] There have been some

5 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *Komentar Zakonika o krivičnom postupku*, Belgrade, 2012, p.76.
6 Brkić S., *Racionalizacija krivičnog postupka i uprošćene procesne forme*, Novi Sad, 2004, p.363.
7 Bejatović S., *Zakonska norma kao pretpostavka efikasnosti postupanja javnog tužioca u krivičnim stvarima*, The Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Group of authors, *Uloga javnog tužioca u pravnom sistemu sa posebnim osvrtom na problematiku efikasnosti krivičnog postupka i maloletničku delikvenciju*, Belgrade, 2010, p.216.
8 Brkić S., *Krivično procesno pravo II (*Third Revised Edition), Novi Sad, 2013, p. 102.
9 See: Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.*, pp. 46-47.
10 Jekić Z, *Optužba (Pojedinačni optužni akti),* Jugoslovenska revija za kriminologiju i krivično pravo, no. 1-2/95, p. 113.

theoretical disputes about the legal nature of this motion whether it is an independent charging document or not. In addition, the motion to file a direct indictment has caused certain problems in practice as well, considering that the form of such a motion has not been prescribed by the law which has resulted in differences among the filed motions in practice (*the motion not to conduct an investigation; motion seeking an approval not to conduct an investigation; motion for the issuance of a direct indictment)*.[11] In any case, the motion not to conduct an investigation had to contain some elements of the indictment and primarily those which were supposed to enable the assessment whether the collected data provide sufficient grounds for the indictment to be issued – specifically, what evidence and through what means indicate a necessary degree of probability that the person about to be charged has committed a criminal offence. These elements were certainly contained by the request for the investigation to be conducted, with one significant distinction, and that is that the material required for the indictment to be issued had to be "stronger" both in terms of its standard of quality and quantity than the one required for the decision ordering the investigation to be conducted which required a lesser degree of probability.[12] The motion not to conduct the investigation, which requested from the investigating judge to approve a direct indictment in cases where it is not allowed to do so without such approval, represented a special combined motion which is not typical and represents a so-called alternative (implicit) motion. It included, in terms of its content, two motions which may exist independently, but here they did not appear side by side but one is contained by the other one (implicitly) therefore they are decided on as such (alternatively).[13]

The difference between the indictment and the direct indictment is only in formal requirements which need to be met when they are applied, while the procedure for issuing the indictment, its content as well as the instruments for its review are the same.[14] A direct indictment is issued pursuant to Art. 331, para. 5, and in doing so, it is identified as the direct indictment and its issuance marks the beginning of the indictment stage. The aim of the charging document and consequently of the indictment is threefold:[15] a) to result in the main hearing; b) to identify and define the scope of the subject matter of the trial since the court is legally bound by the charging document both in terms of the participants and in terms of the subject matter; c) to present to the defendant the charges, i.e. the criminal offence he is charged with, so that the defendant can defend himself. The indictment is in effect only when the court establishes and confirms that it has been properly issued and that it is well-founded. The main substantive requirement for the indictment to be issued is the existence of reasonable grounds for suspicion – a group of facts which directly corroborate grounds for suspicion and provide a justification for the charges to be brought (Art. 2, para. 1, item 19). The indictment results from the evidence collected during the investigation, from the obtained information which provides the grounds for the indictment without having to conduct the investigation (Art. 331, para. 1 and 5) or from the evidentiary actions and collection of certain evidence when the judge establishes in the summary proceedings that a better clarification of the matter is necessary in order to confirm the charging document is well-founded.[16] The evidentiary materials deemed sufficient with regard to reasonable grounds for suspicion must differ in volume and standard of quality from the evidentiary materials required in order to

11 *Ibid,* pp.116-119.
12 Korač I., Kramarić I., *Krivični postupak – Priručnik za primjenu Zakona o krivičnom postupku s primjerima podnesaka i akata, Volume I: Opšte odredbe i prethodni postupak*, Zagreb, 1983, pp.35-36.
13 *Ibid.*
14 Jekić Z, *Krivično rocesno pravo (Eighth Revised and Supplemented Edition), Belgrade, 2003, pp. 279-280.*
15 Brkić S., Krivično procesno pravo II *op.cit,* , p. 102.
16 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.*, p. 53.

indicate the grounds for suspicion, which is what is required in order to start the investigation. If there is insufficient evidence corroborating justifiable suspicion that the defendant has committed an offence he is being charged with, in the ordinary proceedings this represents grounds for suspending the proceedings (Art. 338, para. 1, item 3) which is why the existence of a justifiable suspicion is assessed by the public prosecutor himself in each specific case.

The indictment must contain, according to the Code, precisely specified elements (Art. 332) which are classified as mandatory and optional. Mandatory elements are: the name and surname of the defendant with personal data (Art. 85, para. 1) and the data stating if, and since when, the said defendant has been remanded in custody, or if he is free, and if he has been released from custody before the indictment was issued, in which case it is necessary to specify how long he has been held in detention; the description of the act which provides the legal elements constituting a criminal offence; the time and place of the commission of the criminal offence; the object on which it was committed and the instrument which was used to commit it, as well as other circumstances necessary for a more precise definition of the criminal offence; the legal qualification of the criminal offence citing the provisions of the law which are applicable according to the prosecutor's motion; indication of the court before which the main hearing is to be held; the motion on the evidence to be presented at the main hearing listing the names of witnesses and expert witnesses, documentation and items which are going to serve as evidence; justification[17] of the direct indictment describing the state of facts based on the collected data providing the grounds for the indictment without conducting the investigation, including a list of evidence establishing the facts that are to be proven, presenting a defence and the prosecutor's position on what the defence alleges. Optional elements are, if the defendant is not in custody, the motion to order detention for the defendant, and if he is in detention, motion to release the defendant from custody.

The content of the indictment is exceptionally important since it represents the grounds for the whole proceedings during the main hearing. Should one of the substantive elements of the indictment be omitted, the indictment shall be considered to be incomplete and it is not going to be possible or allowed to process such an indictment, causing such an indictment to be dismissed unless the defects are in the meantime eliminated, thus rectifying the problem, i.e. supplementing the motion.[18] The indictment is considered to be complete if it contains all of the prescribed elements, but the question is raised what should be done with a motion, i.e. the indictment, which is incoherent, since this is not stipulated by the Code making it a matter of interpretation in practice. This is certainly not to say that it may or should be seen as a matter of subjective, discretionary assessment but should be treated as any other assessment, as an objective, professional and qualified interpretation with the help of well-known interpretative methods and in accordance with the aims of the criminal proceedings and especially with the purpose of the said institute of the procedure.[19]

According to the 2011 Criminal Procedure Code, direct indictment may be filed solely by the public prosecutor, but not the subsidiary prosecutor. The injured party has the right to initiate subsidiary prosecution according to the new Code only after the confirmation of the indictment (Art. 52).

17 When the indictment is filed after an investigation has been conducted, an elaboration should describe the state of facts according to the results of the investigation.
18 Korač I., Kramarić I., *op.cit.*, p. 37.
19 *Ibid.*, p 38.

Direct indictment is direct in the real sense of the word and it leaves out the investigation stage in the attempt to speed up the proceedings, so such proceedings start at the indictment stage. The Criminal Procedure Code provides for the cases which are similar to the direct indictment cases which omit not just the investigation stage but also the indictment stage, such is the case when the indictment is issued at the main hearing. In addition, the indictment issued at the main hearing is different from the other types of the indictment with regard to its form as well: a verbal indictment is allowed.[20] Bringing the charges at the main hearing is not just a special form of simplified criminal procedure but a form which is even simpler in structure than the direct indictment and, as such, undoubtedly, one of the instruments improving the efficiency of the public prosecutor's work as well.[21]

The prosecutor has the basic right to issue the indictment and represent it or desist from prosecution (Art. 43, para. 2, items 5 and 6) according to the principle *maiori minor inest* which includes the right to adjust and amend the indictment.[22] The prosecutor may amend or extend the indictment at the main hearing according to the Code (Art. 409 and Art. 410) if it is established based on the evidence presented at the main hearing that the state of facts has changed compared to the one provided by the charging document. When amending the indictment only the factual description is changed while the charging document refers to the same historical event, whereas extending the charges means adding to the criminal offence referred to in the indictment another offence of the accused.[23] According to Art. 409 of the CPC, the prosecutor may amend the indictment during the main hearing or file a motion for the main hearing to be adjourned in order to prepare a new indictment if he finds that the presented evidence indicates that the facts of the case do not coincide with what the indictment describes. If the panel of judges decides to adjourn the main hearing in order to allow the new indictment to be prepared, a deadline shall be set by which the new indictment must be issued by the prosecutor. The court must serve the new indictment on the accused and the defence counsel and allow them sufficient time for the preparation of the defence. There is no possibility of objecting to an indictment thus issued (Art. 336) nor is it possible to review it as referred to under Art. 337 of the Code. This is a right which has been actively or passively exercised with regard to the same criminal event while the court has not been legally bound by the legal qualification cited in the indictment (Art. 340), and an additional reason is the fact that the review of the indictment after the evidentiary proceedings have been conducted would be difficult to ensure without prejudging the outcome on the matter at hand and casting a suspicion on the impartiality of the process.[24] The court shall provide the accused and the defence counsel, at their request, sufficient time for the preparation of the defence even if the indictment is amended at the main hearing if it is found to be necessary. As far as extending the indictment is concerned, according to Art. 410 if an earlier criminal offence is discovered at the main hearing which was committed by the accused, the panel shall extend the main hearing to include the said offence based on the indictment by the authorised prosecutor which may be presented orally as well or decide to prosecute this other offence in separate proceedings. If the panel confirms the extended indictment, the main hearing shall be adjourned and sufficient time for the preparation of the defence shall be allowed. An extended indictment cannot be objected to (Art. 336) nor can it be reviewed (as referred to under Art. 337) due to the

20 Grubač M., *Krivično procesno pravo (Sixth Revised and Supplemented Edition),* Belgrade, 2009 p. 393.
21 Bejatović S., *Zakonska norma kao pretpostavka efikasnosti postupanja javnog tužioca u krivičnim stvarima*, *op.cit.,* p.236.
22 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.,* p. 802.
23 Đurđić V., *Krivično procesno pravo – posebni deo*, Niš, 2011, p.76.
24 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.*, p. 803.

fact that the event which was originally specified in the indictment is not the same as the one the indictment is extended to include, "[...] so in this respect the criminal offence committed earlier has not been covered by the right to an objection and the obligation to review the existing indictment. In this situation as well, however, the issue concerns the information obtained through the presentation of evidence at the main hearing, the evidence the panel would not have been able to decide on and justify the decision regarding the objection or review in such a way that it does not prejudice the decision on these issues which are going to be heard and decided on (Art. 342)"[25] If the court decision on the offence in question is under the jurisdiction of a higher court, the panel shall decide whether to transfer to this court the case which is being heard at the said main hearing as well.

3. Direct Indictment in Serbian Criminal Procedure Legislation – Historical Overview

According to the *Judicial Criminal Proceedings Code passed in 1929*, there were two ways to file an indictment, directly and indirectly.[26] Indirect indictment used to be filed based on the conducted investigation, and the direct indictment was filed solely based on the inquest (in Serbian –"izviđaj") or on the basis of the filed criminal charge itself, in cases where the investigation was not mandatory and the prosecutor found that it was not necessary to conduct it since he had sufficient grounds to indict. According to Art. 96 of the said Code, if the inquest had been complete, the state prosecutor assessed whether there were sufficient grounds to initiate the criminal procedure against certain individual and if it was found that there were, he would file a motion to initiate the investigation or a direct indictment.[27] If, on the other hand, the inquest had been completed to such an extent that it provided all the evidence necessary for a successful trial proving the offence had been committed as well as who was the offender while the investigation was not mandatory pursuant to Art. 97, para 1, the state prosecutor would file a direct indictment (Art. 203 and Art. 372).[28] The direct indictment was to be submitted to the presiding judge of the panel. In the proceedings conducted before the single judge of the district court, the state prosecutor could have filed the indictment directly without an inquest just on the basis of a criminal charge filed by the public authorities when the offender had been caught in the act and if the said offender gave a full admission confirming that he had committed the said offence, or on the basis of a police or judicial inquest, except in cases where pre-trial detention had been ordered (Art. 372, para. 1). By filing a direct indictment and informing the defendant thereof, the relationship between the parties to the proceedings was established whereas with regard to the indirect indictment this relationship would be established at the very start of the investigation.[29]

According to the *Criminal Procedure Code passed in 1948*, [30] the direct indictment was allowed when sufficient evidentiary material on the guilt of the defendant had been collected during the inquest (Art. 127, para. 3). It was not possible to issue a direct indictment if the investigation was mandatory and this was required when there were grounds for suspicion that a certain individual had committed a criminal offence punishable under law by a death sentence (Art. 128, para. 2).

25 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.*, p. 805.
26 Marković B., *Udžbenik sudskog krivičnog postupka Kraljevine Jugoslavije*, Belgrade, 1930, p.472.
27 Čubinski Mih.P., *Naučni i praktični komentar Zakonika o sudskom krivičnom postupku Kraljevine Jugoslavije od 16.februara 1929.* godine, Belgrade, 1933.
28 *Ibid*, p. 233.
29 *Ibid.*
30 Criminal Procedure Act with Annotations, Belgrade, 1948, Collected Laws of the Federal People's Republic of Yugoslavia no.23.

According to the *Criminal Procedure Code passed in 1953*,[31] after the inquest had been completed, which used to be initiated if there were grounds for suspicion that a criminal offence had been committed (Art. 136), and based on the results of the inquest itself, the public prosecutor was able to file an indictment, i.e. motion to indict or file a motion for the investigation to be initiated, refer the case to the competent public prosecutor or pass a decision on the suspension or termination of the inquest (Art. 145, para. 2). Direct indictment was allowed, as it can be seen from that Code, except if the criminal offence in question required mandatory investigation, which was the case with criminal offences prosecuted *ex officio* and criminal offences punishable under the Code by a death sentence or a term of twenty years of rigorous imprisonment or if it had been necessary to order pre-trial detention (Art. 156, para. 2).

Amendments to the Criminal Procedure Code passed in 1967[32] introduced a non-standard direct indictment allowing the public prosecutor to just file the motion with the investigating judge not to conduct the investigation if the collected evidence, data and information did not provide sufficient grounds for the indictment to be filed (Art. 149, para. 1). The investigating judge was allowed to pass the decision on granting the motion filed by the public prosecutor in the form of a ruling only if he had previously questioned the person who was to be indicted and the said person agreed to the motion for the investigation not to be conducted (these two conditions had to be met cumulatively). With regard to the examination and the summoning of the said person, the provisions related to the examination and summoning of the defendant were to be applied accordingly (Art. 149, para. 2). If the investigating judge had passed a decision granting the motion filed by the public prosecutor requesting a direct indictment to be issued, the said indictment had to be issued within eight days, but the panel of judges of the district court could extend this deadline at the request of the public prosecutor (Art. 149, para. 3). The public prosecutor could file a motion requesting a direct indictment even after the request for an investigation to be conducted had been filed until the decision was rendered. If the investigating judge did not grant the public prosecutor's motion, he proceeded as if the request for conducting an investigation had been filed. According to Art. 240, if it was decided to issue the indictment without prior investigation, it was allowed to continue the proceedings just based on the indictment of the public prosecutor, i.e. the injured party as the prosecutor.

The *Criminal Procedure Code passed in1976*[33] introduced for the first time explicitly two forms of direct indictment, standard and non-standard direct indictment. According to the provisions of Art. 160, para. 6 of the Code, the public prosecutor may issue an indictment without conducting the investigation for the criminal offence punishable under law by a term in prison of five years if the collected data related to the said offence and the offender provided sufficient grounds for the indictment. The public prosecutor had to enclose a criminal charge and all of the documentation and reports on the actions which had been undertaken, as well as the items which might be used as evidence or indicate where they could be located (Art. 160, para. 8). Non-standard direct indictment meant that the prosecutor had to file a motion with the investigating judge not to conduct the investigation in cases regarding criminal offences punishable under law by a term in prison of more than five years if the public prosecutor held that the collected evidence related to the said offence and the offender provided sufficient evidence for an indictment to be issued

31 Criminal Procedure Code with the Law on Enforcement, Belgrade, 1953.
32 *Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 50/67.
33 *Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 4/1977 of 14 January 1977.

without prior investigation. The investigating judge had to approve the public prosecutor's motion provided that he had previously examined the person subject to the indictment. Unlike the CPC with the amendments passed in 1967, the consent of the person who was to be indicted directly was not a requirement anymore, and the investigating judge did not pass a decision granting the motion to file a direct indictment, but authorised it through a notice served on the public prosecutor and the person who was to be indicted (Art. 160, para. 2). The deadline for the issuance of the indictment was eight days in such a case but the panel which consisted of three judges (Art. 23, para. 6) could extend it at the request by the public prosecutor. The motion to file a direct indictment was allowed even after the request for the investigation to be conducted had been filed as long as the request was not decided on yet. If the investigating judge found that the requirements for the direct indictment without prior investigation had not been met, he proceeded as if a request for the investigation to be conducted had been filed. The provisions related to the non-standard direct indictment were applied even when criminal prosecution was undertaken at the request by the injured party as the prosecutor but in such a case a time extension was not possible for filing the direct indictment (Art. 160, para. 7). The prosecutor was to enclose with the motion not to conduct an investigation, as well as with the direct indictment, a criminal charge and all of the documentation and reports on actions undertaken, as well as the items which could be used as evidence or an indication where they might be located (Art. 160, para. 8).

The proceedings before the court could be conducted just on the basis of an indictment by the public prosecutor, i.e. the injured party as the prosecutor (Art. 261, para. 1), according to the said Code when it was possible to issue the indictment without conducting an investigation and also when the investigation was completed. The amendments to the Criminal Procedure Code passed in 1985[34] stipulated that if the injured party as the prosecutor filed the indictment without conducting an investigation, the presiding judge of the first instance panel could move for a decision by the panel if he found that there was no reason to prosecute due to the circumstances referred to under Art. 270, items 1-3[35] (Art. 23, para. 6). If the injured party as the prosecutor contrary to the provisions of Art. 160, paragraphs 1 and 2 of this Code filed the indictment without prior investigation for a criminal offence punishable by a term in prison of more than five years, it was considered that the request for the investigation to be conducted was filed (Art. 264, paragraphs 1 and 2).

According to the *Criminal Procedure Code passed in 2001*[36] there were two forms, i.e. two types of direct indictment, which applied to both the public prosecutor and the subsidiary prosecutor, one of which required certain conditions to be met while the other was not conditioned, i.e. there were no pre-requisites which needed to be met in order to file a direct indictment. This unconditional indictment, sometimes referred to in theory as the standard direct indictment[37] was possible with regard to the offences punishable by a term in prison of up to eight years. In such cases, the public prosecutor could file the indictment directly with the competent court if he found that

34 *Official Gazette of SFRY* no. 14/1985 of 22 March 1985, Art. 42 of the Law on Amendments and Supplements of the CPC which stipulated the amendment to Art. 264 of the Code.

35 When deciding on the objection to the indictment, the panel of judges shall decide that there is no cause for the indictment and that the criminal proceedings are to be suspended if it is established that: 1. the act specified in the indictment does not constitute a criminal offence; 2. there are circumstances precluding criminal liability, and security measures are not an option; 3. the request by the authorised prosecutor or the authorisation of the competent authority are missing when these are required by law or there are circumstances which preclude prosecution (Art. 270, Par. 1, Items 1-3).

36 *Official Gazette of FRY* no. 70/2001 and 68/2002 and *Official Gazette* no 58/2004, 85/2005 – state law, 47/2007, 20/2009 – state law, 72/2009 and 76/2010.

37 See: Škulić M., *Krivično procesno pravo (Third Edition),* Belgrade, 2011, p. 373.

the collected data related to the said offence and the offender were sufficient for indictment. It was his discretionary decision which at the same time meant that the investigation was not necessary in that particular case.

The second type of direct indictment was possible under certain conditions and that is why it was referred to in theory as a conditional or non-standard direct indictment. The public prosecutor could file a motion for direct indictment to be issued if it was related to a criminal offence punishable under law by a term in prison of eight years in which case a motion had to be filed with the investigating judge not to conduct the investigation in that particular case. The public prosecutor had to enclose with the motion a criminal charge and the documentation and reports on the actions which had been undertaken, as well as the items which might be used as evidence or indicate where they could be located. The basic substantive requirement for filing the motion for a direct indictment was that there were sufficient evidentiary materials, i.e. that sufficient evidence was obtained related to the offence and the offender in order to issue an indictment. The public prosecutor was allowed to file such a motion even after the request for an investigation to be conducted had been filed, i.e. until a decision was passed on such a request. Although the Code did not explicitly prescribe the content of the public prosecutor's motion filed with the investigating judge not to conduct an investigation, the said motion had to contain all of the elements which had been required for the request for the investigation to be conducted since the investigating judge was supposed to make a decision whether to grant the motion based on those elements.[38]

In order for the investigating judge to grant the motion for a direct indictment, it was necessary first to question the suspect according to the rules of the CPC. The investigating judge had to grant the motion in the form of a notice if the motion for a direct indictment was considered to be justified. The investigating judge orally granted the motion filed by the public prosecutor which was a form of notification of not just the investigating judge but the person who is to be directly indicted in order to inform him that the investigation would not be conducted.

The last formal requirement stipulated by the Code set the time within which the direct indictment was to be filed. The deadline was eight days from the day the motion was granted by the investigating judge but if the public prosecutor did not file the direct indictment within the set time frame, it was considered that he had filed a request for the investigation to be conducted. As the time set for filing the direct indictment expires, it becomes pointless to file it since its purpose is to accelerate the proceedings and if the public prosecutor files a direct indictment after the deadline had passed, it should be treated as if a request for the investigation to be conducted had been filed.[39]

If the investigating judge did not grant the motion filed by the public prosecutor requesting a direct indictment, the motion was treated as the request for the investigation to be conducted, while the decision of the investigating judge was final, i.e. the disagreement between the public prosecutor and the investigating judge on this issue was not subject to a decision made by the pre-trial chamber. The prosecutor alone was authorised to decide whether the direct indictment would be issued, i.e. to file a motion not to conduct an investigation, while the court was not allowed to deny the request for the investigation to be conducted only because it is possible to issue a direct indictment.[40]

38 Bejatović S., *Krivično procesno pravo*, Belgrade, 2003, p.493.
39 Đurđić V., Krivično procesno pravo – tok krivičnog postupka, Niš, 1998, p.113.
40 The decision of the Supreme Court of Yugoslavia, Kž.6/70 of 23 May 1970– as cited in: Bejatović S.,, *Krivično procesno pravo*, Belgrade, 2003, p. 493 (footnote 18).

It should also be mentioned here that when the request for the investigation to be conducted was denied and it was final, the state prosecutor did not have the authority to issue a direct indictment with regard to the same person and charging him for the same criminal offence.[41]

The *Criminal Procedure Code passed in 2011*, under Article 331, para. 5 also provides for the possibility of a direct indictment allowing the public prosecutor to file an indictment without conducting the investigation if the collected information on the criminal offence and the offender provide sufficient grounds for indictment. Thus formulated legal requirement for a direct indictment is the logical consequence of the introduction of the prosecutorial investigation into our criminal procedure legislation, in which the *dominus litis* of this stage of the proceedings is the public prosecutor, and consequently it is the prosecutor who makes a discretionary decision whether the available evidence is sufficient, i.e. the collected information on the criminal offence and the offender, and he shall render this decision in accordance with the generally accepted views found in jurisprudence which pertain to the quantity and level of quality of the evidence proving there are grounds for suspicion necessary to file a charging document. His decision in this respect does not have to correspond to the decision made by the court when reviewing the indictment on whether the proposed material is sufficient to confirm the indictment.[42]

When deciding whether the charges are based on the evidence, the prosecutor must take into account the effect of the principle *ne bis in idem* (Art. 4, para. 1) if the charges are rejected in a final decision, "[...] which actually means that he should decide as objectively as possible to what extent he is potentially "risking", by directly indicting, the criminal proceedings to be suspended at a later stage, i.e. risking to fail as the prosecutor, which would then mean that the same person could not be tried for the same criminal offence twice even if there was a possibility of new evidence emerging."[43] Such a task for the public prosecutor is certainly not difficult since he has always been the one responsible for obtaining the evidence for the indictment he files and represents, but it is to be expected that the prosecutor would not decide to use a direct indictment if there was a risk of possibly failing to prove the indictment.

4. Direct Indictment in Criminal Procedure Legislations of Croatia, Montenegro and Slovenia

Direct indictment is used in other criminal procedure legislations, so, for instance, according to the *Criminal Procedure Code of the Republic of Croatia*[44] direct indictment (Art. 341, para. 3) may be issued in cases involving criminal offences which are subject to investigation, and these are criminal offences punishable by a term in prison of more than five years, (Art. 216, para.1) if the results of the undertaken actions related to the said offence and the offender provide sufficient grounds for the indictment to be issued. According to Art.341, para. 4 of the Code, the defendant must be questioned before the indictment is issued except in cases where it is requested in the indictment that the trial should be held *in absentia* (Art. 402).

41 *Ibid.*
42 Ilić G.P., Majić M., Beljanski S., Trešnjev A., *op.cit.*, pp. 700-701.
43 Škulić M., *Komentar Zakonika o krivičnom postupku*, Belgrade, 2011, pp.775-776.
44 Criminal Procedure Code, *Official Gazette of the Republic of Croatia*, no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13.

According to the *Criminal Procedure Code of Montenegro*,[45] the state attorney has the right to issue a direct indictment (Art. 288) but also the injured party as the prosecutor may file it (Art. 287). The state attorney shall issue a direct indictment if the collected information related to the defendant and the criminal offence in question, provided that the defendant has been already questioned, provide sufficient grounds for an indictment to be issued. The provision which allows the injured party as the prosecutor to do this as well is particularly interesting. Unlike some other legislations which have left out from the criminal procedure legislation the institute of a subsidiary prosecutor after switching from the judicial to the prosecutorial model of investigation, Montenegro's Criminal Procedure Code has kept the said institute even though the critics of the legal provision doubt the success of subsidiary prosecution.[46] *Ratio legis* of such a possibility is based on the reasons of fairness since when the legislator provides the injured party with the opportunity to acquire a status of subsidiary prosecutor then he must provide him with the some opportunity to obtain evidence necessary for a direct indictment to be filed.[47] Namely, the injured party as the prosecutor, pursuant to Art. 59 of the Code, may file a direct indictment when assuming the prosecution from the state attorney. However, if in such a case he finds that prior to indictment it is necessary after all to undertake certain evidentiary actions, the injured party shall file a motion with the investigating judge requesting that the judge should undertake the said actions. When the investigating judge grants the motion by the injured party as the prosecutor, the proposed actions shall be undertaken without any delay, notifying the injured party thereof. If the motion by the injured party is not granted, the investigating judge shall request the panel of judges (Art. 24, para. 7) to decide on the motion which it must do within three days. An appeal against such a decision is not allowed.

According to the *Criminal Procedure Code of the Republic of Slovenia*[48] (Art. 170) the investigating judge may grant the motion filed by the public prosecutor not to conduct an investigation if the obtained information related to the said criminal offence and the offender provides sufficient grounds for an indictment to be issued provided that the investigating judge has already questioned the person who is to be indicted, in which case the provisions of the Code regarding the summons and questioning of the defendant are to be applied. The investigating judge shall inform the public prosecutor and the person subject to the indictment whether the motion is granted. If the investigating judge should decide to grant the said motion, the indictment must be issued within eight days, but a time extension may be requested by the public prosecutor and this may be allowed only by the panel of judges (referred to under Art. 25, para. 6). The motion not to conduct an investigation may be filed even after the request for the investigation has already been filed as long as it has not been decided on yet. If the investigating judge finds that there are no grounds for a direct indictment to be issued, he shall proceed as if the request for the investigation to be conducted has been filed. If the criminal offence in question is punishable under law by a term in prison of up to eight years, the prosecutor may issue a direct indictment provided that the obtained information related to the said criminal offence and the offender is deemed to provide sufficient grounds for the indictment to be issued. The motion is accompanied by a criminal charge and the items which may be used as evidence or the indication of where such items may be located.

45 *Official Gazette of the Republic of Montenegro* no. 57/09.
46 Radulović D., *Oštećeni kao subjekat krivičnog postupka*, Revija za kriminologiju i krivično pravo no. 2-3/2011, p. 134.
47 Škulić M., *Komentar Zakonika o krivičnom postupku*, Podgorica, 2009, p. 835. As cited in: Radulović D., *Oštećeni kao subjekat krivičnog postupka*, op.cit., p. 134 (footnote 13).
48 *Official Gazette of the Republic of Slovenia*, no. 8/2006.

5. Conclusion

Direct indictment represents an institute used to improve efficiency in terms of the time frame within which the criminal proceedings unfold, which is relevant from several aspects, the aspect of criminal procedure, penal aspect, law enforcement aspect and aspect of criminal policy.[49] Efficiency depends on the circumstances of the society as a whole, it is its function, it results from homogeneity of the society, its cohesiveness; it is dependant on how the said society deals with the basic issues related to human rights, whether human and moral norms which ensure general human progress as well as universal human values are observed, first and foremost human rights, "whether law commands moral authority in the society", whether democratic climate is prevailing and whether the laws are observed and wield authority.[50] Although it is not an omnipotent instrument in meeting the aforementioned requirements, it is certainly a useful instrument to be used in the proceedings to that end and it should be used in practice whenever the stipulated legal requirements are met.[51]

The differentiation of the forms of proceedings in criminal matters is related to the legal procedure issues and concerns the state of the evidentiary materials.[52] "[...] the substance of the function of the indictment is not just filing charging documents, but the sum of all activities which are also stipulated by law since they represent the necessary prerequisites for a successful performance of the prosecutorial function (e.g. entrusting the law enforcement authorities with the collection of evidence or detecting unknown perpetrators of criminal offences etc.)" [53]

The distinction between the direct indictment and a motion to indict is that the motion to indict completely excludes the investigation, since "[...] direct indictment in terms of facts and legal issues does not require the investigation to be conducted, whereas when the indictment is filed after the investigation has been completed,[54] the evidence confirming the degree of suspicion necessary for the indictment has been obtained only after the investigation was conducted." In any case, the lowest standard of evidence for the direct indictment must be higher than the one necessary for the investigation order to be issued where the grounds for suspicion that a criminal offence has been committed by a certain individual or an unknown perpetrator is required (Art. 295, para. 1, items 1 and 2). The said standard of evidence is best assessed by the public prosecutor who has the discretionary power to decide whether there are grounds for the direct indictment to be issued or not.

In practice, "[...] the direct indictment is issued only in cases where the obtained evidence may almost on its own, without any further evidence, be used as the basis for a judgment."[55] This certainly depends on the information enclosed with the criminal charge, which must be for the purposes of a direct indictment complete and professionally compiled. The investigation is not a mandatory stage of the proceedings according to the new CPC, while direct indictment is always optional and dependant on the sufficiency of evidentiary materials provided by the prosecution.

49 Špančić I., *Neposredna optužnica*, Bulletin of the Yugoslav People's Army's Legal Service no. 2-3/1990, p. 89.
50 Bačić F., *Značaj materijalnog krivičnog zakonodavstva za efikasnost krivičnog pravosuđa*, Naša zakonitost no. 2/1987, p.194.
51 Špančić I., *op.cit.*,, p. 89.
52 See: Bejatović S., *Novi ZKP RS i pojednostavljene forme postupanja u krivičnim stvarima*, Revija za kriminologiju i krivično pravo no. 2-3/2011, p. 51.
53 Jekić Z., *Optužba (pojedinačni optužni* akti), Jugoslovenska revija za kriminologiju i krivično pravo, no. 1-2/95, p.110.
54 Bejatović S., *Krivično procesno pravo*, *op.cit.*, p.493.
55 Špančić I., *op.cit.*, p. 88.

There is no crystalised view on the sufficiency of the obtained information, in terms of volume and its level of quality, which provides the grounds for the direct indictment neither in theory nor in practice as this is not possible to formulate since the facts are at issue and they must be established and examined in each particular case.[56].

Although compared to the total annual number of indictments, a small number of individuals is indicted directly (about 3% in total annually), the institute of direct indictment, as some sort of form of procedure, is applied in practice, which certainly justifies its place in the procedure legislation. Since the form of conditional, i.e. non-standard direct indictment according to the new Criminal Procedure Code no longer exists, it is to be expected that the said institute is going to be increasingly used in practice.

56 *Ibid.*, p.85.

Nikola Matovski, PhD[1] and Gordan Kalajdžiev, PhD[2]

Efficiency of Prosecutorial Investigation in Contrast to Efficiency of the Defence in Reformed Criminal Procedure
(with a particular view of the new Macedonian CPC)

1. Reforming investigation – prosecutorial or parties' investigation?

Given the fact that after two decades of partial reforms being put into practice in the region the issue of a potentially *fundamental reform* of criminal procedure law was finally raised, a number of mixed opinions about the scope of those reforms have been expressed in legal literature.[3] From one perspective, the existing procedural model or the mixed system should be replaced by a purely adversarial procedure. From another perspective, something like that was neither needed nor desirable, it was sufficient to reform solely the preliminary procedure, without modifying the trial stage. As an argument in favour of the hybrid model of a reformed investigation and keeping the current form of the main hearing, actively conducted by the Court and modelled on reforms implemented in Germany in the 1970s, a degree of moderation with regard to the reform of the investigation was proposed, without making any substantial changes in the main hearing and remedy procedures.[4]

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2 Full professor, *Justinianus Primus* Law School, Skoplje.
3 See: M. Damaška: O miješanju inkvizitornih i akuzatornih procesnih formi, Hrvatski ljetopis za kazneno pravo i praksu, no,. 2, 1997, pp. 381-93.
4 Complexity and a lack of needed institutional framework for undertaking a reform of the criminal justice system, as well as deep-rooted beliefs held by participants in the proceedings about their roles therein were cited as impediments to a wholesale reform. Thus, certain authors found that the reform should have been limited to investigation and acceleration of the proceedings. See: D. Krapac: Uvodna riječ glavnog urednika, in: Hrvatski ljetopis za kazneno pravo i praksu, no. 2, 2008; D. Krapac**:** Reforma mješoviotg kaznenog postupka: potpuna zamjena procesnog modela ili preinaka prethodnog postupka u stranački oblikovano postupanje?, in: N.Matovski (ed.), Зборник посветен на д-р Фрањо Бачиќ, Skopje, 2007, pp.. 177, 180-81.

Notwithstanding the fact that problems surrounding such a comprehensive reform were serious and well-founded, the Macedonian legislator had opted to completely abandon judicial paternalism and introduce an adversary procedure, mostly following the example of the Italian reform.[5] The reform was primarily *aimed at* modernizing the procedure in such a manner as to accelerate the proceedings and achieve greater efficiency of the state's fight against crime (the so-called *crime-control* model or trend) on the one hand and attain a higher degree of fairness by fulfilling all the standards of a fair trial and protection of human rights (the so-called *due process* model) on the other. It is widely known that achieving these two conflicting goals at the same time is no easy task and so the Macedonian legislator drew on the existing experiences found in comparative and international law.

Putting an end to judicial investigation was the first issue addressed in the reform. Discussions in published literature amounted to a conflict between arguments concerning judicial investigation put forward by conditionally speaking the older generation of doyens of Yugoslav theory of criminal procedure law on the one hand and a younger generation of criminal-law experts on the other.[6] Although regional legislators and legal experts came to an agreement that judicial investigation should be abandoned, numerous other issues have been raised ever since and the legislators have taken completely different paths with regard to those issues.[7] In that context, we will mention only some more significant conceptual issues which affect greatly not only the preliminary, but the entire proceedings as well.

In the first place, there are evidently several different perceptions of what is actually meant by "prosecutorial" investigation. Under the guidance of foreign representatives, Bosnia and Herzegovina, which was the first country to do away with the investigation, followed the model of the non-formal and speedy investigation, with few legislative provisions and without formally allocating parts of the investigation to the police or the prosecution. It was not easy for a majority of countries in the region, such as Croatia, Serbia, and Montenegro to break away from the old Yugoslav CPC, which resulted in the new prosecutorial investigation being copied from the old model of judicial investigation.[8] In consequence, prosecutorial investigation has remained very formal in those countries, with a number of statutory provisions governing it. Therefore, the prosecutorial investigation has more or less been reduced to a substitute for the judicial one in the sense that formal presentation of evidence as early as at the stage of the investigation has been kept and so now public prosecutors conduct the old evidentiary actions instead of investigating

5 See: B. Pavišić (ed.): G. Insolera, G. Giostra, Talijanski kazneni postupak, Law Faculty University of Rijeka, 2002.

6 The first group argued in favour of continuing with the reforms by modifying the mixed model and keeping the judicial investigation and investigating judges, while the other one lobbied for a sweeping reform and the introduction of the so-called prosecutorial investigation. This "battle" did not last long and it ended in a rather unexpected consensus that the concept of judicial investigation should be abandoned in the entire region, except in Slovenia. See: N. Matovski: Моделот на истрагата, (судски или тужителски), МРКПК, no. 1-2, 2011/2012, pp.9-22; M. Grubač: Treba li sudsku istragu zameniti nesudskom istragom, in: Зборник на Правниот факултет „Јустинијан Први" во чест на Панта Марина, Skopje,2007, p. 48. Even experts who supported it in principle pointed to certain disadvantages of the adversarial model. See: M. Damaška: O nekim učincima stranački oblikovanog pripremnog postupka, Hrvatski ljetopis za kazneno pravo i praksu, no. 1/2007, pp. 3-14.

7 See: G. Kalajdžiev, Bitnije dileme i razlike u reformi istrage u državama bivše Jugoslavije, in Kriminalističko-krivično procesne karakteristike istrage prema Zakonu o krivičnom postupku u prošloj deceniji, Vol. 5, No.1 (November 2012), pp. 432-443.

8 See: G. Kalajdžiev, Концепциски разлики во реформата на истрагата во Хрватска и Македонија, in Зборник на трудови на Правните факултети во Скопје и Загреб, Skopje/Zagreb, 2010 (available at http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=100280); S. Bejatović, Нови Законик о кривичном поступку Републике Србије и тужилачки концепт истраге, Македонска ревија за казнено право и криминологија, god. 14, br. 2, 2007, pp. 297-321.

judges.[9] In contrast to that situation, Macedonia has, following the model of Italian and Bosnian-Herzegovinian reforms,[10] completely abandoned the paternalism of state investigation and embarked on a task of deformalising preliminary proceedings.

And so, instead of transforming the judicial into "prosecutorial" investigation and keeping it as some kind of "a trial before the trial", Macedonia has opted for a total abolishment (or skipping) of formal investigation. That concept is supported by the idea that evidence should be adduced only at a public trial; thereat, all the evidence collected in the course of an investigation should be examined in an adversarial and fair hearing. On the other hand, it seems that what lies behind the concept of a formal judicial investigation is actually a fear of losing testimonial evidence obtained from the accused or witnesses or modification thereof because over time they can recant or change their evidence for various reasons – a realistic fear which actually was the ace card when the old judicial investigation was concerned. Even today, this theory about efficiency is regarded as legitimate in Croatia.[11]

Consequently, the key question is actually the question of probative value of the results of an investigation at the trial.[12] Pursuant to the new CPC, there are limits on the use of statements, obtained during the interrogation of suspects and questioning of witnesses, at trials in Macedonia. In particular, this applies to witness statements that can be used as evidence only by way of exception, namely if a witness is unavailable or if evidence has been presented at a special evidentiary hearing, when it is presumed that the witness will not be available to attend the trial. With the exception of such cases, witness statements given in the course of preliminary proceedings may be adduced only in the event that a witness has changed his testimony or refuses to testify, but they are not considered evidence *per se*.

2. Trials and tribulations of public prosecutor's offices

Instead of being an armchair authority as used to be the case, public prosecutors have become active and operational participants in criminal prosecution and investigation. The police have still retained considerable autonomy with regard to their activities, but from now on they are obligated to provide prompt information to prosecutors and follow their instructions and orders as part of their cooperation.[13] High hopes were placed on the idea of setting up the so-called judicial police that would be part of public prosecutors' teams working directly under their command. It

9 Such a prosecutorial investigation is rightly characterized not as party-driven but as markedly inquisitorial.! See: Z. Đurđević: Suvremeni razvoj hrvatskoga kaznenog procesnog prava, s posebnim osvrtom na Novelu iz 2011, Hrvatski ljetopis za kazneno pravo i praksu, no. 2/2011, pp. 311-357.

10 For more on this, see: C. P. De Nicola, Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism, awailable at http://laworgs.depaul.edu/journals/RuleofLaw/Documents/DeNicola-Final.pdf.

11 See: Z. Đurđević, Osvrt na rezultate rada radne skupine Ministarstva pravosuđa za usklađivanje Zakona o kaznenom postupku s Ustavom Republike Hrvatske, Hrvatski ljetopis za kazneno pravo i praksu, no. 1/2013, pp. 3-100.

12 See: E. Ivičević Karas: Dokazna snaga rezultata istrage prema Prijedlogu novele Zakona o kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu, no. 2/2013, pp. 691-714.

13 The risk that the police would take absolute control over the investigation is a well-known problem addressed in another paper. The police are more operational and they have at their disposal greater material and human resource, as a result of which they have in fact been dominant in the field in all European countries, with the exception of Italy. The police are difficult to give up their dominant position during these initial stages of the proceedings, either because in any case they are the ones who carry out a majority of tasks, of their own initiative or at the initiative of public prosecutors, or in order to retain the power of discretion. The police achieve this by not providing timely and regular information to public prosecutors about all the uncovered criminal cases. By doing so, they manage to retain power to unofficially dismiss criminal charges by closing cases without informing public prosecutors accordingly, thereby in effect seizing the powers reserved for public prosecutors by the legislator.

is rather unusual that an attempt to establish special teams of *judicial police* (referred to as "judiciary police"- *pravosudna policija* in Macedonia),[14] modelled on the Italian example, has been made only in Macedonia with the intention of increasing the mobility and operability of prosecutor's offices.[15] It is expected that such a solution will not only create conditions with regard to personnel in which the prosecution will be able to assume a more active role in collecting evidence and thus ensure certain control over the work of criminal police, but it is also expected that it will substantially accelerate preliminary proceedings because prosecutors will collect a considerable amount of evidence over a short period of time without relying on the police, investigating judges, or other state authorities to do so.

Unfortunately, the above idea still exists on paper only. Truth to be told, it was obvious that the Ministry of Interior had not been "delighted" by the fact that they would have to turn over their own personnel to public prosecutor's offices and thus lose their actual monopoly on criminal investigation.[16] Instead of assigning the assisting personnel to each prosecutor's office critical to expeditiousness and efficiency of prosecutor's offices and proceedings as a whole, the Macedonian prosecution service now has to make do with one or two pilot investigation centres of the prosecution service that would, in contrast to the original idea, function as some kind of (if we can put it that way) "outsourced" investigation centres.

As if all that was not enough, not only preliminary investigation actions, but the entire investigation has now turned from "non-public" into *secret*! Such a solution goes hand in hand with the controversial issue of not informing the accused that an investigation has been initiated against him, which shall be addressed below. It is clear that the objective of such solutions is to have more efficient state authorities in charge of crime detection and prosecution, *i.e.* a strong tendency towards crime control. The Constitutional Court of the Republic of Croatia ruled that such absolute secrecy about investigation procedure was not in accordance with the Constitution or principles of the European Convention on Human Rights.[17]

Putting of the new model of criminal procedure into practice requires the state to devote a lot of effort to organising and financing such an undertaking. The prosecution service will have to make preparations, in particular with regard to personnel, office space and equipment to be in a position to meet challenges presented by the reform. The new concept of procedure sets serious tasks before public prosecutor's offices, which should become the guarantor of legality in preliminary proceedings. Owing to its current organisation and personnel structure, the public

14 It actually denotes criminal police that closely cooperate with the public prosecution service and it has been provided that few members of the judicial police would directly work in the public prosecutor's team. A new term has been used in the Code to emphasise that the central role in criminal investigations is now performed by public prosecutor's offices assisted by a number of specialised bodies with powers such as those held by the police or similar powers. That is precisely the reason why the term "judicial police" common in a number of European countries is not used in the CPC in Macedonia. See: G.Kalajdžiev, D. Ilić, Формирање, организација и функционирање на правосудната полиција и истражните центри на јавното обвинителство, Македонска ревија за казнено право и криминологија (Macedonian Review for Criminal Law and Criminology), no. 2, 2009, pp. 121-154.

15 Croatia has opted for a slightly uncommon solution, namely that one segment of the investigation is be conducted by a police inspector acting in a special capacity as an authorised "investigator". See: J. Pavliček: Uloga istražitelja u kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 16, no.. 2, 2009, p. 895.

16 The establishment of new relationships between the police and public prosecution service is aimed at overcoming the well-known problem of "dual hierarchy" in criminal police governed more by the politics through the officials of the Ministry of Interior than by the public prosecution service. See: G. Kalajdziev, New Relationships between the Police and the Public Prosecutors Office in the Republic of Macedonia, Iustinianus Primus Law Review, Vol. 2, 2011 (available at http://www.law-review.mk/pdf/02/Gordan%20Kalajdziev.pdf).

17 Such secrecy is apparently contrary to the established European standards on informing the accused that criminal proceedings have been brought against him. See: Z. Đurđević: Osvrt na rezultate rada radne skupine Ministarstva pravosuđa za usklađivanje Zakona o kaznenom postupku s Ustavom Republike Hrvatske, Hrvatski ljetopis za kazneno pravo i praksu, no.1/2013, pp. 3-100.

prosecution service will hardly be able to fulfil the tasks assigned to it by the law, which is why it can easily come to pass that the police will become the master of the investigation instead of the prosecution.[18]

3. Defence's position and challenges in respect of suspect's rights

3.1. Exclusion of the defence from prosecutorial investigations.

Nevertheless, the greatest controversies have arisen over the issue of suspect's rights and his position in the investigation; the countries have been divided over that issue into two groups with fundamentally different solutions. As previously mentioned, the countries that have opted for a rather formal judicial (unilateral) investigation have essentially retained the old, paternalistic concept – according to which suspects *participate* in investigations and are *present* during investigative actions (now renamed to "evidentiary actions"). At first glance, it might seem that the fact that suspects *are informed* about investigations being initiated as well as their participation therein give them more rights in terms of the so-called equality of arms. On the other hand, countries such as Macedonia and Bosnia and Herzegovina, which have opted for a non-formal, party-driven investigation in which evidence is only collected but not presented, on the surface provide less guarantees to suspects who take part in significantly fewer investigative actions. In our opinion, such an advantage of suspect's active participation is only on the face of it much more beneficial to him because he gets dragged into a type of a trial before the trial in which he actually stands significantly fewer changes of challenging and testing the credibility of evidence against him than at the main hearing and thereby actually provides legitimacy to an investigation against himself!

On the other hand, we are of the belief that keeping defence attorneys out of investigations conducted by the prosecution in the manner taken to the extreme by the new Macedonian CPC is rather problematic in terms of European standards.[19]

Firstly, under the new Macedonian CPC enacted in 2010, suspects now *have no possibility whatsoever to seek judicial review* in connection with the opening and conducting of investigations.[20] Investigations are initiated by virtue of a prosecutor's decision which cannot be challenged by a

18 On the other hand, it is not a very realistic expectation that a country would set aside enough resources for consistent implementation of the new system in a time of economic crisis. Those who are well acquainted with local circumstances are concerned that the reform could be thwarted from this aspect or even intentionally sabotaged. From the experience of previous reforms in this field, neither the Ministry of Interior nor the public prosecution service are strongly inclined towards reforms or they implement them to the extent and in the manner that suits them.

19 The latest "due process" offensive lauched in Europe has thus far led to the adoption of three directives aimed at improving suspect's hights (Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty). See: J. Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective', New Criminal Law Review 14 (4), 2011, pp. 611–665.

20 Macedonia has provided in its new Criminal Procedure Code for a possibility of the judicial review of legality of actions taken by the police and prosecution, although not for the review of decisions to initiate investigation! In Croatia, the Constitutional Court has gone into another extreme by returning the Court "through the front door". See: Z. Đurđević, Rekonstrukcija, judicizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V Novelom ZKP/08: prvi dio?, Hrvatski ljetopis za kazneno pravo i praksu, no.2/2013, pp. 313-363.

legal remedy.[21] Such a legislative solution allows prosecutors to question suspects at the closure of an investigation for tactical reasons, before which they are at liberty to collect all the information about potential witnesses for the prosecution and the defence in secret.

Secondly, the issue of whether or not a suspect should be *informed* that investigative proceedings have been initiated against him (before his interrogation) has been and still is the most controversial one in Macedonia. In the process of enacting the new CPC, practitioners such as judges and public prosecutors insisted on a solution that suspects should not be informed that investigative proceedings were brought for obvious reasons, such to preclude the thwarting of investigation efforts (by fleeing, concealing evidence, tampering with a witness, and the like). Additional arguments were put forward such as the avoidance of unnecessary harassment in cases when there would be no investigation and the rareness of such situations since the accused would definitely be informed of charges or investigation against them when they were questioned, searched, etc.[22] Moreover, the fact that they had been informed would not benefit them since if they were to learn that there was an investigation/charge against them, the risk of fleeing and tampering with evidence would increase the probability of a detention order.

Nevertheless, the law does not provide some crucial answers: 1) is the accused entitled to seek information and learn if he is being investigated or 2) how is he to exercise all of his rights in respect of the investigation unless he has been informed accordingly since he is entitled to participate in investigative proceedings conducted by the public prosecutor as well as to conduct his own investigation; also, how is he to identify himself when, for instance, he seeks information from state or other authorities and persons if he does not have it "in black and white" that there is an investigation against him?!

Under the new Macedonian CPC, the accused are no longer present when witnesses are questioned by public prosecutors, except when witnesses for the defence are questioned (at the proposal of defence counsels). Thus, the accused and his defence attorney are very restrictively and in a somewhat modified manner present during investigative actions taken by a public prosecutor as state's authorised body presently in charge of preliminary proceedings.

In addition to the controversial issue of the defence being denied information about and participation in investigations carried out by the prosecution (the state), which is particularly problematic since in many cases the accused will practically be prevented from exercising the rights guaranteed to him under the law in terms of the preparation of his defence, the defence has also been facing a number of other difficulties that will be briefly examined below.

21 Suspect's position is characterized by a certain ambivalence; while on the one hand the protection of his rights is guaranteed by a range of procedural mechanisms in accordance with the highest international standards, on the other hand the moment when he learns about an investigation and starts to actively participate therein is contingent on prosecutor's decision to inform him accordingly, as opposed to his previous position in the proceedings – he was allowed to challenge grounds for opening an investigation against him as early as from the moment a decision to initiate it was issued. See: B. Dodik, Prosecutorial Investigation – the experiences of Bosnia and Herzegovina, *New Trends in Serbia's Criminal Procedure in a Regional Context (Normative and Practical Aspects)*, OSCE Mission to Serbia, Belgrade, 2012, p. 24

22 Understandably, this is not as simple as it may seem since in practice persons are sometimes questioned as suspects or witnesses during the so-called interviews conducted in preliminary investigation when they are not entitled to be advised if the prosecution has decided to initiate investigative proceedings based on such "interviews" and other information or evidence.

3.2. The right of defence to be informed about evidence against the accused and access the files

The previous CPC provided that before the accused was interrogated for the first time, he was to be advised of the grounds for suspicion (although not expressly about evidence against him) and he used to be guaranteed a rather broad right to access the files.[23] However, suspects were not informed about all the prosecution's evidence nor could they access all the files in practice. For instance, the accused and his defence attorney may not as yet access prosecution and police files; they may do it only later, when the formal judicial investigation is initiated. As a rule, a motion for conducting an investigation is read to the accused from which he learns for the first time that there is evidence against them.[24]

The manner in which the right to access information and files is exercised in practice is rather controversial. Attorneys claim that information is conveyed restrictively and that the defence is usually presented with quotes from the statement of facts (according to the criminal charge and motion for conducting an investigation); however, they are not allowed to access files immediately (never before the interrogation of a suspect) nor are they allowed to read the motion for an investigation, order to undertake special investigative measures, or the like.

The new CPC is even more restrictive with respect to providing prompt information to the defence. Namely, if the accused has been interrogated, he is bound to learn if he is a suspect or not as well as about evidence against him; nevertheless, it seems that he is only given superficial information about why he is the suspect and what evidence has been obtained against him, with the excuse that it is only an initial stage in the proceedings. Also, the accused will learn about certain evidence against him if he is remanded in custody or if there is another measure to be taken against him for which the prosecution or the court are obliged to provide arguments and evidence or an adequate statement of grounds. Nonetheless, as we have seen and in contrast to the previous situation when providing information that an investigation has been instituted used to be mandatory, the new CPC does not require that a suspect shall be informed that investigative proceedings have been instituted nor does it guarantee him the right to access files before the conclusion of those proceedings. Only after the investigation has been completed, is there to be a mandatory interrogation of the suspect during which he shall be presented with all the evidence against him; however, in contrast to the previous situation, it is mandatory that evidence learned about by the police and public prosecutor's office which can be helpful to the defence is disclosed to them (Article 302 of the new CPC).[25] From that moment on, the defence is allowed to examine the files and evidence obtained by the public prosecutor's office without any restrictions.

23 Neither the CPC nor the practice have made it clear whether or not that initial information should be disclosed in detail or the suspect should be advised in general that he is charged with a particular criminal offence, especially considering that the information is given very early in the proceedings, when not even the prosecuting authority is always able to form a clear picture of what actually happened. It seems that practitioners prefer the restrictive or minimalist approach. Truth to be told, no clear instructions on how to resolve this dilemma can be found either in international or comparative law. See: E. Cape, J. Hodgson, T. Prakken and T. Spronken: *Suspects in Europe, Antwerp*: Intersentia, 2007; E. Cape/ Z. Namoradze (eds.): Effective Criminal Defence in Eastern Europe, 2012; (available at http://www.soros.org/sites/default/files/criminal-defence-20120604.pdf).

24 An investigating judge used to advise of the fact that investigative proceedings were being conducted on grounds of reasonable suspicion that a crime had been committed prior to the first questioning, when the motion for conducting an investigation was read out.

25 The old Code did not include a clear rule on the discovery of evidence to the police and public prosecutor's office (the so-called disclosure). Namely, investigating judges could – if they deemed it necessary! – summon the parties to inform them about more relevant evidence collected in the course of an investigation.

3.3. Adequate time to prepare a defence

The provision of sufficient *time* for preparing a defence does not pertain to the interrogation of the accused in preliminary proceedings because there is no lapse between providing information to the accused about offences he is charged with and grounds for bringing those charges and the very interrogation.[26] The shortness of the time span given to the defence for the preparation of their defence strategy in cases when suspects learn for the first time that an investigation has been conducted against them only after its conclusion has also been criticised in our local circles of experts. Namely, pursuant to Article 302 of the new CPC, a suspect shall be advised in a notification of concluded investigative proceedings that he is entitled to submit his own evidence or request from the public prosecutor to collect certain evidence only within 15 days following the date on which he received said notification!

3.4. Defence's own investigation

Following the example of Italy, the Macedonian CPC now allows a possibility that the defence may conduct their own investigation for the purpose of collecting evidence in their favour in order to be able to make an efficient defence as well as to be able to achieve the equality of arms early in the proceedings, during that nevertheless critical phase.[27] With a view to the above, a defence counsel may take certain actions in order to find and gather evidence in favour of the defence.[28] The defence counsel or a private investigation authorised by him may, with the aim of gathering necessary information, interview persons who can state facts beneficial to the aims of their investigative actions.

In respect of the above, there are those who refer to it as "investigation by the defence".[29] In addition to defence counsels, the accused will also be assisted by private investigators and experts hired as the so-called technical advisors.[30] Modeled on the Italian example, technical advisors are a type of experts for the parties who are allowed to attend when tasks are assigned to expert witnesses and put in requests and state objections before the court with regard to the opinions and findings of expert witnesses, which are then entered into record. They are allowed to participate in the activities performed in the course expert witness assessments and to propose specific investigative actions to expert witnesses, as well as to make objections to be entered into a report. In that context, their role is to provide professional assistance to the defence with regard to expert

26 The accused is indeed give a certain time limit for finding a defence attorney before the first interrogation, but prior to that he is not advised of the subject matter of the charges. Consequently, the accused may prepare his defence only on the basis of what he himself knows or from meagre information stated in the summons. The only way for a suspect to give himself enough time to prepare a defence is to refuse to make a statement when he is first interrogated.

27 Professor Damaška claims and with good reason that "if the public prosecutor is entrusted with conducting the investigation, the logic of the party-driven procedure requires that the defence be also allowed to gather evidence independently, instead of limiting them – even though they are the opposing party in an adversarial proceeding – to proposing evidence and to other forms of participation in the investigation led by their opponent in the proceedings." See: M. Damaška, O nekim učincima stranački oblikovanog pripremnog postupka, Hrvatski ljetopis za kazneno pravo i praksu, no. 1/2007, pp. 3-14.

28 Under the Macedonian law, as opposed to the laws of Serbia and Croatia, the same value is attached to the evidence gathered in such a manner and to the evidence of the prosecution, which makes this attempt at providing the equality of arms flawed and problematic to a certain extent.

29 See: B. Pavišić, Novi hrvatski Zakon o kaznenom postupku, Novine u kaznenom zakonodavstvu, Inženjerski biro, Zagreb, 2009; V. Drenški Lasan, J. Novak, L. Valković, Pravni i praktični problemi dobre obrane okrivljenika, Hrvatski ljetopis za kazneno pravo i praksu, no.2/2009, pp. 521-541.

30 It is a separate issue if it is realistic to expect to have an active type of "investigative legal profession" in a poor country. Professor Pavišić claims that such a party-driven investigation (conducted by the defence) has not been producing results in Italy. See: B. Pavišić: *supra*.

witness findings. However, the fact that they can be examined in the course of direct examination indicates that the defence can use them as an independent *media probandi*, not only as a tool in the course of expert witness assessments.

4. In conclusion: more attention should be given to the rights of defence

The above paper has been an attempt to examine some controversial issues and dilemmas that the theory and legislators are facing as a result of changes in the procedural model. Judging from the differences between the texts of the Codes from the countries in the region and cited literature, we have dealt with relevant and interesting issues. Also, as previously noticed, those countries have split into two groups. Some have retained the unilateral character and formality of the investigation almost entirely, which has led to the transformation of investigative actions into the so-called evidentiary actions. Others have deformalised the investigation.

It thus follows that the essential question is actually whether or not results obtained in an investigation have probative value at a trial. Answers to that question are crucial to the position and rights of the accused in the proceedings. At the moment, there are great differences when it comes to understanding what is meant by the equality of arms between the parties in a proceeding, in which context the case law of the European Court of Human Rights is interpreted in a substantially different manner.

An effort has been made to defend the thesis that the participation of the defence in formal evidentiary actions taken by public prosecutor's offices is in effect disadvantageous to the defence since it provides legitimacy to the procedural superiority of state's prosecuting authorities. The efficiency of criminal proceedings may be achieved only on condition that the efficiency of the authority in charge of conducting investigations is fairly balanced with the rights of the defence. It can be noticed that in all the countries in the region much more regard and concern is shown for whether or not the prosecution service will be capable of responding to the challenges presented by the reform than to the issues of possibilities for putting up an efficient defence in such a new model of criminal procedure.[31]

Given the limitations of this paper in terms of its length, it has not been possible to present all the other changes in the rights of defence, such as a significant improvement in the position and rights of suspects in situations when certain coercive measures that limit their freedom or privacy are taken against them. For instance, in Macedonia there are relevant new guarantees on the treatment of suspects by the police, in the process of deprivation of liberty and during their time in detention, when special investigative measures are imposed, and the like.

A serious effort has been made to provide in the Code for making the access to defence attorneys easier for suspects, but creating conditions for ensuring that all those charged with criminal offence have an efficient defence is nevertheless a more complex problem that is not resolved only by means of a CPC. Namely, even though the right to a counsel and in particular the right of

31 See: G. Kalajdziev, The Right to a Defence Attorney According to the New Code on Criminal Procedure – Challenges and Risks, in: Pro Bono Legal Aid, CEU, Tetovo, 2011; L. Valković, Procesna prava odbrane prema V noveli Zakona o kaznenom postupku, Hrvatski ljetopis za kazneno pravo i praksu, broj 2/2013, pp.521-554.

the indigent to a defence counsel in criminal proceedings when it is in the interest of justice and fairness is one of the fundamental human rights guaranteed by international instruments, the Constitution and law, it is not far from being completely non-functional in practice.[32]

The increased engagement of lawyers as defence counsels in the new system of criminal procedure will undoubtedly have serious financial implications which have not come up for discussion yet. Virtually all the attention is given, for the time being, to preparations for the implementation of the new CPC by public prosecutor's offices. With all those tasks at hand, it has been forgotten that due to abandoning the judicial paternalism, defence attorneys will have to increase their engagement considerably as well as that someone will have to recompense for their service. For those reasons, the consequences of such radical reforms should be reflected on more closely since the newly adopted Free Legal Aid Act does not solve that problem. In that context, the possibility of establishing an economical system of legal aid lawyers as well as securing the acceptance of *pro bono* defence should be taken into consideration.

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The Defence as a Party to the Proceedings in Prosecutorial Investigation
(an analysis of the new Serbian CPC)

Introduction

The new Serbian Criminal Procedure Code (CPC) of 2011 has introduced prosecutorial investigation which includes a great number of informal procedures and formal actions undertaken by the public prosecutor and the police at his request. The prosecutor is *dominus litis* of the criminal prosecution. He decides unilaterally whether the requirements for criminal prosecution have been met, conducts the investigation and gathers evidence. Judicial review during the pre-trial proceedings is stipulated only under special circumstances. However, the new role of the prosecutor also implies responsibility for impartial collection of evidence – both the evidence which supports the charges and the evidence which suggests that the defendant is not guilty or that his guilt is of a lesser degree. According to the new model of the criminal proceedings, it is the prosecutor who is supposed to collect evidence which is in favour of the defendant as well. In light of the aforementioned, the role of the defence has changed since it is not allowed by law to collect the evidence, instead the defence is only allowed to undertake measures securing the evidence and to request such evidentiary actions to be undertaken by the prosecutor. In order to be able to undertake any actions and request anything, the defence attorney must be allowed to examine the case file and follow the investigation by being present when evidentiary actions are being undertaken. It is only then that the defence attorney is able to determine properly what direction his activities regarding the collection of the evidence should take in order to help the prosecution shed some light on the suspicion – naturally in favour of his client. Legal restrictions on the right of the defence to examine the case file and the right of the defence to be present when evidentiary

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actions are being undertaken fundamentally impair the principle of equality of arms and endanger the principle of the rule of law.

The principle of equality of arms as a constituent element of the right to a fair trial in the criminal proceeding, from Art. 6 of the European Convention on Human Rights and Fundamental Freedoms (Convention), assumes equal treatment of the parties in a sense that the defendant must not be deprived of his fundamental procedural rights in relation to the prosecutor. In ensuring the aforementioned, it is not necessary for the legislator to guarantee the parties to the proceedings complete and absolute equality of arms in advance; instead, equal opportunities to influence the course and the outcome of the criminal proceedings should be guaranteed. Equality of arms implies that each party must be afforded a reasonable opportunity to argue their case and present their evidence under the conditions which do not put the said party at a significant disadvantage compared to the opposing party. The fundamental goal of Art. 6, para. 3 of the Convention is to ensure a fair trial before the court. However, according to the jurisprudence of the European Court of Human Rights, certain requirements of the Art. 6 of the Convention may be relevant to the stages preceding the trial, primarily – the requirement regarding the reasonable duration of the pre-trial proceedings and securing the right to a defence since fairness of the proceedings may be seriously impaired if some oversights occur during the initial stages of the proceedings.[2] As the CPC introduces a principle of confidentiality of the investigation and does not prescribe the length of its duration anywhere in the text, question is raised what rights the defence has in the period from the moment the order to conduct an investigation is issued until such time the said order is served on the defendant. The problem is that this part of the criminal proceedings may last for an unspecified amount of time, kept completely secret, without recognising any rights of the defence.

The principle of the rule of law requires effective protection of human rights and liberties and has the rule that the attained level of rights cannot be reduced, while their restriction is allowed only under special circumstances and in the scope necessary to fulfil the purpose of the said restrictions. This means restricting the said right as little as possible and without encroaching on what is their substance. The CPC would have to regulate the rights of the defence during the prosecutorial investigation better – especially when it comes to the rights guaranteed by the Constitution of Serbia and the Convention and equal treatment of the parties to the criminal proceedings would have to be ensured as required by the rule of law as the fundamental principle of our constitutional order.

Certain Unconstitutional Legal Provisions

Art.68, para. 2 and Art. 68, para. 1, items 2 through 4 of the CPC do not comply with Art. 29 of the Constitution of the Republic of Serbia (RS)

The defendant has the right to be instructed that he does not have to say anything, that everything he says may be used as evidence, as well as to a hearing in the presence of a defence attorney of his own choosing. Unlike the previous CPC, which stipulated that the defendant must be advised of

2 See *Imbroscia v. Switzerland* of 24 November 1993, para. 36 and *Salduz v. Turkey* of 27 November 2008, VV 36391/02 para. 50.

his rights at the moment of the arrest, the new CPC stipulates that he shall receive this instruction right before the first hearing[3] which leaves a time vacuum during which the defendant may supply the police with various types of information and assist them to his detriment, without being previously advised of his rights. At the moment of the arrest, it is stipulated that the defendant must be informed about the reasons for the arrest and that is all. Such a provision of the law is unconstitutional. Article 29 of the Constitution of the RS stipulates that persons who are arrested without a court decision shall immediately be informed that they do not have to say anything and that they are entitled to a hearing in the presence of a defence attorney of their own choosing or if they are unable to afford a lawyer, one will be appointed to them as free legal assistance. If the Constitution prescribes that the arrested person must be "immediately" advised of his rights – at the moment of the arrest, then the law must not stipulate that the instruction on their rights is given at some later stage to the arrested person.

Art. 68, para. 1, item 1 of the CPC does not comply with Art. 33, para. 1 of the Constitution of the RS

The defendant has a right to be informed of the criminal offence he is accused of before his first hearing and of "the nature and reasons for the charge". Unlike the previous CPC, which stipulated that the defendant has the right to be informed before the first hearing of "the evidence collected against them" as well, the new CPC omits this part.[4] Such a provision of the law is unconstitutional. Article 33, para.1 of the Constitution of the RS stipulates that anyone who is accused of the commission of a criminal offence has the right to be informed of the nature and reasons of the charges against them as soon as possible, in accordance with the law, in detail and in a language the defendant understands, as well as of the collected evidence against them. The issue here is not the right of the defendant to have access to inspect the content of the collected evidence, the issue is his right to be generally informed that the evidence exists – which is required in order to be able to build any kind of defence.[5] If the Constitution prescribes that the defendant has the right to be informed about "the nature and the reasons for the charge" and "the evidence collected against them", then the law must not stipulate that they only have the right to be informed about "the nature and the reasons for the charge".

Art. 156, para. 3 with reference to Art. 156, para. 7 of the CPC does not comply with Art. 40 of the Constitution of the RS

The provisions of Art. 156, para. 3 and Art. 156, para. 7 of the CPC stipulate that the police may search the residence in the absence of the occupant and without the presence of witnesses.[6] Such a provision allows the police to plan the search when the place is empty in order to avoid serving the order, waiting for the attorney and securing witnesses, therefore there is valid concern that

3 See Art. 5, para. 1 item 1 of the 2001 CPC (*Official Gazette of the FR Yugoslavia*, no. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia* (*RS*) no. 58/2004, 85/2005, 115/2005, 85/200, 49/2007, 20/2009, 72/2009 i 76/2010) and Art. 68, para. 2, item 1 of the new (2011) Serbian CPC (*Official Gazette of the RS* no. 72/2011).

4 See Art. 4, para. 1 Item 1 of the 2001 CPC and Art. 68, para. 2 Item 1 of the 2011 CPC.

5 In order to be able to exercise his right under Art. 68, para. 1, item 10 and give a statement on the incriminating evidence, the defendant must know what kind of evidence exists. Otherwise, the defendant is expected to offer a defence without prior knowledge of the evidence which has provided grounds for suspicion.

6 See Art. 156, para. 3 with reference to Art. 156, para. 7 of the 2011 CPC.

the police might use these grounds for the search excessively as it makes their job considerably easier. Such a provision of the law is unconstitutional. Article 40 of the Constitution prescribes that the person whose residence or other premises are subject to a search has the right to be present during the search in person or through a representative and with two other witnesses who are not under aged. If the person whose residence is being searched is not present and neither is their representative, the search may be conducted in the presence of two witnesses who are not under aged. Entering somebody's residence or other premises and, exceptionally, conducting a search without any witnesses, without a court order, is allowed if it is necessary in order to directly arrest the perpetrator of a criminal offence or eliminate immediate and serious threat for people or property, as prescribed by a law. Therefore, the Constitution leaves to an act of legislation (law) only the regulation of how the search is to be conducted without the presence of the witnesses, but it does not allow a law to expand circumstances under which such a search would be allowed. The Constitution limits these circumstances to two aforementioned situations – if it is necessary in order to arrest the perpetrator of a criminal offence or to eliminate immediate and serious threat for people or property. These two situations are further regulated under Art, 158, paras. 1 of the CPC. Consequently, adding three more situations to the list of possibilities for the search of the residence without any witnesses present, as described under Art. 156, para. 3 of the CPC - when armed resistance or other type of violence is assumed, if it is clear that destruction of traces of crime or items relevant to the proceedings is either being prepared or has already started, or if the person whose residence or other premises are being searched cannot be reached - does not comply with Art. 40 of the Serbian Constitution. As already said, the Constitution does not prescribe anywhere that the search of a residence without any witnesses present is even possible in such situations.

Art. 7 and Art. 296 of the CPC do not comply with Art. 32 of the Constitution of the RS

Criminal proceeding is initiated when the public prosecutor issues an order, for which there is no legal remedy, for an investigation to be conducted.[7] Therefore, only the public prosecutor decides whether there are grounds for criminal proceedings to be initiated, which is decided without any judicial review, and then the investigation does not have any time restriction regarding its duration. Such a provision of the law is unconstitutional. Article 32 of the Constitution of the RS stipulates that everyone has the right which ensures that an independent and impartial court which has been established by law, should fairly and in a reasonable amount of time deliberate and decide on his rights and duties and whether the grounds for suspicion due to which the proceedings have been initiated are well-founded, as well as on the charges against him. Therefore, it is the court that should decide both on whether the suspicion is well-founded and on the charges. If the Constitution prescribes that the court must decide whether the suspicion which caused the criminal proceedings to be initiated is well-founded, then a law, such as the CPC, is not allowed to stipulate that whether the suspicion is well-founded should be decided by the public prosecutor by an order which offers no legal recourse for the court to decide. Since the CPC does not prescribe anywhere the time by which the prosecutor must conclude the investigation, it is clear that the investigation may continue indefinitely without asking the court at any point in time to decide whether the suspicion which has resulted in the investigation order, thus initiating the criminal proceedings, is well-founded or not.

7 See Art. 7 and Art. 296 of the 2011 CPC.

The right to legal remedy is a universal human and civil right. Article 13 of the European Convention on Human Rights prescribes that anyone whose rights and freedoms established by the Convention are encroached upon or violated is entitled to an effective remedy before the state authorities. The Constitution guarantees the right to an appeal which may be precluded under special circumstances only if other legal protection is ensured. There is no legal remedy against the order to conduct an investigation, which means that legal validity of this action initiating the criminal proceedings is not reviewed at all.[8] With regard to this, a question is raised whether the legislator is under a constitutional obligation to prescribe legal recourse against unlawful criminal prosecution. The whole catalogue of human rights and freedoms guaranteed by the Constitution is directed towards judicial protection. The entire text of the Constitution is permeated with the guarantees of judicial protection. The whole constitutional order is founded on the rule of law and the principle of legality which are protected by the court. Therefore, it is not in the spirit of the Constitution to allow the public prosecutor to decide whether to initiate criminal proceedings without any right to an appeal or other judicial protection.

Art. 69, Par. 1 Item 2 of the CPC does not comply with Art. 33 of the Constitution of the RS

The right to confidential communication with the defence attorney is prescribed only within the scope of the rights of the arrested person, but not in the CPC's list of defendant's rights. In practice this is going to be interpreted – by *argumentum a contrario* - that the defendant who is not arrested does not have the right to confidential communication. So, if the defendant is summoned after being advised on the criminal offence he is accused of, the defendant shall not have the opportunity to talk to the defence attorney in confidence before they start arguing their defence.

Such a provision of the law is unconstitutional. Article 33, para. 2, of the Constitution stipulates that anyone who is accused of committing a criminal offence has the right to a defence and to hire a defence attorney of his own choosing, to unimpeded communication with the said attorney and to be afforded adequate time and appropriate conditions to prepare the defence. The defendants who respond to the summons are discriminated against compared to the arrested persons since they cannot be aware in advance why they are being summoned, and once they learn the reason, they no longer have the right to consult the defence attorney on their defence, which must be built before they even learn what exactly they are being accused of. Consequently, they are allowed neither adequate time nor appropriate conditions for the preparation of the defence, which is direct violation of Art. 33, para.. 2 of the Constitution.

8 In Croatia, the decision on conducting the investigation is served on the defendant within eight days from the moment it is rendered, the defendant has the right to an appeal, and the appeal is decided by the investigating judge within eight days (Art. 218 of the Criminal Procedure Code of Croatia). The criminal proceedings start only after the decision on conducting the investigation becomes final (Art. 17, para. 1 of the CPC of Croatia). Only if serving the said decision would endanger life and limb of a person or property on a large scale, public prosecutor may defer serving the decision for no more than thirty days and only if the investigation involves one of the listed criminal offences – against the state or armed forces, terrorism and conspiracy to commit a crime (Art. 218a, Par. 1 of the CPC of Croatia).

Questionable Confidentiality and Unspecified Duration of the Investigation

The new CPC prescribes that the information whether some person is being investigated shall be available only to the court, the prosecutor and the police.[9] The prosecutor has the right to independently decide the sequence in which evidentiary actions are to be taken during the investigation. The prosecutor is only under an obligation to order the investigation to be conducted within 30 days from the day he was informed of the first evidentiary action undertaken by the police, but he is not under an obligation to serve the said order on the defendant and the defence attorney. The new CPC allows the investigation to be conducted when the perpetrator is unknown, which provides the prosecutor with the possibility to conduct the whole investigation without the participation of the defendant or the defence attorney if he claims that the information identifying the perpetrator was obtained at the end of the investigation.[10] The defence learns about the investigation only when the prosecutor decides to serve the investigation order on the defendant and the defence attorney, which he must do only after the first action during which they are allowed to be present is planned.[11] However, the prosecutor without the defence present may question a vulnerable witness (Art. 300, Par. 2) or any other witness if he obtains authorisation from the pre-trial judge or if the perpetrator is unidentified when the investigation is initiated but is later identified (Art. 300, Par. 6). This allows the prosecutor to devise a strategy regarding the sequence in which the evidentiary actions are to be undertaken in order to lead the investigation as long as possible without any type of participation of the defence.[12]

Such a provision does not comply with the requirements which are derived from the rule of law, especially with the requirements of legal security and legal certainty with regard to the right to a fair trial. The investigation order is issued and the investigation is in progress while the person who is subject to the said investigation is not aware of it at all nor is this person advised of his rights. The defendant who does not know that he is being investigated cannot exercise his right to learn what the grounds for this suspicion are, the right to view the file, the right to propose evidentiary actions to be undertaken. Such content of the provision violates the right of access to court and the right to have the proceedings completed within a reasonable time. Therefore, it is not constitutionally acceptable to delay service of the investigation order. The CPC should prescribe the order to be served without delay and an effective mechanism ensuring judicial protection from an unlawful (arbitrary) criminal investigation and prosecution.

For instance, the investigation is not secret in Croatia, but it may be - in part or in its entirety - only if there are some grounds for the exclusion of the public from the trial and if publishing some information related to the investigation would have an adverse effect on its results (Art. 231, para. 2 of the CPC Cro). The public prosecutor must complete the investigation within six months but a time extension of another six months may be allowed by a higher State Attorney in complex cases, and in particularly complex and difficult cases, Attorney General may allow a time extension of another 12 months (Art. 229, para. 2 of the CPC Cro). After the set time

9 See Art. 10, para.. 2 and Art. 297, para. 1 of the 2011 CPC.
10 See Art. 6, para. 1 and Art. 297, para. 2 of the 2011 CPC.
11 See Art. 296, para. 2 and Art. 297, para. 1 of the 2011 CPC.
12 When the investigation is secret, then it stands to reason that the interrogation of the suspect is among the last evidentiary actions to be undertaken by the prosecutor. The prosecutor will use his right to propose witnesses first also by labeling the witnesses for the defence as the witnesses for the prosecution, by which he can prevent the defence to contact these witnesses during the investigation for the purpose of preparing them for the testimony while also depriving the defence of direct examination of such witnesses at the main hearing.

elapses, the defendant has the right to file a complaint with the investigating judge regarding the delayed proceedings (Art. 229, para. 1 of the CPC Cro) which is an effective legal recourse against unreasonably prolonged duration of the investigation since it allows the investigating judge to pass a ruling terminating or suspending prosecutorial investigation in each case where he finds while deciding an issue that there are grounds for termination or suspension of the investigation (Art. 226, Par. 1 of the CPC Cro). If the panel does not confirm the indictment in its entirety or in part, the public prosecutor must pass a ruling on the amendment of the investigation or undertake an investigative action within eight days from the service of the ruling, and if he fails to do so, it is considered that the prosecutor is desisting from criminal prosecution (Art. 356, para. 3 and 4 of the CPC Cro), which means that the suspension of the investigation is prescribed as a concrete procedural repercussion for the prosecutor's omission.

Therefore, a time limit should be set for the pre-trial proceedings and its stages since this secures legal predictability and provides the citizens with legal security. It would also be advisable to specify procedural repercussions if the investigation does not lead to expected results within a certain period of time, which would motivate the prosecutor to determine if there are grounds to continue criminal prosecution or not within a reasonable time. In such a way, the review of the reasonable duration in terms of the legal standards of the Convention would be avoided since this standard is only applied if there are no stipulated deadlines. The existence of an effective legal recourse against unreasonably prolonged court proceedings was set as a European legal standard by the European Court of Human Rights as early as in 2000.[13]

The Right of the Defence to Examine the Case File

Before the first hearing the defence attorney has the right to read only the criminal charge, report on the crime scene investigation and the findings and the opinion of an expert witness. Ambiguity of the aforementioned norm leaves room for a restrictive interpretation which can be encountered in practice, that the defence attorney has the right to read the criminal charge, but not what is enclosed with it. This norm was introduced at a time when the report on the crime scene investigation and the opinion and the findings of the expert witness were the only legally valid evidence found enclosed with the criminal charge, but that is not the case anymore. The prosecutor who is in charge of the case may undertake before the defendant is questioned many evidentiary actions on which the court decision may be based. However, the defendant is not allowed to examine the contents of such evidentiary actions before his first hearing.

The defendant first learns what is in the criminal charge and talks to a defence attorney in confidence immediately before the first hearing, so the defendant and the defence attorney examine what are the grounds for the suspicion in a very short period of time, conduct this confidential conversation, decide on the defence and present it, which diminishes the value of the right itself since the said conversation is regularly in practice limited for practical reasons to a certain "reasonable amount of time of about 20 minutes". This is really not enough to get familiarised with the content of the evidence or to decide on the defence strategy. Such a provision does not comply with Art. 32 of the Constitution which stipulates that anyone who is accused of the commission of a criminal offence is entitled to adequate amount of time and appropriate conditions

13 See the verdict in the case *Kudla v. Poland* , ECtHR, 26 October 2000, request no. 30210/96.

for the preparation of the defence. This problem is particularly prominent in more complex cases where the criminal charge is a hundred-page long document and where the documentation is extremely extensive even at the initial stage. The sole purpose of the rule that the criminal charge should not include official notes on received information from the members of the public is to limit the defence attorney's access to information and make the defence strategy harder to plan.[14] At the moment of the first hearing the defence attorney and the prosecutor are not equal since the prosecutor has all the information and the evidence and the defence attorney has next to nothing.

The defence attorney has the right to examine the documentation and inspect the items which are going to be used as evidence after the first hearing. The exercise of this right in practice has given rise to the question whether all of the documentation can be examined or just the documentation which can be used as evidence. Since there is no comma after the word "items" in this norm, it is clear that "the documentation" is what is being examined and not "the documentation which may be used as evidence".

The prosecutor is allowed to suspend the defence's right to examine the documentation until such time the last suspect has been heard[15], which leaves room for manipulation since the prosecutor independently decides on the order in which the evidentiary actions are being undertaken and is able to actually put the defence attorney in the position to be present at the hearing of witnesses even though he is not familiar with the relevant documentation due to the fact that one of the co-suspects has not been heard yet.[16]

Without the right to examine the case file, the right to a defence represents *nudum ius*. By effectively exercising this right, the defendant plays an active role and transforms from just being "subject to the investigation" into "the party to the criminal proceedings". The fairness of the criminal proceedings shall depend to a great extent on the said right and the way it is exercised.

The Right of the Defence to be Present While Evidentiary Actions are Being Undertaken During the Investigation

The prosecutor must only "send the summons" and not serve the summons for the hearing of the suspect and the examination of the witnesses and expert witnesses. According to the stand taken by the Republic Public Prosecutor and the practice of the Office of the Prosecutor for Organised Crime, the defence attorneys of the co-defendants who have already been heard are not allowed to be present during these, although this used to be allowed according to the previous CPC. With regard to summoning the defence attorney, the law uses the phrase "send the summons" rather than "to summon", which means that it is sufficient that the prosecutor is able to supply a receipt

14 See Art. 288, Par. 8 of the 2011 CPC.

15 Ibid.

16 In Croatia – the defendant and the defence attorney have the right to examine the documentation from the service of the investigation order and if the defendant has been interrogated before the investigation was ordered, immediately after the interrogation (Art. 184, para. 4 of the CPC Cro). If there is a risk that viewing a part or of the entire documentation would jeopardise the purpose of the investigation by making it difficult or preventing the collection of important part of the evidence or if this would put lives at risk, pose a physical threat or endanger property on a large scale, the defendant may be prevented from examining a part or the entire documentation for no more than 30 days from the service of the investigation order (Art. 184a, Par. 1 of the CPC Cro)

proving the summons have been sent properly, and not the receipt proving that the defence attorney has actually received the summons.[17]

The prosecutor may examine a witness or an expert witness – regardless of the fact whether the defence attorney has been properly summoned – if he first obtains the preliminary proceeding judge's approval.[18] This means that it has no bearing on the legality of the evidentiary action during the investigation whether the defence attorney has a legitimate reason to be absent since the evidentiary action will proceed in his absence, just as it has no bearing if the defence attorney has actually received the summons as long as it has been sent as required, and just as it has no bearing if the defence attorney has been summoned at all as long as the prosecutor has previously obtained the consent of the preliminary proceeding judge. Consequently, it would be possible for the prosecutor to examine all the witnesses with the consent of the preliminary proceeding judge before the investigation order is served on the suspect along with the summons for his hearing.[19]

The principle of confidentiality of the investigation especially comes into play with regard to the prosecutors of special jurisdiction (for organized crime and for war crimes) as they are given the authorisation to examine witnesses without summoning the suspect and the defence attorney to be present "if they find that their presence may influence the witnesses".[20] The key question is: who has something against the presence of the defence attorney during the examination of witnesses and why? It is possible that the witness is disturbed by the presence of the defendant, but it is not realistic that the defence attorney's presence is an issue since he does not have the right to ask questions directly, but is allowed only to request a question to be asked by the prosecutor and may object to certain evidentiary actions only after the examination of the witness is concluded. If the witness is afraid to testify, the status of protected witness is available for such situations. As they stand now, these norms allow the prosecutor to completely exclude the defence attorney from the investigation based on the prosecutor's own discretionary assessment.

The Right of the Defence to Propose Certain Evidentiary Actions to be Undertaken by the Public Prosecutor

The defence attorney has the right to propose certain evidentiary actions to be undertaken by the public prosecutor. If the prosecutor refuses to undertake such actions or does not decide on this matter within eight days, the defence attorney may file a motion with preliminary proceeding judge who shall within eight days either grant it and order the prosecutor to undertake the said action or deny it. It is expected here that the prosecutor is going to undertake an evidentiary action in favour of the defence adequately although he initially objected to the said action.

17 See Art. 300, para. 1 of the 2011 CPC.

18 Ibid, para. 6.

19 In Croatia, if the public prosecutor has not served a notice on the defendant before an evidentiary action of examining the witness has been undertaken, the defendant has the right to request the said action to be repeated which shall be decided on by an investigation judge who may order the public prosecutor to re-examine the witnesses. In such a case the report on the earlier examination of the witness shall be excluded from the case file and may not be used as evidence. (Art. 213a, para. 1 and 2 of the CPC Cro).

20 See Art. 300, para.2 of the 2011 CPC. In such a case, the court decision may not be based solely on the said witness' statement or treat the said statement as a deciding factor, but a deciding factor is a vague term and the status, during the proceedings, of the evidence acquired indirectly using the information from the said testimony is not defined. If certain information is obtained through the statement of a certain witness and then based on such information other evidence is obtained – is the court decision then treating the statement made by this witness as a deciding factor? It is to be expected that this norm shall be interpreted restrictively by the courts.

It remains unclear why the CPC has not prescribed evidentiary hearing – an evidentiary action undertaken by a preliminary proceeding judge in certain cases if it is probable that the evidence in question shall not be available to be presented at the main hearing.

For instance, in Croatia – at the request by the public prosecutor, the injured party as the prosecutor, or the defendant, the investigative judge may hold an evidentiary hearing in order to present the evidence if it is necessary to examine a witness referred to under Articles 292 and 293 of the Croatian CPC or if some other evidence will not be available at a later time. The investigative judge issues an order within 48 hours scheduling the evidentiary hearing or denies the motion in a ruling but the person filing it has the right to file an appeal against the said ruling with the judicial panel within 24 hours, and the panel must decide on the appeal within the 48 hours (Art. 235, para.. 1, Art. 237, para. 1 of the CPC Cro). The evidentiary hearing is attended by the public prosecutor, the defendant, the defence attorney and the injured party and they may object and request the investigative judge to ask the witness or expert witness certain questions in order to clarify matters and if the judge allows it they may ask the questions directly (Art. 238, para. 2 and 4 of the CPC Cro) Similarly, in Republika Srpska and the Federation of Bosnia and Herzegovina, the pre-trial judge at the request of the parties or the defence attorney may order a witness to be deposed at a special hearing when it is in the interest of justice to hear the witness in order to use such a deposition at the main hearing because there is a possibility that the said witness is not going to be available to the court during the trial (Art. 231, Par. 1 of the CPC Republika Srpska).

The Right of the Defence to Undertake the Actions for the Preservation of Evidence During the Investigation

Unlike the prosecutor who undertakes evidentiary actions during the investigation, the defence attorney is authorised just to collect the evidence i.e. to undertake preparatory actions for the preservation of evidence, and has the possibility to propose to the public prosecutor that one of these evidentiary actions is undertaken during the investigation. The defendant and the defence attorney have the right during the investigation to independently collect the evidence and the material in favour of the defence and to interview to this end a person who is able to provide information useful for the defence, as well as to obtain the necessary statements and notices from such a person provided that this person is not the injured party or someone who has already been interviewed by the police or the public prosecutor.[21] The most important of all implicit principles from the Convention is the principle of "the equality of arms" which implies that both parties to the proceedings are authorised to be informed of the facts and arguments of the opposing party and that each party must have equal opportunity to offer a response to the other party. However, the CPC does not ban the police and the prosecutor to take statements from such persons who have already given their statements to the defence attorney, which means that they are allowed to do so. Since the defence attorney is not required by law to be present when the police or the prosecutor summon a person who has already given their statement to the defence attorney for the

21 See Art. 301, para. 3 of the 2011 CPC. In Croatia, this restriction is reduced only to the ban on contacting the victim and the injured party (Art. 67, Par. 2 of the CPC Cro). Therefore, *ratio legis* is unclear for such a broad formulation of the exception in the Serbian CPC which significantly reduces the rights of the defence. Such a legal provision allows the prosecutor to identify, locate and take statements from all of the potential witnesses immediately after the event, with the assistance of the police and based on the information obtained by them and thus limit the right of the defence to collect evidence indirectly – which will become commonplace in practice.

purpose of taking a new statement, it can be expected that the defence witnesses shall have double statements putting into question their credibility.

The right to interview a person who is able to provide some information useful for the defence, the right to obtain written statements and notices, the right to enter a residence and private premises and the right to take items and documents issuing a mandatory receipt – all these the defence attorney may exercise only with the consent of the person in question. [22] However, the CPC does not provide for a possibility for the defence attorney to enforce this right using an order from the preliminary proceeding judge with the assistance of the police or under a threat of a court fine or imprisonment.[23]

The Defence's Duty to Disclose to the Prosecutor All of the Obtained Evidence

The defence attorney must notify the prosecutor immediately after the evidence has been obtained and allow him access to the obtained evidence before the investigation has been concluded.[24] The duty imposed on the defence attorney to allow the prosecutor to examine the defence's documentation before the investigation is concluded does not comply with the presumption of innocence and the rule stating that it is up to the prosecution to prove the guilt and not the defence to prove the innocence. In such a way, the defence is deprived of any possibility to plan any kind of strategy and the defence attorney must submit to the prosecutor even the material which may be of use to the prosecution. The defence attorney must be allowed to freely choose what evidence he is going to use against the evidence of the prosecution, but only after he has assessed the results of the presentation of the evidence of the prosecution at the main hearing.

The imposed duty and the rule according to which the defence must propose all of the evidence as early as at the preparatory hearing infringe the defendant's right to defend himself in the way he deems the best, since he is practically forced to present the evidence and disclose the concept of the defence at the very beginning of the proceedings. Such a legal restriction of the right to a defence cannot be justified by saying it is in the interest of the efficiency of the proceedings. The right to remain silent during the proceedings, the right of the defendant not to incriminate himself as well as the right of the defendant to defend himself in the way and at the moment he deems the most opportune are at the heart of the right to a fair trial.[25]

The European Court has taken a stand regarding the right to a fair trial referred to under Art. 6, para. 1 of the Convention that when it comes to assessing the fairness of the criminal proceedings, it is not that important whether the proceedings of the local competent authorities have

22 See Art. 301, para. 2 of the 2011 CPC.

23 Some cases will occur in practice where the defence attorney is not going to be able to fulfil certain requests for obtaining items and taking statements because the persons in question will prefer not to be involved in the proceedings that do not directly concern them. If the defence does not have the possibility to warn such persons that avoidance of providing assistance in the determination of truth in the criminal proceedings amounts to practically obstructing the criminal proceedings and the evidentiary process in terms of "obstruction of justice", these norms are going to remain proclaimed without offering the possibility of actually enforcing their application effectively in practice. In Republika Srpska and the Federation of BiH, anyone who is in a possession of an item must hand it over at the court order for the seizure of the said item, and those who refuse may be fined with up to 50 000 KM and if they persist in refusing to hand it over – they may be imprisoned until such time the item is handed over or the proceedings are concluded and no more than 90 days. This rule applies to an officer in charge or a liable person in the state authorities or a legal entity, and the only exceptions are the suspect and the persons who are exempt from testifying. (Art. 129, para. 5 and 9 of the CPC of Republika Srpska)

24 See Art. 303, para. 3 of the 2011 CPC.

25 See *Jalloh v. Germany*, ECtHR , 2006, *J.B. v. Switzerland*, ECtHR , 2001, *Allan v. the UK*, ECtHR, 2003.

abided by the formal rules of local procedure regarding the collection of evidence and the procedure for dealing with the evidence, as much as it is important if there are indications that through the use of the said evidence to get a conviction, the autonomous principles of "regularity" have not been violated as referred to under Art. 6 of the Convention, specifically : the accusatory procedure, equality of arms, as well as the absence of inducement to the commission of a crime and undue pressure to waive the right to remain silent.[26]

The Prosecution is Not Under an Obligation to Disclose All of the Collected Evidence

Since the CPC imposes an obligation on the Prosecutor's Office and the police to confirm the suspicion that a criminal offence has been committed impartially and to examine both facts that support the prosecution's case and the facts that are in favour of the defendant equally closely, they must collect both the incriminating and the exculpatory evidence equally attentively. This provision perhaps best illustrates the dichotomous nature of the public prosecutor's role – as the investigator and the opposing party. As an investigator, he must impartially confirm the suspicion as referred to under Art. 6, para. 4 of the CPC. However, this role of the prosecutor does not include an obligation to present the evidence during the proceedings in favour of the person who is being accused if he does not find them to be credible while presenting the indictment. This is a very delicate legal issue which requires the legislator to find a fair balance between, on one side, the prosecutor collecting all of the evidence while presenting before the court just the evidence on which the indictment is based and, on the other, the defence, which must have access to all of the evidence the prosecution has collected and such a status in the proceedings which allows the defence to use effectively any such evidence obtained which is in favour of the defendant.

The defence is not conducting its own investigation but is only collecting certain information on the evidence, but the defence may propose certain evidentiary actions to be undertaken by the prosecutor. It seems, however, that a fair balance between the prosecution and the defence cannot be achieved if there is no legal obligation of the prosecutor to enclose with the indictment all of the evidence he has obtained as an investigator and thus present all of the evidence both to the court and the defence. Therefore, it is necessary to stipulate in the CPC that the prosecutor must disclose all of the evidence obtained so that the defence, too, is able to examine it in order to assess their relevance. A list of all the evidentiary actions that have been undertaken and a list of all of the documents proposed as evidence should be submitted by the prosecutor to the court as well as the list of evidence obtained but which are not planned to be presented, which CPC does not stipulate anywhere. Without an obligation to disclose every piece of evidence, the principle of equality of arms and fair trial are jeopardised.[27]

26 In Croatia, at the preparatory hearing, the defence attorney may even make a statement after the evidence proposed by the prosecutor has been presented, and the defendant is questioned at the end of the evidentiary hearing unless he requests otherwise – which means that the formulation of the defence follows the examination of the results of the prosecution's evidence (Art. 417, para. 1 and 5 of the CPC Cro). In the Republika Srpska and the Federation of BiH, the court shall instruct the defendant that he may give his statement during the evidentiary proceedings as a witness and if he decides to do so, he shall be directly examined and cross-examined. This is just an option not an obligation. (Art. 274, para. 2 of the CPC of Republika Srpska). The prosecutor shall briefly present the evidence on which the indictment is based at the beginning of the main hearing and the defendant or his attorney may then present the defence, but they do not have to. Instead, they may wait to see the effect of the prosecution's evidence in order to decide what needs to be proven and if there is any need to prove anything (Art. 275 of the CPC RS)I

27 In Republika Srpska and the Federation BiH, a legal obligation is imposed on both the court and the prosecutor to allow any obtained information or fact which may be used as evidence to be examined by the defence attorney and the defendant. (Art. 55, para.. 4 of the CPC Republika Srpska)I

The Necessity of Effective and Timely Exclusion of Unlawful Evidence

Court decision may not be based on evidence which does not "comply with the law" either directly or indirectly, in itself or in the way it has been obtained, and not just on the evidence "which the law expressly forbids".[28] Such formulation of the law provides the grounds for a claim that court decisions may not be based on the evidence which is indirectly obtained – as a result of unlawful conduct and must share the legal fate of the unlawful conduct itself due to this fact, according to the 'fruits of the poisonous tree' doctrine.[29]

Since the CPC allows only an appeal to be filed against the ruling which grants the motion to exclude unlawful evidence, but not the ruling denying the said motion, it would be advisable to prescribe a mechanism for timely separation of the lawful and unlawful evidence in order to prevent the contamination of the evidence during the proceedings.

In Croatia, the investigating judge, before the investigation is concluded, or the presiding judge of the indictment panel, after the indictment has been submitted for confirmation and before it has been reviewed, at the motion of the parties or *ex officio*, shall decide in a ruling on the exclusion from the case file of unlawful evidence immediately or within no more than three days from the moment of receiving the information about it. A special appeal is allowed against the ruling on the motion of the parties or on the exclusion of evidence, an a higher court shall decide on such an appeal. Therefore, there is a second instance if the motion to exclude unlawful evidence is denied and against the decision of the investigating judge or the decision of the presiding judge of the indictment panel or the indictment panel (Art. 86, Par. 1 of the CPC Cro).[30] There are no constitutionally acceptable reasons which explain why a deadline has not been set in Serbia for preliminary proceeding judge's decision on the exclusion of evidence, which would start running from the moment of the receipt of the motion filed by the parties or the moment the judge personally learns about the said evidence. Unlawful evidence may be removed from the case file on two separate occasions during the proceedings – at the end of the investigation and at the end of the main hearing.[31] By prescribing just a final deadline for the exclusion of unlawful evidence which is actually quite a long period of time, the preliminary proceeding judge is allowed to use the material containing unlawful evidence when rendering his decisions such as

28 See Art. 18, para. 2 of the 2001CPC and the Art. 16, para. 1 of the 2011 CPC.

29 In Croatia, there is a rule according to which the evidence which resulted from the information obtained through unlawful evidence is also unlawful (Art. 10, para. 2, Item 4 of the CPC Cro). In the Republika Srpska and the Federation BiH, it is prescribed that the court cannot base its decision on the evidence obtained by a violation of human rights and freedoms prescribed by the Constitution and international agreements, nor on the evidence obtained by substantial violations of the CPC, and the court may not base its decision on the evidence which has been obtained through the unlawful evidence (Art. 10, Par. 2 and 3 of the CPC Republika Srpska).

30 In Croatia, a session of the indictment panel is held regarding the review of the indictment to which the public prosecutor, the defendant and the defence attorney are summoned if the proceedings involve a criminal offence punishable under law by a term in prison of up to 5 years. At such a session, the parties present and explain their conclusions using the data from the case file. The public prosecutor presents briefly the results of the investigation and the evidence on which the indictment is based, whereas the defendant and the defence attorney may point out the evidence which is in favour of the defendant, possible omissions of the investigation and what evidence is unlawful. If the panel suspects that certain evidence is unlawful, and without the presentation of additional evidence cannot make a decision on this issue, the hearing shall be postponed and a new one shall be immediately scheduled, at which the evidence relevant for the establishment of facts regarding the lawfulness of the evidence shall be presented (preliminary proceedings on the lawfulness of evidence) and it shall first be decided whether the evidence is lawful and then a decision on the indictment shall be rendered. A special appeal against the aforementioned court decision may be filed which shall be decided on by a higher court. The excluded evidence cannot be examined or used when deciding the criminal proceedings (Art. 349 – 351 of the CPC Cro). If the panel finds that there is insufficient evidence that defendant is reasonably suspected for the offence he is prosecuted for i.e. that the obtained evidence is so obviously conflicting that a conviction would be impossible to get at the main hearing – the proceedings shall be suspended (Art. 355, para. 1, Item 4 of the CPC Cro).

31 See Art. 237 and Art. 407 of the CPC.

the decisions on measures securing the presence of the defendant, on temporary seizure of proceeds from crime as well as the decisions of the pre-trial panel of judges during the investigation. All these decisions are included in the case file contaminated with the unlawful evidence which might even be excluded at some point, but all of these decisions remain in the file during the later stages of the proceedings.

Key issue here is that it is not stipulated that the use of unlawful evidence during the presentation of evidence is not allowed, and neither is the treatment during the proceedings of the evidence which has stemmed from the use of unlawful evidence. The use of unlawful evidence is no longer classified by the CPC as an absolutely substantive violation of the criminal proceedings.[32] This is now a relatively substantive violation of the criminal proceedings as the judgment shall not be overturned if the second instance court has found that even without such evidence the judgment would have remained the same. Such a provision of the law completely discredits the "poisonous tree" doctrine as proclaimed under Art. 16 of the CPC.

The Evidentiary Actions Undertaken During the Prosecutorial Investigation and Their Procedural Relevance

If the defendant has the constitutional right to request the defence witnesses to be examined under the same conditions as the prosecution's witnesses, a question is raised whether it is constitutionally acceptable to read prosecution's witness statements at the main hearing if these witnesses were questioned by the prosecutor without a possibility of direct examination and cross-examination. It is also a question whether it is constitutionally acceptable to read the prosecution's witness statements at the main hearing in cases when there has been no attempt to secure the presence of the defence because the presence of the defendant or the defence attorney according to the prosecutor's own assessment could have influenced the witness's statement (Art. 300, para. 2), or the witness has been interviewed in accordance with the pre-trial judge's authorisation (Art. 300, para. 6), or the witness has been interviewed during the investigation conducted against an unknown perpetrator who has been identified only at a later stage. Therefore, these are situations in which there was no attempt made to enable the defence to participate in the questioning of witnesses during the investigation when pursuant to Art. 406 of the CPC the requirements for the evidence to be read at the main hearing have been met.

In such cases, the principles of direct examination and of adversarial argumentation are not adhered to and they must be strictly and restrictively prescribed and understood since these are fundamental principles of fair trial. Therefore, when answering this question one must start at Art. 32 of the Constitution which stipulates that anyone who is tried for committing a criminal offence has the right to present the evidence in his favour, examine the prosecution's witnesses and to request that the witnesses for the defence are examined under the same conditions as the prosecution's witnesses either in person or through a defence attorney. It is an elementary principle that the defendant must have an effective possibility during the criminal proceedings to refute the evidence against him. This principle requires the defendant to have the opportunity to examine if the claims are true and credible by being present while the witnesses are being questioned orally. The European Court determines the fundamental rule in

32 See Art. 438, para 2. 1, item 11 and para.2 of the CPC.

relation to the rights under the Convention when it comes to the principle of adversarial procedure and examination of witnesses and according to that rule before the judgment of conviction is pronounced all of the evidence must be presented in a public hearing in the presence of the defendant so that he might refute it.

Therefore, in all of the situations when the witness has been questioned during the investigation without summoning the defendant or the defence attorney, it is not possible to read their statements at the main hearing since the defendant has not been provided with an opportunity to exercise his constitutional right pursuant to Art. 32 of the Serbian Constitution during the proceedings, which takes precedence over the legal possibility that such statements are allowed to be formally read. If the judicial practice takes this stand, the prosecutor will find it to be too risky to apply Art. 300, para. 2 and Art. 300, para. 6 of the CPC extensively because it will open up the possibility that a statement of such a witness will not be allowed to be read at the main hearing when the legal requirements for this are met. Reading such statements would constitute a violation of the principle of equality of arms since it would exclude the review of the prosecution's evidence and it would degrade the procedural balance of the prosecutorial investigation.

The principle of direct examination, the principle of adversarial argumentation and the principle of equality of arms are regulated properly in Republika Srpska and the Federation BiH where the duty of the court to treat both parties and the defence attorney in the same way is proclaimed as a principle as well as the duty to provide each party with the opportunity to have access to evidence and their presentation at the main hearing (Art. 14, para. 1 of the CPC Republika Srpska). The witness statement given during the investigation cannot be used at the main hearing if the witness is present, and when the party requests a statement obtained during the investigation to be taken into account at the main hearing they must prove that despite all the effort to secure the presence of the said witness, the witness remained unavailable (Art, 231, para. 2 of the CPC Republika Srpska). The statements obtained during the investigation may be used as evidence at the main hearing and may be used solely during the direct or cross-examination or when disputing the allegations made or in response to the refuting of evidence or additional examination, after which the said statements shall be submitted as evidence. In such a case, the person may be given the opportunity to explain or retract their previous statement. Under special circumstances, the reports on the statements made during the investigation may be read out pursuant to a decision by a judge or a panel and be used as evidence at the main hearing only if the persons in question have died or have developed a permanent mental illness, or cannot be found, or their appearance before the court is impossible, or is significantly made difficult due to valid reasons (Art. 288, paras. 1 and 2 of the CPC Republika Srpska). Consequently, the statements made during the investigation may be used as evidence at the main hearing only during the direct or cross-examination if the witnesses change their previously given statements and only for the purpose of determining the credibility of the witness or the statement and to that end they are submitted as evidence on the given statement.

Plea Agreements and Testimony Agreements Must be Corroborated by Evidence

Plea agreements and the agreements on the testimony of the defendant or the convicted person must be supported by some other evidence that the defendant has committed a criminal offence. This would eliminate the possibility that someone could be convicted solely based on false testimony as it is to be expected that many defendants are going to lie in order to secure a lesser punishment they are promised. It is necessary to secure a mechanism which could confirm the credibility or the truthfulness of a given statement. Otherwise, legal security of the citizens would be jeopardised since it would be sufficient to obtain someone's false statement to get a conviction. In addition, by reading the report or the judgment concerning the fact established based on the statement of a person rather than examining the said person at the trial, the right of the defence to examine such a witness for the prosecution is violated. The state of facts established in the judgment based on a plea agreement or a settlement agreement would not have been established in accordance with the procedural guarantees of a fair trial. The European Court has established a rule of a "sole or deciding evidence" as a test for confirming whether the evidence is admissible under the assumption that a conviction which in its entirety or in its deciding part is based on the statement of a witness who was not directly examined by the defence would not be reliable and consequently would not comply with the Convention since unexamined evidence is unreliable and dangerous.[33]

Croatian CPC recognises the immunity from criminal prosecution which regulates the issue of credibility of the witness statement in an appropriate way. Namely, if the witness does not answer the question because it would put him or a close relative of his at risk of criminal prosecution, the public prosecutor may state that he will not prosecute them if the answer to the question and the witness' statement is relevant for the process of proving the criminal offence has been committed by another person and if it is probable that the witness would expose himself or a close relative to criminal prosecution for a criminal offence which is punishable by a lesser sentence than the criminal offence which is mentioned in the said statement. This statement, however, cannot be given at all with regard to a criminal offence punishable by a term in prison of ten years or a more severe sentence.

The public prosecutor shall not give his statement of non-prosecution if the answer is not complete, detailing the circumstances and corroborated by other evidence. Written and signed statement by the prosecutor stating that the criminal prosecution shall not be undertaken is handed over to the witness and such a statement made by the public prosecutor is irrevocable but the witness may be prosecuted for giving a false statement (Art. 286 of the CPC Cro). A conviction must not be based solely on a statement of such a witness (Art. 298 of the CPC Cro).

The condition that the statement must be "full, detailing the circumstances and corroborated by other evidence" should be prescribed for the plea agreement in Serbia too, as well as a rule that the agreement entered into by another person must not be the deciding factor upon which the court judgment is based.

33 See *Al-Khawaja and Tahery v. UK, EctHR*, verdict VV of 15 November 2011 requests 26766/05 and 22228/06.

Restriction of the Right to Choose a Defence Attorney and Simplified Procedure for the Relief of Duty

The new CPC introduces the discretionary right of the authorities conducting the proceeding (public prosecutor or court – depending on the stage of the proceeding, or other public authority before which the proceedings are being conducted) to allow the same defence attorney to represent several defendants only if it is deemed that this would not be against the interests of the defence and the power of the authorities in the proceedings to assess how professional, conscientious or timely are the defence attorney's actions.[34] The question is why are now different defence attorneys a norm and a joint defence is an exception while the power is granted to the authorities in the proceedings to decide at their discretion when it is allowed to have the same defence attorney and no criteria is specified in order to somehow define this discretionary assessment of the defence's interests. Considering that it is a person's constitutional right to have a defence attorney they choose, the rule should be based on the choice of the defendant and the exception on his supposed best interest.[35]

In Republika Srpska and the Federation BiH this issue is regulated better since several defendants are allowed naturally to share the same attorney unless the defence attorney is appointed by the court (Art. 48, para. 1of the CPC Republika Srpska). The constitutional right to choose the attorney thus takes precedence and it should not be legally restricted like the court-appointed defence. However, even with regard to the appointment of a defence, attorney ex officio, the defendant shall be first asked to choose his own attorney from the offered list (Art. 53, para. 6 of the CPC Republika Srpska) which fully upholds the right to choose a defence attorney.

One of the possible reasons for the relief of duty of a chosen defence attorney is when he is being criminally prosecuted regarding the same case for the criminal offence of preventing and obstructing evidentiary proceedings whereas one of the possible reasons for the relief of duty of the appointed defence attorney may be if he is not performing his duties of providing the defendant with professional, conscientious and timely assistance on the defence. The defence attorney is always relieved of his duties by the court, but the defendant and the said attorney must be summoned first to make a statement on the reasons for such a decision within 24 hours and to submit evidence supporting their claims with a warning that if they do not do so, the court would decide based on the available data. Therefore, the defence attorney should present the court with the evidence against the relief of duties when giving this statement and if he does not do so, the court shall decide based on the "available data" which do not have to meet the same standard of quality as evidence. When applying the relief of duty, the discretion, mistakes and malice must be reduced to a minimum – which could be achieved if the rule that the attorney cannot be relieved of his duties based on mere indications or one-sided claims is accepted in practice.

The Statute of the Bar Association of Serbia prescribe as a serious breach of lawyer's duty "evidently unconcscientious conduct". However, the CPC does not prescribe that the unconcscientious conduct must be evident in order to relieve the said attorney of his duties, which will lead to problems when assessing the type and degree of unprofessional or unconscientious conduct. Therefore, only

34 See Art. 73, para. 3, item 4 and Art. 78, para. 1 and 2 of the CPC.

35 The adopted provision is particularly questionable during the investigation because it is expected that the presumed interest of the defence shall be adequately assessed by the prosecutor who is the opposing party.

when the omissions of the defence are evident should it be intervened by relieving the attorney of his duties since in such a case the norms regulating this issue would not conflict.

The degree of probability that the defence attorney would take part in criminal activities opted for by the legislator is too low (grounds for suspicion) for the purpose of excluding him from the defence. It is to be expected that the application of the standard of the "grounds for suspicion" as a test for initiation of the criminal proceedings would discourage the defence attorneys to perform their job. It should be remembered that the lawyer's freedom to perform his work without undue interference is a fundamental component of a democratic society and a necessary prerequisite for effective application of the Constitution and the European Convention.[36] On the other hand, this restricts the right of the defendant to choose the defence attorney according to his wishes since the public prosecutor is allowed, based on his personal assessment, to prevent a particular defence attorney from performing the role assigned to him by the Constitution, which is to provide legal assistance. In Croatia, the accepted standard is "serious probability" (Art. 70, para.. 5 of the CPC Cro) which is a higher degree of suspicion than "the grounds for suspicion" which are a sufficient requirement here for the initiation of the criminal proceedings.

It is only natural that it is not in the prosecutor's best interest to intervene if the defence is sloppy by filing a motion for the relief of duty of the defence attorney, just as it is in his interest to obstruct adequately built defence, which he might do through the abuse of the initiative for a relief of duty. However, the prosecutor should be governed by what is the public interest and by professional ethics which implies that it is inexcusable to use the power of the state in order to diminish the effects of the work of those who are successfully resisting criminal prosecution. The deciding factor here is definitely going to be ethical awareness and a culture shared by the prosecutors whose duty is to act consistently and fairly as well as not to use the evidence obtained illegally.

When it comes to mandatory defence, the defence attorney is not allowed to have a reason due to which he is unable to appear. The new CPC does not stipulate anywhere the possibility of being absent due to a valid reason such as health issues, official business or other important reasons. If "the summons have been sent" to the defence attorney, the prosecutor may interview the defendant even if the defence attorney is unable to attend due to valid reasons.[37]

The defendant must not suffer any adverse effects if the defence attorney fails to appear due to a valid reason. He might receive a sentence of eight years in prison but he does not have the right to an adjournment if the defence attorney providing him with professional assistance fails to appear due to some valid reasons. The legislator here assumes that this is an obstruction of the criminal proceedings and an abuse of the right to a defence. However, the state must not revoke a fundamental right to a defence before it is established that this is in fact an abuse of the said right. The right to a defence attorney of his own choosing must be upheld at all times during the criminal proceedings. Accordingly, failure of the chosen defence attorney to appear due to improper service of the summons or due to some other valid reason must be taken into consideration and result in an adjournment. The adjournment must occur also when the defendant who previously did not have a defence attorney decides to hire one. In both cases, conducting the evidentiary actions without the presence of the chosen defence attorney prevents the defendant from having

36 See *Elci et al. v. Turkey*, ECtHR, footnote to the verdict of 13 November 2003, requests 23145/93 and 25091/94 para. 669 and 714.
37 See Art. 85, para.. 4 of the CPC.

the benefit of a practical and effective defence, i.e. active and adequate participation in presenting and proposing the evidence and other actions which can contribute to his defence. Such cases violate the principle of a fair trial.

The defence attorney is not a necessary formality but an assistant to the defendant during the proceedings who helps the defendant through his legal knowledge and procedural skills to discover and establish facts in his favour, apply the regulations which are the most favourable for the defendant and to use his procedural rights. The purpose of the provision of Art. 6, para. 3, item c) of the Convention is, according to the position held by the European Court of Human Rights, "to secure that the defendant enjoys the benefits of a fair trial including every opportunity for an appropriate defence."[38]

Therefore, the principle of a fair trial is being violated here in the part concerning the assistance of the defence attorney of the defendant's choosing. Consequently, the CPC must clearly stipulate that this provision refers to defence attorney's failure to appear without a valid reason.

If the representation by a defence attorney is cancelled due to the abuse of procedural rights, the defendant who is entitled to a court-appointed defence attorney is protected unlike the defendant who is accused of a criminal offence for which there is no mandatory defence. When a defendant who has retained a defence attorney of his own choosing and it is not a case which requires mandatory defence, subsequently loses the said attorney, he shall not have the opportunity to exercise his right to a defence, which violates the principle of the equal treatment of citizens before the law. Consequently, even in the case of optional defence, the court must act according to the special provisions of the CPC governing court procedures in order to uphold the right to a defence in all situations when the defendant does not have representation or loses the chosen defence attorney at any point of the proceedings.

Key Issue Regarding the Investigation – The Possibility of Simplified Evidentiary Proceedings

For a decision on the guilt, it is sufficient that there is an admission of guilt which does not conflict with other evidence, which will increase the number of judgments based solely on admissions which cannot be corroborated. Unlike the previous CPC which prescribed a rule that an admission must be corroborated by other evidence as well, the new CPC prescribes a rule that an authority conducting the proceedings must continue to collect the evidence on the perpetrator and the criminal offence only if there are reasonable grounds for suspicion that the admission is false or that the admission is incomplete, contradictory or vague and if there are other conflicting evidence.[39] This provision stops at the admission which is logically accurate.[40] However, admissions cannot replace evidence. They are often the result of different motivations such as e.g. concealing the actual perpetrator, lessening either personal or the guilt of someone else, and above

38 See *Goddi v. Italy, ECtHR,* 1984. para. 31.

39 See Art. 88 and Art. 94 of the CPC.

40 When the defendant does not have the right to be informed about the obtained evidence against him before he is first questioned, and his admission does not have to be corroborated by another piece of evidence in order to allow a judgment to be based on it , it is to be expected that there will be an increase in the number of judgments which treat the admission as the beginning and the end of the evidentiary proceedings. That will only encourage the prosecutor's office and the police to recognise the admissions as the objective of their work which will be far easier to obtain through plea agreement and a testimony agreement than to collect evidence.

all, fear of possible detention and not knowing how long it might last. Legal security of the citizens dictates that the truthfulness of an admission must be corroborated by at least one more piece of evidence but erroneous belief may be found in practice that the admission can be authenticated by evidence proving that the criminal offence has been committed and not proving that the defendant is the one who has committed it.

With regard to the new methods of identification, through photographs and voice, formal requirements specifying the conditions under which this is to be done have not been stipulated,[41] which will increase the number of questionable identifications, the reliability of which is not possible to determine. Voice recognition is not a reliable method of identifying a person since it is not possible to use it against the defendants will, it is not easy to first describe someone's voice, it is not realistic to expect four other individuals with similar voices to be found and audio and visual recording of such identification is not prescribed for the purpose of demonstrating the evidence. Since the court uncritically accepts the identification, many innocent people are going to be convicted based on the eye-witness's inaccurate perception which shall not be re-examined at the main hearing since the witness is going to confirm that he has recognised the voice of the defendant among five other voices which will be sufficient to the court for a conviction.

The new CPC does not prescribe that the defence attorney is at least allowed to be present at the identification during the investigation, which is very bad. When we add that recognition based on photographs and voice is legally allowed while it is not prescribed that such procedures must be somehow recorded as audio or visual recordings, which means that the only evidence of the identification will be written records which are then going to be presented as indisputable truth both by the police and the prosecutor during the hearing. Consequently, it will be very difficult to question whether the procedure was properly observed during the identification process and determine if the witness was perhaps influenced by suggestive remarks during the process of identification, which would be somewhat less possible if the defence attorney were to be present. In any case, the presence of the defence attorney would actually strengthen the credibility of such evidentiary procedure which would then be harder to dispute based on the circumstances under which identification was made.

The status of an especially vulnerable witness entails the exclusion of direct examination during the questioning and the confrontation, in addition to allowing the possibility of questioning the witness from some special premises.[42] The reasons for awarding someone a status of an especially vulnerable witness are too broadly defined so that literally anyone can present themselves as an especially vulnerable witness and an appeal against such a ruling is not allowed. Consequently, the status of such witnesses is decided by the prosecutor as the first and last instance. The principle of direct examination is thus violated by the discretionary decision of a party to the proceedings to the detriment of the other party to the proceedings and without any possibility of a judicial review. Such a provision will result in the elimination of cross-examination of key prosecution witnesses.[43]

41 See Art. 90, para. 3 and 4 and Art. 100 of the CPC.
42 See Art. 103-109 of the CPC.
43 The new CPC imposes even an obligation on the police and the public prosecutor to advise the citizens, when collecting information from them, of the possibility of the use of special protection measures which will increase drastically the use of the institute of an especially vulnerable witness which will then be resorted to even in cases of mere discomfort thus diminishing the value of the principle of direct examination at the main hearing and rendering meaningless the cross-examination which, as such, relies on the sensory perception for it to be successful.

Necessary Judicial Revew of Legality of Special Evidentiary Actions

All of the reports on the incoming/ outgoing communication and mobile phone base stations are obtained by the police pursuant to an order issued by the public prosecutor without any kind of court order. Such provision does not comply with the Constitution and the Convention since these reports are the type of communication which can only be obtained by the court. Obtaining records of the communication exchanges as well as locating where the person who is communicating through the use of base stations is, should be regulated under the provisions on special evidentiary actions since this constitutes invasion of privacy of the citizens and therefore these reports cannot be obtained by the police at the order of the public prosecutor.

The CPC prescribes that the obtained material shall be destroyed if the prosecutor does not initiate the criminal proceedings within six months from the day he inspects the material and not from the day he receives the material, as well as that the person in question may be notified of the destruction of material by a preliminary proceeding judge, but does not have to be.[44] The date of delivery of the material is set in time and as such it is suitable to mark when the deadline should start running whereas the day the public prosecutor first inspected the submitted material is relative in time and impossible to verify which allows manipulation – which opens the door for the possibility that after the material is submitted, the prosecutor finally inspects it in a year or two due to being overworked during which time the set deadline of six months would not start running. Such a provision is going to cause unequal treatment of citizens because the prosecutor is going to inspect some materials sooner than others which renders the deadline of six months meaningless. This time restriction should increase legal security and apply to everyone equally. In addition, the notification of the said person about the destruction of the material should be mandatory and not optional since this is almost never done in practice as it is not a legal obligation.

An extensive catalogue of listed criminal offences regarding which special evidentiary actions may be undertaken has caused the restrictions of the constitutional rights and freedoms - which all the legislations prescribe as an exception to the rule - to become a rule of procedure. Legal norm formulated in such a way does not meet the requirements for laws which are derived from the rule of law particularly the requirement of legal security, legal certainty and legal predictability. Consequently, such a norm does not adhere to the proportionality principle and has a hidden built-in arbitrariness in its very structure.

The question is raised whether these prescribed vague legal concepts and prescribed duration of such evidentiary actions are constitutionally acceptable. The power of preliminary proceeding judge to extend the deadline for evidentiary actions "due to the necessity of further collection of evidence" for three more months and "under special circumstances" twice more for three months each time is questionable because these are vague legal terms since there are no boundaries set for the assessment whether something is necessary or the circumstances are special. The law is not clear and transparent here since it leaves the possibility for arbitrary interpretation and actions by the authorities involved in the proceedings. The assessment whether the requirements for extending the measure is entirely left to the discretionary assessment by the judge in each

44 See Art. 163 of the CPC.

particular case. Such a provision can never guarantee balanced judicial practice. This causes legal unpredictability, legal uncertainty and, consequently, legal insecurity.

The preliminary proceeding judge is unable to oversee whether there is still a need for undertaking these actions once their implementation begins since the law does not prescribe that the judge should request daily or periodical reports from the police although the police compile daily reports. After the actions are completed, the police write a special report and it is only then that the judge shall receive complete information on the results of the implementation of special evidentiary actions. European Court holds that the control of secret surveillance measures is better left to the court since judicial review provides the best guarantees of independence, impartiality and observance of the procedure.[45] However, the problem is that the law does not provide for the possibility in the proceedings that the preliminary proceeding judge should request the relevant data to be submitted. It seems that the submission of the valid data is the only effective way to enable the conclusion to be reached whether the reasons for ordering the said measures to be imposed have ceased to exist and therefore the measures in question must be terminated. Therefore, a legal obligation should be imposed on the judge to request periodical review, in periods prescribed by the law and according to the stipulated procedure, since effective review of the application of the rules does not exclude the supervision by the prosecutor, but in the final outcome, it must be under the jurisdiction of the court and the reviewing procedure must be regulated precisely by the law.

CONCLUSION

Key shortcomings of the new CPC of Serbia can be seen in certain unconstitutional legal provisions, questionable confidentiality and unspecified duration of the investigation, marginilised position of the defence as a party to the proceedings during the prosecutorial investigation and the lack of any effective procedural mechanism for a timely exclusion of unlawful evidence which are then being used during the proceedings and evidentiary actions contaminating other evidence in the process. In addition, it is necessary to prescribe that the court is under an obligation to treat the parties to the proceedings and the defence attorney in the same way and to provide both parties with the opportunity in terms of having access to the evidence and their presentation at the main hearing, to prescribe that the court and the prosecutor must, when they come into possession of any kind of information or fact which might be used as evidence at the trial, offer the defence attorney to inspect these, and it is necessary to eliminate the obligation of the defence attorney to disclose all of the evidence obtained to the prosecutor.

Introducing simplified evidentiary procedure and the lack of judicial review of evidentiary actions jeopardises legal security of the citizens for whom it is vital that the deadlines are set for the prosecutor's actions and specific procedural repercussions in the event of failure to meet such deadlines, while the equal treatment of the parties to the proceedings requires prescribing precisely and utmost restrictively the conditions under which a piece of evidence obtained through a prosecutorial investigation may be used as the basis for a court decision without critical re-examination at the main hearing. The principles of direct examination and adversarial argumentation can only be minimally departed from, while the principle of equality of arms must be effectively

45 See the case *Rotaru v. Romania*, ECtHR,verdict VV of 4 May 2000 (request no. 28341/95).

legislated through specific provisions regarding the procedure which would provide both parties equal opportunity to influence the course and the outcome of the criminal proceedings while observing the fundamental procedural rights of the defendant.

The provisions of the CPC are not clearly, precisely and consistently adapted to the two substantially different categories of criminal offences the distinction between which has become a necessity in a modern society. The first category includes the criminal offences which are detrimental to the society itself and threaten the life in an organised community – terrorism, organised crime on a large scale and with grave consequences which are usually committed by criminal organisations (e.g. money laundering which is connected with financing terrorism or drug trade and weapons trade on an international level) as well as complex economic criminal offences on a large scale including corruption which as a rule involves public sector and state authorities. Therefore, this category practically includes the criminal offence that fall under the jurisdiction of UBPOK (Directorate for the Fight against Organised Crime) whereas the other category includes conventional criminal offences which have always been around. This differentiation which has arisen due to realities of life in the modern society has led to gradual differentiation of the standards for the criminal proceedings regarding these two categories. This distinction should be evident in the provisions which stipulate restrictions on the constitutional civil rights. However, in the provisions of the new CPC, the experiences of the criminal proceedings involving the first category of criminal offences have shaped the concepts that are provided for, while neglecting the fact that 80% of the criminal proceedings involve criminal offences which are punishable under law by a term in prison of up to eight years. Instead of creating general rules according to the 80% of criminal proceedings and allowing for the possibility of an exception when they involve the first category of criminal offences, the new CPC has shaped important legal provisions around the exceptions to the rule.

Dealing with both of the said categories of criminal offences in a single legal provision within a legal norm has caused the said norm not to comply with the Constitution, although the said norm has a constitutional justification when it comes to the first category of offences while it would not be constitutionally justifiable with regard to conventional criminal offences – regarding which there is excessive infringement of the defendant's rights to a defence. Normative model of the criminal procedure must be founded on uniform principles but within the structure of the proceedings, smaller or bigger differences may and should be recognised with regard to the legal nature, seriousness and consequences of the first category of offences as opposed to the second category, there should be greater clarity and consistency when regulating the institutes of the criminal procedure which are appropriate for each category as well, and an appropriate degree of restrictions of the procedural rights of the defendants in question according to these categories should be prescribed. Therefore, there is a constitutional obligation of the legislator to balance the national criminal procedure system in such a way that it is consistently governed by specific predictable rules while any departures from such rules should be precisely specified exceptions which have an evident constitutional justification.

The defence primarily requests the rights and obligations of the parties to the proceedings to be prescribed by clear, precise and complete norms, as well as that effective instruments and mechanisms are stipulated which allow their enforcement and protection – while consistently observing the principles of equality of arms and a fair trial.

Slobodan Beljanski, PhD[1]

Prosecutorial Investigation in Serbia and Collecting Evidence and Materials in Favour of the Defence

Introduction

The new Serbian Criminal Procedure Code[2] has introduced several modifications in respect of the investigation that are systematic in nature. Reasonable suspicion, expressed as being aware of available evidence, is no longer the substantive condition for initiating investigations; now, it is grounds for suspicion. Investigations are initiated, conducted and discontinued by public prosecutors, not by the court. A decision on initiating an investigation may not be appealed. Even the fact that an investigation has been discontinued does not allow for the application of the *ne bis in idem* principle. Investigations may be conducted even against unknown perpetrators.

The number of cases in which an investigation may be conducted has been significantly reduced by not setting any limits for bringing direct indictments[3] and by raising the limit of statutory prison sentences from five to eight years for criminal offences resolved in summary proceedings. At the same time, the changing of the lower limit of statutory penalty as a requirement for mandatory defence from imprisonment of more than ten years to imprisonment of eight years has broadened a scope of criminal offences in connection with which criminal proceedings may not be conducted without a defence counsel. In effect, formal defence is, starting from the first interrogation of a suspect, mandatory in cases of criminal offences into which an investigation will be conducted.

1 Attorney-at-law, Novi Sad.
2 Criminal Procedure Code (hereinafter: CPC or Code), *Official Gazette of the Republic of Serbia* no. 72/11, 101/11, 121/12, 32/13, 45/13.
3 The 2001 Criminal Procedure Code (hereinafter: 2001 CPC) laid down that direct indictments may be brought only for criminal offences punishable with imprisonment of eight years.

A suspect's and his defence attorney's right to autonomously collect evidence and materials in favour of the defence in the investigation should be viewed in light of the above. This right has been provided by the law for the first time. Even though the defence has thus far been in a position to collect information about evidence, their activities and records did not have the form of procedural actions to which a special role was assigned in evidentiary proceedings.

Article 301 of the CPC lays down that a suspect and his defence counsel shall have the right to interview a person who can provide them with information useful for the defence and to obtain written statements and information from that person with their consent; to enter private premises or areas not open to the public, a residence or premises linked therewith, with the consent from their occupants; and to take over from natural and legal persons objects and documents and obtain information available to them, with their consent. The injured party and persons already questioned by the police or public prosecutor are excluded from the group of persons to which interviews and written statements pertain. Written statements and information may be used when questioning witnesses or verifying the credibility of their testimonies, as well as for making decisions about whether or not a specific person should be questioned as a witness by the public prosecutor or by the court. The extent of this right is not dependent only on its direct effects; it is also dependent on prerequisites for its effective exercise, as well as on other rights enjoyed by defendants and defence counsels in the investigation.

1. Availability of Information and Evidence

The main prerequisite for exercising the right referred to in Article 301 of the CPC is defendant's and his defence counsel's right to be advised about the subject of charges against him prior to his first interrogation and only thereafter are they allowed to inspect the files and examine objects serving as evidence. Whether or not the defence will collect evidence and materials as well as their nature is dependent in the first place on the extent of their awareness of the evidence available to the prosecutor and evidentiary actions he plans to take during the investigation.

Provisions that govern the availability of files and objects require interpretation. Under the 2001 CPC, suspects and their defence attorneys were entitled to read criminal charges, a motion for conducting an investigation, the record of crime scene investigation and the findings and opinion of an expert witness before a suspect is interrogated for the first time. As a result of the changed model of the investigation, the motion for conducting an investigation is no longer in place. Even though the narrowing of sources is at first glance only a technical issue, it could lead to a lack of information that the former motion for conducting an investigation had to contain. This primarily refers to information about evidence which public prosecutors use to provide a basis for reasonable suspicion (presently, grounds for suspicion) and then to evidence proposed to be obtained. That information may, but does not have to be included in the criminal charge(s) or in the order for conducting an investigation. Under a provision contained in Article 298, paragraph 3 of the CPC, such an order shall include suspect's personal information if his identity is known, the particulars and legal classification of the offence, as well as circumstances which provide grounds for suspicion. Even though the circumstances related to grounds for suspicion are primarily based on evidence, nowhere is it mentioned that such evidence and evidentiary actions must be cited, regardless of the fact that the order may be issued even an entire month after a prosecutor has been notified of the first evidentiary action. On the other hand, the Code

does not provide for the mandatory contents of criminal charges. It is only informally mentioned that the person filing charges will relate evidence of which he has knowledge, but not that he is obligated to cite it in the very criminal charge (Article 280, paragraph 3 of the CPC). One of the first versions of the draft Code provided for the suspect's and defence attorney's right to read the criminal charges as well, including all the enclosures thereto. A subsequent omission of the right to read enclosures is indicative of a calculated restriction of the right which may just as well lead to separating the document which would be titled "criminal charge" and contain a description of the known information about the presumed perpetrator and the commission of the criminal offence from the document in which all the evidence substantiating grounds for suspicion would be cited and which would form an enclosure to the criminal charge(s). That would lead to denying the suspect and his counsel the possibility of learning about the type and number of pieces of evidence prior to the first interrogation; as a result, such a solution would limit the rights of defence when compared to the 2001 CPC. In order to avoid such a result, the Code should be either amended or the jurisprudence should adopt the view that the right to read the criminal charge(s) pertains in each and every case both to the access to information about the type and number of pieces of evidence irrespective of whether or not such information has been cited in the very criminal charge or in another named or unnamed document enclosed thereto.

The 2001 Criminal Procedure Code allowed suspects and their defence attorneys to gain the right to inspecting files and examining objects used as evidence in the earliest phase of criminal proceedings due to the fact that the interrogation of a defendant was a prerequisite for issuing rulings on conducting an investigation (with the exception of cases in which there was a risk of delay). However, no such requirement or sequence of actions is set down in the new type of the investigation. Investigations are instituted by an order of the public prosecutor's whose issuing is not contingent on the interrogation of a suspect as a procedural prerequisite. Moreover, the interrogation of suspects and issuing of orders to conduct investigations are not dependent on each other temporally or otherwise formally.

A provision contained in Article 71, item 3 of the 2011 CPC lays down that a defence counsel shall have the right to inspect case files and examine objects serving as evidence after the issuance of an order to conduct an investigation or after an indictment has been issued directly, as well as before that time if a defendant has been interrogated in accordance with the provisions of the Code. Nevertheless, in a provision contained in Article 251, paragraph 2 of the CPC, that same right is made contingent on the interrogation of the defendant.

If we were to understand the provision contained in Article 71, item 3 of the CPC as a special rule that governs a specific right in its full extent and the provision contained in Article 251, paragraph 2 as a general rule that only sets the lowest possible limit of the right, that would lead to an interpretation, in the broadest sense of the word, according to which defence counsels gain the right to inspect files and examine objects, including that same right of defendants, when any of the following three prerequisites has been met: 1) an order to conduct an investigation has been issued; 2) a charging document has been filed if there has been no investigation; 3) the defendant has been interrogated if his interrogation preceded the issuance of the order for conducting the investigation or filing of the charging document. A weak point of such an approach is that the issuance of the order to conduct an investigation is not set as an autonomous requirement in Article 71, point 3 of the CPC; instead, it forms a part of an instructive rule which requires that thereby prescribed instruction is "in accordance with the provisions of this Code".

The referential provision contained in Article 251, paragraph 1 of the CPC, that deals precisely with the right in question, does not even mention the order for conducting an investigation, whereas the exercise of the right itself is made contingent solely on the interrogation of a defendant. Even according to the provisions of Article 303, paragraphs 1 and 3 of the CPC, if the interrogation of a suspect is not conducted as a procedural action, the public prosecutor does not have a duty to grant access to evidentiary materials to the defendant and his defence counsel nor do the latter two have a duty to inform the former of the evidence and material they have collected and allow him to examine the objects used as evidence before the completion of the investigation.

Regardless of the fact that in borderline situations the Code should be interpreted to the benefit of defendant's rights, in this particular case, a systematic, logical, and targeted interpretation in line with the new type of investigation gives precedence to the position that the right of defence counsels to inspect files and examine objects in the course of investigations is made contingent on the interrogation of suspects. Interrogation is a basis for exercising the right in question, both prior to the issuance of an order to conduct an investigation as well as before filing a direct indictment. Certainly, it would be better if such a meaning followed from direct wording of the rule and not merely from an interpretation of the Code.[4]

Formally speaking, there is nothing to prevent public prosecutors from thwarting the exercise of the defendant's and his defence counsel's right to inspect files and other evidentiary materials by postponing or avoiding the interrogation of a defendant. Nevertheless, that ought not to be the case. Even though the right to be interrogated immediately upon his request or that he must be interrogated prior to the conclusion of an investigation has not been expressly set out as one of defendant's rights, it must be kept in mind that one of defendant's fundamental rights is the right to present his defence (Article 68, paragraph 1, item 2 of the CPC). Therefore, it should be presupposed that public prosecutors have a duty to enable defendants to exercise that right during the investigation.

2. Equality of Arms and the Defence's Influence on Undertaking of Evidentiary Actions

The advantages of public prosecutors, who initiate, lead and conclude investigations at this stage in criminal proceedings are unquestionable. Even though it should apply to all the phases of criminal proceedings, the equality of arms is present in the investigation only to a limited degree and it pertains to the defendant's and his defence counsel's right to propose procedural actions and to be present thereat, then to question witnesses and expert witnesses and to have access to evidentiary material. Nevertheless, as long as only one party may directly undertake evidentiary actions and the other one can only propose and observe them or merely collect evidence and materials, the equality of arms should be understood as conditional and projected. This is even truer considering that the jurisprudence of the European Court has taken the course towards viewing this element of a fair trial from the perspective of co-dependence between a specific denial of

4 Pursuant to Article 303, para. 1 of the CPC, when there are several persons suspected of the same criminal offence, the inspection of files and examination of objects may be postponed until the public prosecutor has interrogated the last accessible suspect. It is the finding of the European Court of Human Rights that such a course of action is not contrary to the European Convention on Human Rights (*Jasper v. the United Kingdom*, 27052/95 of February 16, 2000). Under the Code, a decision on the postponement is taken by the prosecutor, while a judicial review includes filing a complaint to the judge for preliminary proceedings if an immediately superior public prosecutor has denied an objection filed on account of irregularities that occurred in the course of an investigation (Article 312 of the CPC).

a right and the final effect of its share in criminal proceedings taken in their entirety, so that any departures made to the prejudice of the defence at early stages in the proceedings may be compensated for through subsequent phases of the proceedings.[5]

In operational terms, the purpose of an investigation is to collect evidence and information. Apart from Article 295, paragraph 2 of the CPC, a difference between collecting evidence on the one side, and undertaking evidentiary actions or obtaining evidence on the other has been emphasised in other provisions contained in the chapter devoted to the investigation, in particular those found in Art. 301 and 302 of the CPC. When compared to "obtaining" and "undertaking" to which potentially probative effectiveness is assigned in the provisions contained in Article 306, "collecting" fulfils a role of a supplementary and permanently supporting activity in respect of evidence. Whereas the defence is autonomous with regard to "collecting", it is as a rule in an inferior and dependent position vis-à-vis "obtaining" and "undertaking". The defence may not under any circumstances "undertake" any action autonomously, but it may autonomously "obtain" certain evidence in the course of "collecting" as well as propose that it is directly presented in the subsequent course of criminal proceedings.

The public prosecutor (or the police, if thus entrusted by the prosecutor) is vested with the right to undertake evidentiary actions or obtain evidence in the course of the investigation (Article 298, para. 3 and 4, Article 299, para. 1 through 3, Article 300, para. 6 through 9, Article 302, Article 303, para. 2 and 3, Article 304, para. 1, Article 305, para. 1, Article 307, para. 2, Article 311, para. 1 of the CPC). The defence may only propose to the public prosecutor to take a specific evidentiary action. Indeed, a more complete and fairer approach would be to grant the suspect and his defence attorney a right to "lead their own investigation, *i.e.* collect (defence) materials in the same manner as the public prosecutor for the forthcoming court proceedings (for instance, as in the Italian CPC) and thus put the suspect on an equal footing with the public prosecutor."[6]

Nevertheless, even the approach regulated by the Code shows that the defence is not only a passive bystander and follower in the so-called prosecutorial investigation, but that it plays its own active role. A provision contained in Article 302 governs defence's right to take initiative in respect of evidence as well as the right to secure the obtaining of evidence or undertaking of evidentiary actions. In the event that the public prosecutor should reject a defence's proposal or fails to make a decision thereon within eight days, the defence may, in order to protect its interests, turn to a judge for preliminary proceedings. Even such a limited extension of investigative

5 The European Court of Human Rights, *Lamy v. Belgium*, 10444/83 of March 30, 1989; *Edwards v. the United Kingdom*, 28135/95 of June 6, 2000. A similar approach can also be found in a legal opinion of the Belgrade High Court's Special Department (for Organised Crime) of February 21, 2012 which found that the right to inspect files was sufficiently secured in an investigation if a defendant and his counsel were allowed to listen to audio recordings of telephone conversations in the court since they had thus been enabled to propose additional transcripts or move at the main hearing that the contents of particular segments of those recordings should be acquainted with. The Court held that in consequence their request that the audio recording be submitted to them should have been denied in order to protect the privacy and preclude any potential abuses, in the first place in technical terms, which may have caused problems in the field of proving the case.

6 Grubač, M., Nove ustanove i nova rešenja Zakonika o krivičnom postupku Srbije od 26. septembra 2011. godine, Pravni zapisi, year II, no. 2, Belgrade, 2011, p. 493.

powers to the court is a reflection of a concept in which defence's evidentiary initiative in the investigation is regarded a fundamental human right.[7]

3. Collecting Evidence in Favour of the Defence

The credibility of activities undertaken on the basis of the right in question should be guaranteed by a number of formalities. None of them has been provided for by the Code. It can hardly be compensated for through jurisprudence since mandatory procedural mechanisms are a matter of statutory provisions and not interpretations. A reasonable precaution requires that these delicate actions are formally regulated as much as possible and protected from the suspicion of abuse associated with illegal collaboration with witnesses, instructing them on how to testify or exerting pressure on them. Hence, taking care that evidence and materials are collected in a manner that carries credibility and that a risk of destroying them is reduced, as well as that honesty as a very important principle of a lawyer's professional ethics is promoted, imposes an obligation on defence counsels to take precautionary measures, even though they are not bound thereto by the law.

As part of those measures, a defence counsel should advise a person with whom he engages in a conversation of the following:

- that he is acting in a capacity as a defence counsel in a particular criminal proceeding, stating the title of the court and legal classification of a criminal offence;
- that the purpose of the interview is to collect evidence in favour of defence;
- that he is not allowed to impart any information about the type and contents of evidence already collected in the course of criminal proceedings;
- that the person he is interviewing is not obligated to answer any of the questions he may ask him or give statements or information;
- that neither the interview nor the statements or information is allowed if the person has already been questioned by the public prosecutor or the police in connection with the same case;
- that the defence counsel may neither directly nor indirectly influence the contents of his answers, either by letting him known what would be a desirable answer or by resorting to persuasion, deception, threats, coercion, or promise or giving of a reward or other benefit;
- that a written statement is drawn up and that information is recorded and used only in a manner analogous to the provisions contained in Art. 233 and 234 of the CPC.

7 The order to undertake evidentiary actions issued by the judge for preliminary proceedings is not accompanied by any procedural guarantees. It has not been provided for a solution which, in case of "disobedience" on the public prosecutor's part, would ensure that the judge's order is executed. It would make more sense if the judge for preliminary proceedings had the right to take the evidentiary action whose undertaking he unsuccessfully ordered by himself. An objection on grounds of irregularities in the course of an investigation is made available to a suspect and his defence attorney, which is decided upon by an immediately superior public prosecutor, while in the case their objection is denied or not reacted upon, they are only left with the option of applying to the judge for preliminary proceedings, whose involvement is once again limited to ordering that measures be undertaken for the purpose of rectifying the irregularities (Article 312, para. 3). This shortcoming could possibly be eliminated by introducing the so-called evidentiary hearing for the purpose of securing evidence in connection with which there is a risk that it might not be presented at the main hearing (Grubač, *op. cit.*, p. 494), as well as in order to undertake evidentiary actions the public prosecutor has failed to undertake in spite of the order by the preliminary proceedings judge.

A written statement has to include a date, place and time at which it is made, personal information of the person who took and the person who gave the statement, all of the above-mentioned cautionary advice, facts that constitute the statement, personal signatures of both persons and any other person that may be present thereat, as well as the attorney's stamp. A judge for preliminary proceedings could give an approval for conducting an interview with a person held in custody, but only provided that the detained person has agreed to talk after consulting with this defence counsel.

In order to accomplish the purpose of the statement and information,[8] it could be also useful to make a video and audio recording of the interview, with the consent from the person being interviewed. Unless a position is taken in the case-law that making and reproducing recordings of such activities is not in contravention of the law, provisions contained in Article 236, paragraph 1 and Article 405, paragraph of the CPC would prove a hindrance to such an interpretation since they govern that making recordings is ordered by the authority that conducts the proceedings, whereas a video or audio recording or electronic recording may be played at the main hearing if used as evidence.

The right governed by Article 301 of the CPC is granted to a suspect and his defence attorney directly. A possibility that some of those rights might be exercised indirectly through an authorised private detective[9] or a technical advisor on the basis of a power of attorney has not been provided for, but it has not been excluded either. Since Article 301 of the CPC pertains to defence counsels and given that the Law on Legal Profession provides that an attorney may be replaced by a legal intern working at his law firm or by another attorney directly or through his legal intern, it follows that evidence and materials may also be collected by a defence counsel, an attorney or legal intern who replaces him, possibly with help from a technical assistant (a recording clerk, sound recordist/ cameraman, a technician in charge of measurements or making sketches, and the like).

The provision contained in Article 301 of the CPC is included in the chapter on the investigation. If it was included in the special section of Chapter VII on evidence, it would pertain to the entire course of criminal proceedings. There are no justified reasons for limiting it only to the investigation.

Obtaining consent from the occupant of a residence or premises linked therewith, of private premises or premises closed to the public is a condition which has to be fulfilled in order for a defence counsel to be allowed to enter such premises to collect evidence. The legislator has opted for a restrictive solution which would be implied even if it was not laid down in that Article. The principle of equality of arms would justify another approach according to which defence

8 Unlike a written statement, the information is a suspect's or his defence attorney's note about a conversation with a person who has agreed to be interviewed and not to give a statement.

9 The Law on Detective Practice (*Official Gazette of the Republic of Serbia*, no. 104/13); the Law, which came into force on December 5, 2013) governs that detective (private investigator) activities include investigative and detective services (collecting, processing, and transfer of information), which, pursuant to a signed contract, may be provided by legal persons, sole proprietorships, and natural persons holding a licence to that effect. The services also include collecting and processing information about lost or stolen property, successfulness of the business conducted by legal persons and sole proprietors, protection of intellectual and industrial property, as well as about missing persons or persons who have gone in hiding so as to avoid criminal prosecution, persons who have caused loss to a client, or persons who take anonymous or illegal actions against the client with a view to causing harmful consequences. A suspect and his defence attorney make avail themselves of certain detective services for the purpose of obtaining information about persons, documents, and other materials necessary for defence; however, they may not allow their service provider to directly perform the actual actions of collecting evidence and materials referred to in Article 301.

counsels would be allowed to enter all the premises or at least all the other private premises except the residence and law firm based on an order issued by the court at a motion by that counsel.

The injured party and persons already questioned by the police or public prosecutor are excluded from the group of persons whom the defence counsel is entitled to interview. Such a solution can be criticised with a good reason. Even though it is presumed that the injured party has a conflicting interest, there were no grounds to *a prior* exclude him, taking as a starting point psychological arguments and preconceived ideas about his predispositions, irrespective of whether or not he would agree to the interview.

Another issue is whether or not a ban on defence's contact with persons already questioned by the police or public prosecutor is justified. A right to prepare for a cross-examination may not be denied in advance. On the other hand, such a restriction has not been imposed on a public prosecutor in respect of persons with whom a suspect or his defence attorney has previously conducted an interview. If the *ratio* behind the ban is to prevent the influence on potential or already "spoken for" witnesses, the same reason applies to both parties and therefore favouring only the public prosecutor violates the principle of equality of arms. Such precedence is of secondary importance in respect of the contents of evidence. The advantage that the prosecutor has owing to the work of the police is in any case difficult to overweight. Moreover, the suspect and his defence attorney may collect evidence even before the public prosecutor allows them to inspect the files and examine objects, which means even before they are in a position to learn that those persons have already been questioned by the police or public prosecutor. The Code does not impose a ban on use of statements and information; instead, it denies the authorisation to conduct an interview. Should a person already questioned by the police or public prosecutor not impart that piece of information, the defence may in a *bona fide* manner obtain a statement or information whose indirect usage may not be precluded.

Information and statements that have been obtained do not have the force of evidence, although that has not been expressly stated in the Code. Based on the grammatical and targeted interpretations, as well as on the *a contrario* method, it can be undoubtedly concluded that they have only a subsidiary and controlling function. Since the use of a statement or information is expressed by a normative proposition which is affirmative in terms of its quality and categorical in terms of its relation, it is not difficult to conclude that it may not be applied outside that particular domain. Statements and information cannot be found among evidentiary actions mentioned, expounded, and provided for in Section 2 of Chapter VII. Finally, it is expressly stated that, unlike the said actions, certain manners and types of procedural performances, provided that statutory requirements have been met, may be used as evidence in the further course of criminal proceedings or that they may be used as evidence in criminal proceedings, such as evidence obtained by the police through evidentiary actions (Article 287, paragraph 2 of the CPC) or a record of a testimony given by a suspect before the authority that conducts pre-investigation proceedings (Article 289, paragraph 4 of the CPC).

As a result, a defendant and his defence counsel may use statements and information referred to in the said article only during interviews with witnesses as guidance to asking questions or a point of reference when verifying the credibility of their testimonies. With a view to the above, they may present to witnesses what constitutes a difference between a statement and information on the one hand and a testimony on the other in respect of their contents and ask for clarifications in case of any discrepancies.

4. Disclosure of Evidence

A provision contained in Article 303 of the CPC lays down that the parties have a duty to inform each other about evidence they have collected. A prosecutor is obligated to make available to a defendant and his defence counsel all the evidence, both incriminating and exculpatory, within a time period which will allow them to prepare for a trial.[10]

Public prosecutor's duty should be viewed within the framework of the criminal proceedings' dynamics as one of prerequisites for completing the investigation. Even though pursuant to provisions contained in Article 68, para. 1, item 8, Article 71, item 3, and Article 251, para. 1 of the CPC, the defence counsel and the defendant are entitled to access files and objects serving as evidence even before the completion of the investigation provided that the defendant has been interrogated, Article 303, para. 1 of the CPC provides not only that the prosecutor has a corresponding duty to enable them to exercise the said right, but also that he has a duty to do it in a timely manner, *i.e.* within a time frame sufficient for the preparation of a defence. In that regard, the provision contained in Article 303, paragraph 1 of the CPC should be interpreted as special in essence and technical in form in respect of the provision contained in Article 251, paragraph 1 of the CPC. Given that the more general provision lays down the above-mentioned right, whereas the special one, in a potentially narrower scope, lays down a duty along with a necessary time and functional framework for exercising the right concerned, it can be inferred that the right referred to in Article 251, paragraph 1 may be exercised during the investigation in the manner set forth in Article 303, paragraph 1 of the CPC.

An issue of the reason for which the right enjoyed by the defence counsel and defendant after the latter's interrogation, which may be exercised whenever they decide so and in the extent required by them, should be subsequently limited by the prosecutor's duty to enable them to exercise the said right within a time frame sufficient for the preparation of the defence is open to argument. Does it mean that the prosecutor is allowed to deny them an already earned right if he finds it has been requested too early?

In a wider context, such an interpretation could not be excluded, meaning that in the course of the investigation it is nevertheless dependent on the prosecutor when he will allow the defendant and his defence counsel to exercise their right in full, as long as he thereby does not violate their right to make use of the time period sufficient for preparing their defence and for proposing that some additional evidentiary actions be undertaken. In a narrower context, such an interpretation would be contrary to a provision contained in Article 251, paragraph 1 of the CPC and in particular, a provision contained in Article 71, item 3 of the CPC.

Looking from the perspective of safeguarding defendant's rights, restrictive rules should be interpreted in a restrictive manner. From such a standpoint, the provision of Article 303 of the CPC does not allow room even for delaying the right earned after the interrogation of the defendant nor for delaying the very interrogation; instead, it charges the prosecutor with a duty to remind the defendant of his right to familiarise himself with the collected evidence and to remove any obstacle preventing him from exercising his right.

10 European Court of Human Rights, *Edwards & Lewis v. the United Kingdom*, 39647/98, 40461/98 of October 27, 2004.

Disclosure plays a particularly important role vis-à-vis suspect's and his defence attorney's decision on whether or not they will propose that some additional evidentiary actions (Article 303, paragraph 2 of the CPC) be taken or that the investigation be supplemented (Article 311 of the CPC); it is also important in respect of a decision by the public prosecutor on bringing an indictment or abandoning prosecution and discontinuing the investigation (Article 308 of the CPC).

The suspect and his defence attorney are not afforded any effective protection from non-objective fulfilment or violation of the said prosecutor's duty. Admittedly, they may file an objection to an immediately superior public prosecutor on grounds of irregularities that occurred in the course of an investigation, but only an insufficiently effective recourse against a decision rejecting the objection has been made available to them – a complaint to the judge for preliminary proceedings (Article 312 of the CPC). If the judge should find that the complaint is well-founded, he will order that measures be taken for the purpose of eliminating the irregularities, but he is not empowered to take those measures by himself. Even though a violation of the public prosecutor's duty to disclose evidence at the same time constitutes a violation of the defendant's fundamental rights on which the fairness of proceedings is directly contingent – the right to be afforded sufficient time and an opportunity to prepare defence and the right to inspect the files and examine objects serving as evidence (Article 68, paragraph 1, items 7 and 8 of the CPC) – not enough attention has been devoted to the protection from such an irregularity in the provisions of the Code that govern the subsequent course of the proceedings. A failure to disclose evidence by the public prosecutor does not provide grounds for issuing an order for supplementing the investigation or for discontinuance of criminal proceedings in connection with the examination of an indictment (Art. 337 and 338 of the CPC); also, it does not constitute grounds for denying a motion for examining evidence at the main hearing (Article 395, paragraph 4 of the CPC) nor does it constitute grounds for appealing a first-instance judgment on account of substantive violation of the rules of criminal procedure (Article 438 of the CPC). Nevertheless, a lack of disclosure may indirectly be introduced in the course of the main hearing and classified as a relatively substantive violation of criminal procedure laid down by Article 438, paragraph 2, item 3 of the CPC if the court does not find that such a violation of the law constitutes justified grounds for affording additional time for the preparation of a defence or grounds justifying untimely proposal of evidence.

A public prosecutor should inform the suspect and his defence attorney in writing that he allows them to inspect the files and examine objects. Even though the following duty in that paragraph is formulated in such a manner that it becomes pertinent only after the suspect and his defence attorney have exercised their right, the fact that they do not have to exercise it and that the dynamics of the proceedings require that all situations which may lead to impediments should be overcome support the position that the public prosecutor should also define by that same document the time period in which the suspect and his defence attorney may exercise their rights as well as a time period in which they may put forward their proposal for undertaking certain evidentiary actions.

At first glance, the equality of arms was present more in the 2001 CPC, when defence counsels had an absolute right to access the files and objects after the interrogation of the suspect. Still, it does not always have to be the case. Under the 2001 CPC, public prosecutors did not have a duty to present to the defence all the evidence available to them; instead, they were allowed to keep some of the evidence undisclosed until the main hearing. If we are to interpret the Code in such a way that a defendant has to be interrogated in the investigation, a possibility to act in the above

manner would be, at least in name only, be precluded for the time being: disclosure of evidence collected in an investigation is a duty which could only be postponed in exceptional situations, but not excluded before the completion of the investigation or before the defence is given an opportunity to propose that some additional evidentiary actions be undertaken after familiarizing itself with the contents of the files and objects serving as evidence. However, it cannot be denied that no effective protection has been provided for in cases when a prosecutor refuses to interrogate a suspect or neglects his duty to disclose to the defence evidence available to him.

The suspect's and his defence attorney's duty "to inform the public prosecutor accordingly after having collected evidence and materials in favour of the defence (Article 301 of the CPC)" should be understood to mean that it pertains only to their notifying him about their exercise of the right governed by Article 301 of the CPC and not about the entire contents of performed activities. This duty, as well as the one to allow the public prosecutor to inspect the files and examine objects serving as evidence prior to the conclusion of the investigation must be viewed from the aspect of the burden of proof and the right to present a defence. As a result, both duties are associated with three basic restrictions.

In the first place, the duty of disclosure does not include anything else but the files and objects that may be used as evidence. Since the information and written statements referred to in Article 301 of the CPC do not constitute *media probandi*, they are not encompassed by the duty of disclosure.

On the other hand, in respect of the files and objects that formally may be used as evidence, the duty does not extend to evidence about facts that are not the subject of evidentiary actions (Article 83 of the CPC).

Finally, the duty does not pertain to evidence that is not favourable to the suspect. The entire Article 301 of the CPC, to which this provision refers, is devoted to collecting evidence and materials in favour of the defence, so any disclosure may refer only to what is useful for the defence and by no means to unfavourable or accidental findings prejudicial to the suspect. Not only is an attorney not obligated, he is not allowed to show any files or other material prejudicial to his client. He is thus obligated by the Code and other national and international instruments concerning the practice of law. Article 72, paragraph 1, item 1 of the CPC provides for a duty of defence attorneys to provide to defendants assistance with their defence in a professional, conscientious and timely manner. *Ex officio* defence counsels who neglect the above duty shall be disqualified (Article 80, para. 2, item 2 of the CPC). In any case, providing assistance with one's defence excludes any form of cooperation with the opposing party to the prejudice of the suspect's interests. Under the Code of Professional Conduct for Attorneys, they are obligated to put the interests of their clients before their own interests, the interests of other participants in proceedings and the interests of third parties (Rule 7.4). The Basic Principles on the Role of Lawyers (UN) require that lawyers shall always loyally respect the interests of their clients. The EU Code of Conduct for Lawyers provides that a lawyer must always act in the best interest of his client (Rule 2.7). Under Principle III of the Recommendation No. (2000)21 of the Council of Europe, the duty of lawyers includes taking legal action to protect, respect and enforce the rights and interests of their clients (item 3c). All of the above undoubtedly confirms that a lawyer is not allowed to take any actions prejudicial to the interests of his client at any moment or in any form when acting in his capacity as defence counsel, nor is allowed to disclose any files, objects, statements, information, or any other materials that may be prejudicial to his client.

Conclusion

The fact that suspects and their defence attorney have been authorised under the law to autonomously collect evidence and materials in favour of the defence is a useful innovation. It represents a small, yet important step towards correcting the parties' imbalance caused by the fact that investigations are under the control of public prosecutors.

The importance of this innovation is not any less because of the fact that it involves a right falling within to the domain of voluntary and free communication in which materials beneficial to the defence could be collected even if something like that were not provided for by the Code. Neither is it decreased by the fact that defence counsels also have at their disposal other legal grounds for achieving similar goals. Namely, the Law on Legal Profession governs that in order to provide legal aid, attorneys-at-law have the right to seek and obtain from state authorities timely information, documents and evidence in their possession or under their control (Article 36). Also, the duty of state authorities to provide necessary assistance for the purpose of collecting evidence is provided for in a general manner in a provision contained in Article 19 of the CPC. Defence counsels can also cite the Law on Free Access to Information of Public Importance.

When compared with those regulations and practical possibilities, the right governed by Article 301 of the CPC is considerably broader. In addition to state authorities, legal persons and information of public importance, it also pertains to natural persons, private premises, and information that may be only interpersonal in character. Also, it does not solely encompass seeking and receiving information, it also allows for drawing up statements that have a special role in criminal proceedings.

Collecting evidence and materials is certainly not the same as undertaking evidentiary actions. It the overall process of proving a case, collecting evidence in terms of written statements and information has only preparatory, preventive, and controlling function. On the other hand, in terms of obtaining documents or objects, it also encompasses means that can be directly used as evidence.

In spite of the fact that the public prosecution service is an authority whose task is to act in the public interest, to discharge its office in an impartial manner, and to ensure that human rights and fundamental freedoms are protected and respected,[11] defendants in adversarial proceedings may not count on public prosecutors to discharge their duties equally in the interest of criminal prosecution and for the purpose of safeguarding their rights. As a result, the right referred to in Article 301 of the CPC provides partly symbolical and partly actual parity in respect of autonomy of parties in the process of collecting evidence. The presence of defence counsels in the investigation, as opposed to prosecutors who always have at their disposal the assistance of the police, serves the same purpose.

The right to collect and evidence and materials in favour of the defence should be strengthened and broadened in the future. It should apply to the entire course of criminal proceedings; there should be no restrictions in respect of persons who may provide information useful for the defence. Finally, in view of the right to access certain premises or areas, it should be ensured by allowing the judge for preliminary proceedings to intervene in the investigation.

11 Article 46 of the Law on Public Prosecution (Official Gazette of the Republic of Serbia, no. 116/08, 104/09, 101/10, 78/11, 101/11, 38/12, 121/12, 101/13).

Ivan Jovanović and Ana Petrović-Jovanović[1]

Injured Party as Participant in Investigation and Reformed Criminal Procedure Laws of Countries in the Region (Serbia, Croatia, BiH, and Montenegro)

1. Notion of Injured Party and General Remarks on Injured Parties as Participants in Investigations

The understanding of criminal procedure has evolved over time in such a manner that its purpose and aim are now viewed not only from the perspective of state's right to protect the public order by way of punishing criminal offenders, but also – and increasingly more - as the state's duty towards individuals (victims) to penalise the violations of their rights. The above situation has mostly been a result of the development of human rights on a global scale, primarily through the jurisprudence of international institutions that oversee the protection of human rights, in particular the European Court of Human Rights (ECtHR). That has led to the widening of the restorative role of criminal law and procedure, whose aim is to repair the injustice and harm done to the victim as much as possible by, *i.a*, acknowledging victims their status, expressing the solidarity of the state and community with victims, protecting them from any further victimisation, providing them with a role in the process of criminal justice, compensating for the harm, and restoring their trust into the government. Both the normative elaboration and major development of the concept of protection of victims in criminal proceedings have occurred at the

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international level, thereby making an impact on national legislations and jurisprudence.[2] The United Nations and the Council of Europe have adopted a number of recommendations concerning this subject matter and the European Union has adopted framework decisions and directives; also, recently this field has been influenced by the improvement of the victim's position before the International Criminal Court.[3] Nevertheless, international standards and recommendations still leave to countries a wide margin for making decisions about the degree and form of victim's participation in criminal proceedings and the extent in which victim's interests influence the decisions of authorities that conduct proceedings; as we shall see, even when they come from once federal systems, countries opt for a wide range of solutions.

The subject matter of this article is the position and rights of the injured party in the investigation, as defined and elaborated on in four national legal systems – those of Serbia, Montenegro, Croatia, and Bosnia and Herzegovina – whose regulations were available to the authors.[4] These four national legislations that share a common legal legacy had in the previous ten years – starting with Bosnia and Herzegovina in 2003 and ending with the latest changes made to the criminal procedure in Croatia in 2013 – substituted the inquisitorial system with various models of the accusatorial system in which the investigation is entrusted to the prosecutor. The primary focus of the analysis will be on the solutions found in the new Criminal Procedure Code of Serbia adopted in 2011 (hereinafter – the *2011 CPC* or the *new Serbian CPC*), its comparison with the previous 2001 Serbian CPC (hereinafter – the *2001 CPC*) and the laws of BiH, Croatia, and Montenegro. Certain solutions regarding the position of the injured party will also be analysed in the light of relevant international instruments. Attention will be concentrated on the rights enjoyed by injured parties during the investigation which are particularly important for understanding their position at this stage in the proceedings and opportunities afforded to them under the law to participate in the investigation or have influence on it or on the criminal proceedings in general. In the first place, the paper will consider certain procedural mechanism and institutions according to which the injured party's action has a constitutive function in respect of the proceedings, *i.e.* on which depends the initiation of the proceedings (such as private indictment or motion to prosecute) as well those according to which the applications of the injured party are accessory in character or a reaction to previous actions by the public prosecutor (such as objection or subsidiary indictment). Then, special attention will be devoted to the rights enjoyed by the injured party in situations when the prosecutor is allowed to depart from the principle of legality and proceed with the resolution of the criminal matter by reaching an agreement with a defendant - the so-called prosecutorial discretion and plea agreements between the prosecutor and the defendant. In addition, the paper will present some of the most important rights of the injured party, which may also be exercised during the stage of the main hearing, but which are of importance for the injured party's participation in or presence during certain actions undertaken during the investigation.

2 For more information on this, see Ksenija Turković, "Utjecaj međunarodnog kaznenog prava na razvoj prava žrtava međunarodnih kaznenih djela te žrtava općenito u Europskoj uniji i u Republici Hrvatskoj", *Zbornik radova Pravnog fakulteta u Zagrebu/Collected Papers of Zagreb Law Faculty* 5/2004 pp. 865-937 and Ivana Simović Hiber, "Nova shvatanja o položaju žrtve u krivičnopravnoj teoriji i procesnom pravu i alternativne krivične sankcije", u *Pojednostavljenje forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, XLVI Regular Conference of Serbian Association for Criminal Law Theory and Practice, 2009, pp. 236-244.

3 The Statute of the International Criminal Court (Rome Statute) gave victims a number of rights, including the right to participate in the proceedings and apply for reparations, all of which marked a turning point in respect of the position of victims in international criminal law.

4 As regards Bosnia and Herzegovina, the Criminal Procedure Code of BiH (hereinafter BiH CPC), applied before the Court of BiH, is the one that is analysed in this paper, noting that the provisions of the criminal procedure laws of the Federation of BiH, Republika Srpska, and Brčko District regarding this matter are the same as the ones found in the BiH CPC.

The term "injured party" is traditionally used in the criminal procedure terminology of Serbia and other countries of the former SFR Yugoslavia. On the other hand, international documents most commonly employ the term the "victim of crime" and assign a wider meaning to it (even though the ECtHR has not declared its position specifically on the issue of whether or not an injured party may at the same time be referred to as the victim).[5] Finally, the lay public uses the word "victim" and even jurists sometimes do, in particular when addressing a wider audience, as the plain meaning of term "injured party" can be associated with some kind of material damage and may sound too technical and depersonalizing, especially when serious offences, such as murders or rapes, are concerned. Equating these two terms in colloquial speech is not essentially wrong since any victim of crime has the status of the injured party in criminal proceedings, whereas the injured party has been a crime victim in the majority of cases. Nevertheless, these two terms are not always fully equivalent. A victim is not necessarily a participant in criminal proceedings, whereas the injured party may be someone who is not a criminal offence victim (*e.g.* the next of kin of a deceased victim of crime). The term "victim" is used more in the context of substantive law and criminology and victimology,[6] while the term "injured party" is used more within the procedural law frame of reference (although – as we shall see from the example of Croatia – that is not the case in every national system of criminal law).

The new 2011 Serbian CPC, which began to be applied to all criminal cases as of 31 October 2013, defines the injured party in the same manner as the previous 2001 Code as "a person whose personal or property right has been violated or jeopardised by a criminal offence."[7] The concept of the injured party is defined in exactly the same manner in the criminal procedure codes of Montenegro and BiH. The Croatian CPC is the only code among the ones in force in the four observed countries which, in addition to the concept of the injured party, has introduced the concept of the victim of crime into criminal procedure and defined it as follows: a victim is "the person who, due to the criminal offence committed, suffers physical and mental consequences, property damages or substantive violation of the fundamental rights and freedoms."[8] In keeping with that definition, the Croatian law defines the injured party (*oštećenik* – according to the terminology used in the Croatian CPC) as a victim and any other person whose personal or property right has been violated or endangered by a criminal offence and who participates in criminal proceedings in a capacity as injured party.[9] The injured party under the Croatian law therefore includes the aforementioned notion of victim, but it is not on account of that any different from the contents of the notion of injured party from other codes of criminal procedure in the region since the definition of that term found in these codes encompasses the notion of victim even though that very notion is not expressly mentioned or acknowledged by those Codes in criminal procedure terms.

5 For instance, according to some international documents, the term victim denotes not only the person who has either individually or collectively suffered harm, but also the victim's relative as well as persons who have suffered harm in intervening to assist the direct victim. See: *Declaration of basic principles of justice for victims of crime and abuse of power* – General Assembly Res. 40/34, Annex 1985. The concept of victim is similarly defined in the *Recommendation R (2006)8 of the Council of Europe (CoE) Committee of Ministers to member states on assistance to crime victims* of 14 June 2006, para. 1.1. On the concepts of victim and injured party see also Goran P. Ilić, "O položaju oštećenog u krivičnom postupku", *Annals of the Belgrade Faculty of Law*, year LX, 1/2012, pp. 141-142.

6 For more information about a broader concept of victim, especially as a term used in victimology, in Serbian literature refer for instance to Vesna Nikolić-Ristanović, "Različita shvatanja pojma žrtve i njihove konsekvence na odnos društva prema viktimizaciji", *Temida*, no 1, year 15, March 2012, pp. 21-40.

7 Article 2, para. 1, item 11 of the Criminal Procedure Code (of the Republic of Serbia), *Official Gazette of the Republic of Serbia*, no. 72 of 28 September 2011, 101/11 (hereinafter – *2011 CPC*) and Article 221 of the Criminal Procedure Code (of the Republic of Serbia), *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia*, no. 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010 (hereinafter – 2001 CPC).

8 Article 202, para. 10 of the Criminal Procedure Code (of the Republic of Croatia), *Official Gazette*, number 152/08, 76/09, 80/11, 121/11, 91/12, 143/12) – consolidated text as of 11 October 2011 (hereinafter - *Croatian CPC*).

9 Article 202, para. 11 of the Croatian CPC.

The injured party may be a secondary participant in the proceedings - when the prosecutor brings criminal prosecution. He may also be or become a primary participant in the proceedings assuming two important roles – of the injured party as a prosecutor or as a private prosecutor. *Injured party as a prosecutor* (subsidiary prosecutor) is, according to the definitions of statutory terms from the new Serbian CPC (Article 2), defined as "the person who has taken over criminal prosecution from the public prosecutor", whereas a *private prosecutor* is "a person who has filed a private indictment in connection with a criminal offence prosecutable under the law by a private indictment."[10] The Croatian CPC defines these concepts in an almost identical manner. They are used in the Montenegrin Code as well, although they have not been specifically defined therein, just as they were used in the previous 2001 Serbian CPC without being specifically defined therein.[11] The CPC of Bosnia and Herzegovina does not include a statutory definition of either term since, as we will show below, the injured party in BiH may be neither a private nor a subsidiary prosecutor. The choice of these two terms has not been completely adequate and may lead to misunderstandings by the public, including the very injured parties, because in cases of criminal offences prosecuted by a motion by the injured party (by virtue of private indictment), the private prosecutor is at the same time the injured party, whereas in cases of offences prosecuted *ex officio*, the injured party as a prosecutor acts as an individual participant in the proceedings. We therefore side with those authors from the region who propose that it would be more appropriate to use some other statutory term when referring to the present injured party as the prosecutor, for instance a subsidiary prosecutor or the like.[12] In any event, the term "subsidiary prosecutor" will also be used as a synonym for the injured party as a prosecutor throughout this paper.

2. Injured Party's Rights during Investigation

Unlike the former 2001 CPC, the new Serbian CPC sets out a number of injured party's rights in one place (Article 50, paragraph 1). Among the rights enumerated in that Article, the ones relevant to the investigation include that the injured party is entitled to be informed about the dismissal of criminal charges or of public prosecutor's abandonment of prosecution; to file an objection (whenever allowed to) against the public prosecutor's decision not to undertake criminal prosecution or to abandon it; to be advised that he may take over criminal prosecution and present an indictment; to draw attention to facts and propose evidence relevant to the subject matter of evidentiary actions; to inspect files and examine objects used as evidence; to hire a proxy from the ranks of attorneys-at-law; as well as to file a motion and evidence in support of his restitution claim and a motion for imposing measures aimed at securing the claim.[13] The above list is not final given that injured parties may enjoy other rights as well, provided for in some other sections of the Code. In addition, the injured party is entitled to file a motion for initiating criminal prosecution.[14] Naturally, he has the right to file criminal charges (criminal complaint) as any other individual, so this right could not be subsumed under the rights whereby injured parties are given

10 Article 2, para 1, items 7 and 8 of the 2011 CPC.
11 See Article 22, para. 1, item 6 of the Criminal Procedure Code (of Montenegro), *Official Gazette of Montenegro*, no. 57/2009 and 49/2010 (hereinafter referred to as the Montenegrin CPC); Article 221 of the 2001 Serbian CPC.
12 See: Zoran S. Pavlović, "Neke specifičnosti oštećenog kao supsidijarnog tužioca (u kaznenom procesnom pravu Republike Srbije)", *Zbornik radova Pravnog fakulteta u Splitu/Collected Papers of the Split Faculty of Law*, year 49, 3/2012. p. 618, and Goran Tomašević, Matko Pajčić, "Subjekti u kaznenom postupku: pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku", *Hrvatski ljetopis za kazneno pravo i praksu*, Zagreb, vol. 15, broj 2/2008, p. 835, fn. 69.
13 Article 50, para. 1, items 1 through 7 of the 2011 CPC.
14 Article 53 of the 2011 CPC.

a special position in criminal proceedings. Some of the rights set forth in Article 50 of the new CPC, as well as other rights pertinent to the status of the injured party, will be separately analysed below. In addition to the above-mentioned rights, whose exercise or commencement thereof is related to the investigation, injured parties have a number of rights at the later stages and phases of the proceedings, which will not be covered in this paper.[15]

Some international recommendations and other international legal instruments concerning victims of crime point to the direction and extent in which certain rights of injured parties discussed herein ought to be regulated. Thus, the Declaration of the UN General Assembly of Basic Principles of Justice for Victims of Crime and Abuse of Power provides among other things for "allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."[16] Likewise, the Recommendation R (85) 11 of the Council of Europe's (CoE) Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure provides in its section on the criminal prosecution of offences that the victim must be given the right to ask for a review by a competent authority of a decision not to prosecute or the right to institute private proceedings,[17] whereas the Recommendation R(87)18 instructs that a complainant – who can also be an injured party – should be notified whenever possible of a decision to waive or discontinue criminal prosecution in instances when a procedural mechanism of simplified procedure is applied.[18] The CoE's Recommendation R(2006)8 on Assistance to Crime Victims requires that victims are kept informed of the outcome of their criminal complaint.[19]

It is also important to mention – because of the accession of the countries in the region to the European Union and Croatia's membership therein – that the Directive 2012/29/EU of the European Parliament and of the Council adopted in 2012 whereby minimum standards on the rights, support, and protection of victims of crime were established (which has replaced the previous Council Framework Decision EU 2001/220/JHA in this field) expressly provides that the Member States are obligated to ensure that victims are notified of the instituting, course, and completion of proceedings in order to be able, among other things, to make a decision about their own participation therein and to ensure that victims have the right to challenge decisions not to prosecute and to a review of such decisions (this does not apply to cases of out-of-court

15 Article 50 as well as some other Articles of the 2011 CPC set forth the rights enjoyed by injured parties for the duration of the main hearing. Thus, the injured party is entitled to attend the preparatory hearing and the main hearing; to participate in the presentation of evidence at the main hearing or away from the main hearing; to propose new evidence or supplemental evidence and to make a closing argument. Also, he may file an appeal against a decision on the costs of criminal proceedings and awarded restitution claim; he is entitled to be informed about the outcome of the proceedings and to be served with a final judgment. In addition, he may undertake other actions when thus allowed by the CPC, such as applying for protection from an insult, threat, or other form of attack, applying for the status of especially vulnerable or protected witness, restoration to a prior position (*restitutio ad integrum*) It is provided in general terms that the public prosecutor and the court have a duty to advise the injured party of all of his above-mentioned rights; also, it is provided that the prosecutor, when serving an order to conduct an investigation on the suspect and his defence attorney, has a duty to notify the injured party of initiating an investigation and to advise him of the said rights he enjoys throughout the duration of the entire criminal proceedings (Art. 297, para 3). The rights of injured parties at the main hearing are regulated in a similar manner both in Croatia and Montenegro.

16 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly A/Res/40/34, adopted on 29 November 1985, para. 6(b).

17 CoE Committee of Ministers, *Recommendation R (85) 11 on the position of victim in the framework of criminal law and procedure*, 28 June 1985, para. 7.

18 CoE Committee of Ministers, *Recommendation R(87)18 concerning the simplification of criminal justice*, 17 September 1987, para. 10.

19 CoE Recommendation R(2006)8 of 2006, (footnote no. 5 *supra*), para. 6.5

settlements reached by the prosecution under certain conditions).[20] Victims are in any case entitled to challenge such decisions if they are rendered by prosecutors, investigating judges, or law enforcement authorities, but not if such decisions are rendered by courts.[21] Despite the fact that it defines a number of rights for victims of crime that must be provided for in their national legal systems, the Directive explicitly allows the EU Member States liberty to regulate the scope and manner of victim's participation in the proceedings as they deem suitable.[22]

The European Court of Human Rights has mostly addressed the rights and position of the injured party from the aspect of the right to a fair trial, including as well the right to access to court, through the injured party's role in civil proceedings for the purpose of being awarded a restitution claim. Nevertheless, there have been cases in the ECHR's jurisprudence in which the Court, while addressing the issue of the procedural element of guarantees related to the right to life under Article 2 of the European Convention on Human Rights, has found that it also included the injured party's right to be informed of the course of an investigation and to be involved therein, or more precisely, that victim's next of kin are entitled to be informed of the course of an investigation and to participate therein, which also includes asking questions, to the extent in which it is necessary for them to protect their own legitimate interests.[23]

2.1 Injured Party's Objection

A new right of the injured party, which among other observed countries exists only in one more country, namely in Bosnia and Herzegovina, was introduced by the Serbian 2011 CPC: that right is an objection to a public prosecutor's decision not to undertake criminal prosecution or to abandon it. This recent right has been a procedural substitute or compensation for a right to bring criminal prosecution in the course of proceedings, investigation included, previously enjoyed by injured parties under the 2001 Serbian CPC, which, as we will see, has presently been limited. Until an indictment is confirmed, objection is the only procedural recourse whereby the injured party may assert and protect their interest that criminal prosecution is undertaken.

Injured parties are entitled to file an objection if - in connection with a criminal offence prosecuted *ex officio* - a public prosecutor dismisses criminal charges (criminal complaint), or discontinues an investigation, or abandons criminal prosecution before the confirmation of an indictment.[24] When the public prosecutor renders any such decision, he is obligated to notify the injured party thereof within eight days and to advise him that he may file an objection to an immediately superior public prosecutor (Article 51, para. 1 of the 2011 CPC). Article 51, para. 1[25] should be construed or applied to the relation public prosecutor – injured party together with

20 *Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime*, the European Parliament and the Council, 25 October 2012 (hereinafter – *EU Directive 2012/29*), especially paragraphs 43 and 45 of the Preamble as well as Articles 6 and 11. Member states are required to harmonise their national regulations with the Directive by November 16, 2015.

21 *Ibidem*, para. 43 of the Preamble to the EU Directive.

22 *Ibidem*, para. 20 of the Preamble to the EU Directive.

23 European Court of Human Rights (ECtHR), *Ayhan v. Turkey*, 16 February 2011. para. 86, as well as *Hugh Jordan v. UK*, 4 May 2001, para. 109 and *Oğur v. Turkey* (20 May 1999), para. 92. Also, *Edwards v. United Kingdom* (2002).

24 A public prosecutor may render a decision to abandon criminal prosecution in the period from the completion of an investigation until the bringing of an indictment, and then after the confirmation of the indictment, while abandonment is not allowed in the period from the bringing of an indictment to is confirmation, G. P. Ilic, M. Majić, S. Beljanski, A. Trešnjev, *Komentar Zakonika o krivičnom postupku (Commentary to the Criminal Procedure Code)*, IV edition, Belgrade, 2013 (hereinafter – *Commentary to the Serbian CPC*), p. 716.

25 If the title of a law or code is not specified next to a provision, that provision pertains to the Serbian 2011 CPC.

Article 284, para. 2 which governs the dismissal of criminal charges. This is on account that the latter requires from the prosecutor, in addition to his duty to notify the injured party of the dismissal of criminal charges within eight days and advise him of his rights – which is also laid down in the above-mentioned Article 51, para. 1 – to notify the injured party of the reasons for such dismissal of criminal charges. In that respect, Articles that govern the discontinuance of investigations (Article 308) and abandonment of criminal prosecution after the completion of an investigation (Article 310, para. 4) also lay down that the prosecutor has a duty to notify the injured party thereof so that he could file an objection afterwards; however, neither these two Articles mention that the notification should include reasons for such decision by the prosecutor. That could be an oversight on the part of the legislator due to which articles addressing the same prosecutor's duty have not been laid down in an identical manner; in any case, even though the work of prosecutors is made easier in practice because of Article 51, paragraph 1, given they are not required to provide injured parties with reasons for their decisions, the prosecution service should be guided by the article of the Code that grants more rights to citizens (injured parties in this instance) in respect of that matter and to provide a rationale as required under the said paragraph 2 of Article 284.

When a public prosecutor receives a report about an incident (*e.g.* a report about traffic accident and record of accident scene investigation) instead of criminal charges, and finds that there are no grounds for bringing prosecution, he is not under such circumstances required to notify the injured party thereof or advise him of his rights.[26] This follows from the provision contained in Article 51, para. 1 and Article 284, para. 2 of the CPC in which the prosecutor's decision is characterised as the dismissal of criminal charges (criminal complaint) and not a decision against initiation of the prosecution and hence no duty on the prosecutor's part has been laid down to inform the injured party that he has not found any grounds for initiating prosecution.[27]

The public prosecutor shall also notify the injured party that an investigation has been completed (Art. 310, para. 1 of the 2011 CPC). The injured party is entitled to file an objection if the prosecutor does not issue an indictment within 15 days, or within 30 days in particularly complex cases, after the completion of the investigation (Article 331, para. 3). In such a situation, the prosecutor does not render a decision or in other words he does not take any action, *i.e.* he remains "silent" and identical time limits are set for filing an objection by the injured party: eight days from the expiry of the time limit for issuing an indictment or three months from the completion of the investigation.[28]

The Code requires that the prosecutor shall inform the injured party even when he dismisses criminal charges on grounds of defendant's compliance with his obligations in cases of conditionally deferred prosecution. In such situations, the injured party has no right to file an objection and neither is he entitled thereto in cases of dismissal of criminal charges on grounds of purposefulness or fairness.

The Code gives the injured party a time limit of eight days to file an objection, starting from the day on which he receives a notification from the public prosecutor and advice of the right to file

26 Priručnik za primenu Zakonika o krivičnom postupku/Handbook on Application of Criminal Procedure Code, S. Bejatović. M. Škulić, G. Ilić (eds.), Serbian Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade 2013, p. 221.

27 *Ibidem*.

28 Article 331, para. 3 of the 2011 CPC.

an objection or from the expiry of the time limit for issuing indictment after the completion of an investigation (Article 51, para. 2 and Article 331, para. 3). When the injured party has not been notified that the investigation was completed, the objective and preclusive time limit for filing an objection is set at three months from the day on which the prosecutor dismisses criminal charges, discontinues an investigation, or abandons criminal prosecution,[29] or issues an order for completing the investigation.[30] It should be mentioned that even if the injured party were notified within those three months, his objection would be precluded by the expiry of the eight-day time limit – which applies in such cases – and not by the expiry of the three-month time limit.[31] As can be seen from the above, the exercise of the injured party's right to file an objection is contingent on the prosecutor's timely notification of his decision against undertaking or in favour of abandoning criminal prosecution. Prosecutors do not face any procedural consequences under the provisions of the Code if they fail to discharge the duty in question, although such an omission could possibly constitute grounds for disciplinary action against the public prosecutor or deputy prosecutor. In any event, the exercise of this right in practice will depend on how professional, responsible to his vocation and ethical each prosecutor is. For that reason, it would certainly be useful if injured parties, for their part, actively followed as much as possible the proceedings in connection with their criminal matter so as to preclude any possible omissions by prosecutors and losing their right as a result of exceeding the set time limit.

In all of the above-mentioned cases, the immediately superior prosecutor is the one who renders a decision on the injured party's objection within 15 days from the date of receiving the objection and he may either deny or grant it by issuing a decision (Article 51, para. 3 and Article 331, para. 4). Neither an appeal nor any further objection is allowed against such a decision. The above-mentioned 15-day time limit is instructive and the injured party does not have at his disposal any special procedural recourse to force the superior prosecutor to render a decision on the objection in the event he exceeds the set time limit for any reason whatsoever. If the prosecutor to whom the injured party has addressed grants the objection, he will by the same decision give a mandatory instruction to the competent lower public prosecutor to undertake or resume criminal prosecution.[32] If the investigation has been completed and no indictment is issued, he will order him to issue an indictment.[33] When the Law on Public Prosecution Service is taken into account, the immediately superior prosecutor could, after granting the objection, issue a mandatory instruction only on condition that he found that the previous decision by the lower-ranking prosecutor (to dismiss criminal charges, discontinue the investigation, abandon prosecution, or not to issue an indictment) was unlawful.[34]

The injured party is entitled to file an objection in summary proceedings as well, under the same conditions as set out in Article 51, if the public prosecutor abandons criminal prosecution before the scheduling of the main hearing or the sentencing hearing (pursuant to Article 497, para. 1). The majority of proceedings before basic courts in Serbia will be conducted as summary

29 Article 51, para. 2 of the 2011 CPC.
30 Article 331, para. 3 of the 2011 CPC.
31 Analogous to the decision by the Supreme Court of Cassation, Kzz.19/12, of 28 March 2012. This decision pertained to the 2001 CPC and exceeding the eight-day time limit after the injured party had been notified of the prosecutor's abandonment of criminal prosecution.
32 Article 51, para. 3 of the 2011 CPC.
33 Article 331, para. 4 of the 2011 CPC,
34 See Article 118, para. 1 of the Law on Public Prosecution Service, Official *Gazette of the Republic of Serbia*, no. 116 of 22 December 2008, 104/09, 101/10, 78/11, 101/11, 38/12, 121/12, 101/13, 32/14.

proceedings given the number of offences to which this type of simplified procedure is applied.[35] As regards summary proceedings, the injured party has the right to file another objection, specifically if within six months from the day of receiving criminal charges the public prosecutor fails to file a motion to indict or notify him that he has dismissed the charges (Article 499, para. 3). A time limit for filing this type of objection is also three months and it is also calculated not from the day of dismissal of criminal charges, but from the day of expiry of the six-month time limit, starting from the day on which criminal charges are filed.[36] That represents yet another narrowing of the rights enjoyed by injured parties in comparison with the previous 2001 CPC because in this instance as well the objection has replaced the former option given to the injured party to assume prosecution as a subsidiary prosecutor (by filing a motion to indict with the court) if the public prosecutor failed to file the motion to indict or notify him that he had dismissed criminal charges within the timeframe of one month after receiving the charges (Article 437 of the 2001 CPC). In such cases as well, the prosecutor had remained "silent" as when he would not issue an indictment after the conclusion of an investigation in regular proceedings. Under the former CPC, no time-limit for initiating proceedings by virtue of a motion to indict was imposed in such situations on the injured party after the expiry of the foreseen one-month deadline.

Among the four observed national legislations, injured party's objection exists only in one more country, namely Bosnia and Herzegovina, but it has been differently termed (as a complaint). When a prosecutor issues an order not to conduct an investigation or to discontinue it, of which he is required to notify the injured party within three days (and at the same time he has a duty to inform him about reasons for his decision), the injured party in BiH is entitled to file a complaint with the prosecutor's office within eight days from the date on which he receives such notification.[37] In contrast to the Serbian CPC, the BiH Code provides neither for a procedure to be followed upon a complaint nor for the form of a decision rendered in connection therewith, although it can be concluded based on the nature and character of the complaint that - in the similar manner as in Serbia - the prosecutor's office may either issue a decision that the complaint is well-founded and order that an investigation be conducted or a decision that the complaint is unfounded and inform the injured party accordingly.[38]

Unlike the new Serbian CPC and the CPC of Bosnia and Herzegovina, the former 2001 Serbian CPC did not provide for a possibility of injured party's objection during an investigation nor do laws governing criminal procedure in Montenegro and Croatia provide for it at present. The reason for that is simple: they specifically give injured parties a stronger right and a more powerful mechanism for protecting their interests and controlling prosecutor's actions during an investigation and that is the possibility of taking over criminal prosecution.

The existence of a possibility for filing an objection is in accordance with the above-mentioned recommendations from the UN General Assembly's Declaration of Basic Principles of Justice for

35 The legislator has widened the scope of offences processed in summary proceedings in the new CPC so to encompass those punishable with imprisonment of up to eight years (it was up to five years under the former CPC) or a fine as their principal penalty, which is justifiable from the perspective of simplification and efficiency of proceedings.

36 Commentary to the Serbian CPC, *op. cit*., p. 1058.

37 Criminal Procedure Code of Bosnia and Herzegovina (consolidated text) – *Official Gazette of Bosnia and Herzegovina*, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/055, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09) (hereinafter – the BiH CPC) Article 216, para. 4 and Article 224, para. 2.

38 Miodrag Simović, "Main Characteristics of the Criminal Investigation System in the Legislation of Bosnia and Herzegovina and its Impact on the Simplification of Criminal Proceedings" in Ivan Jovanović, Miroljub Stanisavljević (eds.), *Simplified Forms of Procedure in Criminal Matters: regional criminal procedure legislation and experiences in application*, OSCE Mission to Serbia, Belgrade, 2013, p. 130.

Victims of Crime to allow victims to present their views and concerns which must be considered when they affect victims' personal interests; it is also in line with the CoE Recommendation R (85) 11 that it should be ensured that victims have the right to request that competent authorities review decisions on not initiating criminal prosecution. The very procedural tool of objection established as a partial substitute for taking over criminal prosecution is also in line with the above recommendation by the Council of Europe which allows its member states to opt for laying down either of those two possibilities available to victims of crime. As regards its compliance with the EU *acquis communautaire*, the objection also satisfies a requirement set out the above-cited EU Directive of 2012/29 to ensure that victims have the right to a review of prosecutors' decisions not to prosecute offenders.[39] However, in order for this right to be exercised, it is crucial that a victim is informed by the prosecutor about the outcome of criminal charges filed by him or about the prosecutor's decision not to initiate criminal prosecution or to desist therefrom, as set forth by the CoE Recommendation R(2006)8 and EU Directive 2012/29 (Article 6, para. 1 – Right to receive information about their case) and as requested by the European Court of Human Rights in its previously mentioned decision whereby it has found that victim's next of kin has the right to be informed about the course of an investigation.[40]

The introduction of objection into the new Serbian CPC is justified as a component of the right to receive a reasoned court decision as an element of the right to a fair trial,[41] but this tool has also been met with criticism for not being purposeful.[42] One of main arguments in favour of such criticism has been that the prosecution service is structured as a strictly hierarchical institution in which superior prosecutors constantly oversee the actions of lower-ranking prosecutors, for which reason the actions of superior prosecutors would not be impartial due to the fact that they would review decisions of their subordinates whose work they should in any case monitor according to the nature of their work and so they would have to acknowledge their own mistake(s).[43] Criticism may also be founded on a supposition that a prosecutor who is ordered by a superior prosecutor to prosecute an offender has already stated his position on that same criminal matter when he decided against initiating or continuing with criminal prosecution in the first place; as a result, despite the mandatory instruction from an immediately superior public prosecutor, there is still a risk that that same prosecutor will not be committed to representing the prosecution and collecting evidence that would lead to a well-founded indictment or will not issue an indictment for which he previously believed that it was unfounded. In addition to that, the prosecutor in charge could not file an objection to the instruction he received even if he believed that such an instruction was unlawful or unfounded, whereas if he should fail to act according to the mandatory instruction, that failure would, pursuant to the Law on Public Prosecution Service, constitute a disciplinary violation.[44] Such criticism is not unfounded looking from the

39 *EU Directive 2012/29*, Article 11, para. 1.
40 See footnotes no. 5, 20, and 23 *supra*.
41 Goran P. Ilić, *op. cit.*, p. 153, fn. 77.
42 Criticism is also centred on the fact that the Law on the Public Prosecution Service does not include any such instructions as a special type of mandatory instructions, which is why such type of the instruction should be specifically regulated through amendments to the Law on the Public Prosecution Service and to the Rulebook on Administration in Public Prosecutor's Offices. See Goran Ilić "Position of the Public Prosecutor According to the New Serbian Criminal Procedure Code" in Ana Petrović, Ivan Jovanović (eds.), *New Trends in Serbian Criminal Procedure Law and Regional Perspectives (normative and practical aspects),* OSCE Mission to Serbia, Belgrade 2012, p. 74 and Handbook on Application of Criminal Procedure Code, *op. cit.*, p. 216.
43 *Ibidem*.
44 Commentary to the Serbian CPC, *op. cit.,* pp. 205-206. See Article 104, para. 1(4) of the Law on Serbian Public Prosecution Service.

perspective of criminal procedure policy, but the legislator's choice is completely legitimate and allowed from the normative point of view.[45]

2.2 Taking over Criminal Prosecution by Injured Party (Subsidiary Indictment)

In principle, one of the most important and prominent rights traditionally enjoyed by injured parties has been a possibility to take over criminal prosecution if prosecutors decided not to initiate criminal proceedings or to desist therefrom. In such situations, injured parties acted as prosecutors instead of public prosecutors or as *subsidiary prosecutors*. The right to file a subsidiary indictment was legislated already by the first Yugoslav Code of Criminal Procedure before Court passed in 1929, whereas afterwards it was absent only from the 1948 CPC; today, it is present in all the countries that have emerged after the dissolution of the former SFRY with the exception of BiH. The new 2011 Serbian CPC has retained that right, but it has been considerably restricted and reduced only to the taking over of criminal prosecution (*i.e.* filing a subsidiary indictment) upon the confirmation of an indictment, but not during an investigation. Although injured parties in Serbia currently do not enjoy this right in the course of the investigation, we will briefly comment on it because of its relevance and in order make a comparison with the other countries in the region.

The 2011 CPC thus lays down that if a public prosecutor declares that he is withdrawing charges after the confirmation of an indictment, the court will ask the injured party whether he wishes to assume criminal prosecution and represent the prosecution (Article 52, para. 1).[46] A time limit before which injured parties must state their position has also been established in this case as in the case of objections: eight days from the date on which they receive notification and advice from the court, and if they have not been informed, the preclusive and absolute time limit is three months from the day of public prosecutor's statement that he withdraws the charges.[47] If an injured party states that he will assume criminal prosecution, the court will proceed with or schedule a main hearing.[48] On the other hand, if the injured party does not state his position within the above timeframe or states that he does not wish to take over criminal prosecution, the court shall issue a ruling discontinuing the proceedings or pass a judgment whereby charges are denied.[49] An injured party who could not attend a preparatory hearing or the main hearing or who could not inform the court of his change of residence in a timely manner for justifiable reasons has the right to apply for restoration to a prior position (*restitutio ad integrum)* within eight days from the date on which an obstacle ceases to exist, but not exceeding the absolute time limit of three months (Article 226, para. 1, item 2).[50] In the further course of proceedings, the injured

45 The EU Directive allows that such decisions are reviewed by immediately superior bodies, while decisions originally passed by the highest prosecutorial authority in a country may be reviewed by that same authority. It is thus not required that courts shall review prosecution's decisions. *EU Directive 2012/29*, para. 43 of the Directive's Preamble.

46 In any case, the public prosecutor may withdraw the charges from the moment of indictment's confirmation until the conclusion of the main hearing, as well as during a hearing before a court of second instance (but in case of latter solely with consent from defendant).

47 Article 52, para. 2 of the 2011 CPC.

48 The court first needs to establish that a specific individual has the status of an injured party because if an individual who could not have that status assumed criminal prosecution after the dismissal of criminal charges, that would constitute a substantive violation of criminal procedure because it will be considered that there was no authorised prosecutor in that specific case. Commentary to the Serbian CPC, *op. cit*., p. 207, citing the case-law of the Supreme Court of Serbia, *Kzz2, no. 2229/05* of 19 January 2006 and Supreme Court of Serbia, *Kzz. no. 153/06* of 2 March 2007.

49 Article 52, para. 3 of the 2011 CPC.

50 Commentary to the Serbian CPC, *op. cit*., p. 208

party may withdraw the charges before the conclusion of the main hearing or a hearing before a second instance court; his statement whereby he withdraws the charges is irrevocable. If an injured party should pass away within the timeframe provided for making a statement on assuming prosecution or in the very course of the proceedings, his legal successors shall have the right to take over prosecution.[51]

After assuming criminal prosecution, an injured party as a prosecutor is entitled, among other things, to represent the prosecution, file motions for and evidence in support of his restitution claim, and undertake other actions as specified by the Code in the further course of the proceedings before a court of law while acting alone or through his proxy. In general, he enjoys all the rights which would otherwise be enjoyed by a public prosecutor (including, for instance, the right to alter the legal qualification of an offence),[52] except for those that public prosecutors have in their capacity as public authority (Article 58 of the 2011 CPC). As opposed to prosecutors, injured parties may not count on assistance from the police or other state authorities in collecting evidence, nor are all those authorities obligated to provide them with information and notifications.[53] Similarly, they are not allowed to conclude plea agreements with defendants. On the other hand, there are some actions that may be undertaken by injured parties as subsidiary prosecutors but not by public prosecutors: for instance, they may file a motion to be examined as witnesses or an application for restoration to a prior position.[54]

As regards the injured party's right as a subsidiary prosecutor, the key difference between the current Serbian CPC and the 2001 CPC lies in the fact that under the former CPC injured parties could take over criminal prosecution not only from the beginning of the main hearing, but during the investigation as well (within eight days from the date of receiving a notification or within three months if they were not notified of the prosecutor's decision not to bring prosecution or to abandon it – Article 61 of the 2001 CPC). When the prosecutor or the court sent notifications to injured parties, they would provide them with advice about actions they were entitled to take in their capacity as subsidiary prosecutors.[55] When a public prosecutor decided to withdraw the charges, the injured party had the right to stand by the same charges or bring the new ones.[56]

Changing the rules pertaining to the possibility of taking over prosecution by injured parties, *i.e.* eliminating such a possibility during the investigation, has led to problems in Serbia with regard to practical application after the entry into force of the 2011 CPC, because it has raised the question of how the proceedings should be continued if the motion to indict was filed by the injured party while the previous CPC was in still effect. This issue has also been addressed by the Appellate Court in Belgrade whose Criminal Division in answering enquiries from lower-instance courts has taken a position that if an injured party has taken over prosecution and filed a motion for conducting an investigation which has not been decided yet, that motion shall be regarded as an injured party's objection filed with a senior public prosecutor, whereas in all the

51 Article 57 of the 2011 CPC.
52 Supreme Court of Serbia, *Kzz.17/97* of 16 December 2002.
53 Commentary to the Serbian CPC, *op. cit.*, p. 213.
54 *Ibid.* See Article 92, para. 1 or Article 226, item 2 of the 2011 CPC.
55 Article 61, para. 5 of the 2001 CPC.
56 Article 61, para. 3 of the 2001 CPC.

other cases, given Article 604 of the current CPC,[57] the injured party shall have the capacity as an authorised prosecutor pursuant to the provisions of the former CPC.[58]

The *Montenegrin* Criminal Procedure Code provides for and regulates the injured party's right to assume prosecution both during the investigation and at the main hearing in the same manner as did the 2001 Serbian CPC; the only difference is that time limits it sets are more favourable to injured parties: 30 days to take over criminal prosecution from the moment of receiving a notification and six months if they have not received any such notification (Article 59, para. 3 and 5 of the MN CPC). Subsidiary indictment is provided for in *Croatia* in an almost identical manner as it used to be regulated in Serbia before the adoption of the new CPC and as it is regulated presently in Montenegro; the only difference is made in respect of the objective time limit, so in cases of a stay of proceedings, the time limit is set at three months from the issuance of state attorney's decision (as under the 2001 Serbian CPC), whereas in cases of state attorney's dismissal of charges, the time limit is set at six months (Article 55, para. 4 of the Croatian CPC). In *Bosnia and Herzegovina,* injured parties may not act as subsidiary prosecutors in criminal proceedings under any conditions.

As for the summary proceedings, in Serbia injured parties are entitled to take over prosecution in that type of proceedings as well, under the same conditions as set out in Article 52 of the new CPC, specifically if the public prosecutor withdraws charges from the date of scheduling the main hearing or a sentencing hearing until the conclusion thereof. The *Montenegrin* CPC has kept and regulated in the same manner that same right of the injured party as it was laid down by the 2001 CPC (Article 449 of the Montenegro CPC).[59] As regards *Croatia*, injured parties could exercise that same right in summary proceedings under the former 1997 CPC – which used to exist under the former Serbian CPC and which is still in force under the current Montenegrin CPC – namely, to act as subsidiary prosecutors in cases when state attorneys failed to initiate criminal prosecution or dismiss criminal charges within a specified timeframe, given that a period of time injured parties had to wait for a prosecutor's reaction in Croatia was somewhat longer then – it was three months.[60] The new 2008 Croatian CPC has nevertheless abolished that right and presently, injured parties are forced to wait for state attorney's decision in any case.[61]

It cannot be doubted that the right to act as a subsidiary prosecutor represents both in principle and from the formal aspect of law a powerful procedural means of the injured party's whereby he protects his interests; it is at the same time an important corrective to improper actions or a passive stance taken by public prosecutors. As a manner of challenging prosecutors' decisions not to take action which is more direct and powerful than the objection, it automatically complies with the requirement from the EU Directive 2012/29 which provides that victims of crime shall be entitled to a review of the discontinuance of proceedings not ordered by the court. However, the state is not in any way obligated to provide for such a right of injured parties and the CoE Recommendation R (85)11 expressly states that it may be replaced with the injured party's right

57 Article 604 of the 2011 CPC lays down that the legality of actions undertaken prior to the entry into force of that very Code shall be assessed pursuant to the provisions of the previous CPC (the 2001 one).

58 Answers to the enquiries from lower-instance courts provided by judges with the Criminal Division of the Appellate Court in Belgrade given at their session held on 7 April 2014.

59 See Drago Radulović, Commentary to the Criminal Procedure Code of Montenegro, Podgorica 2009, p. 586.

60 Article 433, para. 1 of the Criminal Procedure Code (of the Republic of Croatia), *Official Gazette*, no. 110/97, 27/98, 58/99, 112/99, 58/02 and 143/02.

61 Also see Tomašević-Pajčić, *op. cit.*, p. 845.

to request a review of the decision not to initiate criminal prosecution,[62] which has been achieved by both the Serbian and BiH legislators when they provided for objection as a procedural tool. If we are to lament the abolishment of this right, it should be mentioned that the number of subsidiary indictments at the time they were allowed both during the investigation and at the main hearing was negligible in practice, while the percentage of such indictments that resulted in judgments of conviction was even lower.[63] A number of reasons could have led to such a situation: it could be that the prosecution had always made right decisions concerning dismissal or withdrawal of charges or perhaps injured parties' lack of confidence that they could be successful as subsidiary prosecutors prevailed or the fact that they were not aware of any such right (regardless of the prosecution's and court's duty to advise them thereof – which could also have been neglected in practice); other possible reasons included a lack of money or time to get involved into proceedings, even the fear that defendants might retaliate if they acted as prosecutors. The low percentage of judgments of conviction passed on subsidiary indictments could also have meant that such indictments had not been sufficiently well-founded or that injured parties were unable to conduct their investigations and further proceedings in an equally adequate manner as dedicated public prosecutors would have in their capacity as state authorities with all of their prerogatives and status, or it could have been due to some other reason. If those reasons existed before, they also exist today and even more so since injured parties as prosecutors now face even greater challenges than before given the new concept of the investigation and the burden of collecting evidence placed on prosecutors. Nevertheless, the fact that an individual right is rarely exercised should not be the primary reason for its abolishment. We are not of the belief that the legislator was guided by previous practice to such an extent that they eliminated a not-so-often-exercised right; if that was the case, a question arises as to why they have kept the possibility of filing a subsidiary indictment at the main hearing. Rather, the impression is that the legislator had consistently adhered to the principles underlying the new Serbian CPC and entrusted the investigation exclusively to prosecutors with all the competences and powers on the one hand and the accompanying burdens and duties on the other, in spite of the examples that, as we have seen, can be found in the neighbouring countries which have kept this right of the injured party despite a more active role taken on by prosecutors and their predominantly accusatory systems.

Now that the possibility of filing a subsidiary indictment has been limited to the stage following the confirmation of an indictment, one can assume that filing such indictments will be even more rare than before if only for the fact that prosecutor's withdrawal of an indictment after its confirmation has always been an exceptionally rare occurrence in practice. In consequence, the possibility of acting as a subsidiary prosecutor and representing an already prepared indictment will in reality remain a powerful potentiality for injured parties, which will nevertheless be rarely realised. On the other hand, it should be mentioned in any case that injured parties are not deprived of the possibility to influence the investigation and assist, propose, and even "guide" prosecutors in a certain manner if they should take a passive stance or be on the wrong track since, as we shall see, injured parties are entitled to take part in the investigation to some extent, as well as to point to facts and propose evidence. Still, the following problem remains: if there were an unwilling prosecutor who opted for avoiding criminal prosecution against certain persons, an injured party would not have at their disposal any other recourse than filing an objection with the

62 See footnote no. 17 *supra*.

63 In the period 2002-2006 there were less than one percent of subsidiary indictments in Serbia. The situation is similar in other countries, for instance in Croatia. Cited according to Zoran Pavlović, op. cit., p. 626 (especially footnote 25 at that page).

senior prosecutor – which has been discussed above. When all of the above arguments are taken into account, we are still of the opinion that the solutions from the 2001 CPC should have been kept and the possibility of filing a subsidiary indictment during the investigation should have been preserved even if it were not to be used frequently in practice or if its outcome were rarely to be in favour of injured parties.

2.3 Injured Party's Motion for Criminal Prosecution

As many other national legislations, the Serbian Criminal Code provides that certain criminal offences may be prosecuted only at a motion by an injured party. Those offences are believed to threaten someone's personal interest first and only then to jeopardise the public interest.[64] A motion is filed with the competent public prosecutor within three months from the day on which the injured party learns about a criminal offence and a suspect (Article 53, para. 2 of the 2011 CPC). If the injured party files criminal charges (criminal complaint) or restitution claim in criminal proceedings, it shall be deemed that he has thereby also filed a motion for criminal prosecution.[65] If it should happen that the injured party pass away within the timeframe for filing a motion, his legal successors may succeed him, *i.e.* they are allowed to file the motion.[66] The injured party may also withdraw his motion, but not later than the conclusion of the main hearing.[67]

The 2001 Serbian CPC used to govern the injured party's right to file the above motion in the same manner (Art. 53 through 56 and Art. 61, para. 6 of the 2001 CPC) as it is presently governed by the *Croatian* CPC (Article 48 through 51). There is no prosecution at the motion by an injured party in *Montenegro*; instead, there is only a private indictment. Given that in Bosnia and Herzegovina all the criminal offences are prosecuted *ex officio*, no prosecution at the motion by an injured party has been provided for.

2.4 Private Indictment

Injured parties may occupy the role of a private prosecutor in criminal proceedings and consequently in an investigation – when they initiate criminal proceedings in connection with offences for which substantive criminal law lays down that they shall be prosecuted by virtue of a private indictment. Private prosecutors are entitled to file and represent a private indictment and they also have rights to which public prosecutors are entitled in criminal proceedings, except for those they exercise in their capacity as public authorities (Article 64 of the 2011 CPC). As any other injured party, a private prosecutor may file a motion and submit evidence in support of his restitution claim as well as propose the imposition of interim measures to secure it and hire a proxy from the ranks of attorneys; provisions on the injured party as a subsidiary prosecutor and on the

64 Under the Serbian Criminal Code, offences in connection with which public prosecutors may undertake prosecution only at a motion by an injured party include as follows: unauthorised disclosure of secret, less serious forms of prevention of printing and distribution of printed material and of broadcasting, prevention of public assembly, rape and sexual intercourse with a helpless person when committed against a spouse, usury, squatting, unlawful occupation of premises, etc. The fact that criminal prosecution has been made contingent on the injured party's motion, which constitutes a departure from the principle of legality, is in line with the recommendations of the Council of Europe concerning the simplification of criminal justice R(87)18 (footnote no. 18 *supra*), Chapter I and on the role of public prosecution in the criminal justice system R(2000)19 of 6 October 2000, item 3.

65 Article 53, para. 2 of the 2011 CPC.

66 Article 57 of the 2011 CPC.

67 Article 54 of the 2011 CPC.

injured party as a filer of the motion for criminal prosecution which pertain to the succession by legal successors and withdrawal of charges apply accordingly to private prosecutors (Article 67).

In any case, a private indictment is filed within three months from the day on which the injured party learns about a criminal offence and a suspect.[68] If the injured party has filed criminal charges (criminal complaint) or a motion for criminal prosecution, and it is established in the course of proceedings that the offence in question is prosecuted based on a private indictment, the charges or the motion are to be deemed a timely private indictment if they have been filed before the set time limit.[69] The manner in which the rights of private prosecutors are provided for by the new Serbian CPC is almost identical to the rights regulated by the previous 2001 CPC (Articles 53 through 60 of thereof) as well as by the laws of *Montenegro* (Articles 51 through 57 of the MN CPC) and *Croatia* (Articles 60 through 63 of the Croatian CPC). In *BiH*, where all criminal offences are prosecuted only *ex officio* and where there is no prosecution at the motion by an injured party there is no private indictment either.

2.5 Injured Party's Rights in Instances of Departure from the Principle of Legality of Criminal Prosecution

2.5.1 Injured Parties and Prosecutorial Discretion (Principle of Opportunity)

A particularly critical moment in respect of injured party's interests may arise in instances when prosecutors are allowed to depart from the principle of legality and have the right to decide not to undertake prosecution under the conditions set out by the law. The first instance pertains to the so-called conditionally deferred prosecution (conditional prosecutorial discretion) – or deferral of criminal prosecution if a defendant undertakes to fulfil certain obligations and subsequent dismissal of criminal charges when those obligations have been fulfilled (Article 283, para. 1 and 3 of the 2011 CPC).[70] As opposed to the previous Code, the new Serbian CPC does not require either consent or an opinion from the injured party for the prosecutor to defer criminal prosecution in any case whatsoever. Likewise, under the new CPC injured parties are not entitled to file an objection against prosecutor's final decision to dismiss criminal charges if a suspect complies with the imposed obligation within the set time limit after the prosecutor has deferred criminal prosecution.[71] If the damage sustained by an injured party has not been indemnified through the fulfilment of a condition imposed on a suspect by the prosecutor, the injured party's only recourse is to file for a restitution claim in civil proceedings.[72]

68 Article 65, para. 2 of the 2011 CPC.
69 Article 65, para. 3 of the 2011 CPC.
70 Public prosecutors may defer criminal prosecution for criminal offences punishable with a fine or a term of imprisonment of up to five years provided a suspect accepts and fulfils one or more of the following obligations within a time limit not exceeding one year: to rectify a detrimental consequence of a criminal offence or indemnify the damage caused; to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution; to perform community service or humanitarian work; to fulfil maintenance (alimony) obligations that have fallen due; to submit to an alcohol or drug treatment programme; to undergo psychosocial treatment for the purpose of eliminating the cause(s) of violent behaviour; or to fulfil an obligation or observe restrictions imposed by a final court decision. If the suspect fulfils the above obligation(s) within the prescribed time limit, the public prosecutor shall dismiss criminal charges by issuing a decision. Article 283, para. 1 and 3 of the 2011 CPC.
71 Article 283, para. 3 of the 2011 CPC.
72 Commentary to the Serbian CPC, *op. cit.*, p. 653.

No consent is sought from injured parties nor are they entitled to file an objection in the second type of prosecutorial discretion – when prosecutors are allowed to dismiss criminal charges for reasons of purposefulness or fairness (the so-called unconditional or pure prosecutorial discretion from Article 284, para. 3 of the 2011 CPC).[73] There is not even a duty on the prosecutors' side to notify injured parties of their decision unlike in the previous type of case of the conditional prosecutorial discretion for which the Code still requires from prosecutors to inform injured parties that they have dismissed criminal charges.

The status of injured parties used to be more favourable under the previous 2001 Serbian CPC since it provided that they were allowed to participate in the decision-making process on the application of conditionally deferred prosecution. More precisely, consent from an injured party was sought in cases of two out of six measures that constituted potential requirements for abandonment of criminal prosecution under the 2001 CPC (these two were the payment of a certain amount of money to a humanitarian organisation, foundation, or a public institution and the performance of community service or humanitarian work); only in those two situations did injured parties lose their right to act as subsidiary prosecutors (Article 236, para. 4 and 6 of the 2001 CPC). Nevertheless, an injured party could not arbitrarily refuse to give consent because if the prosecutor found that he was denying consent for unjustified reasons even though he had been fully indemnified for the damage sustained, the prosecutor would apply to the panel to issue a ruling allowing the fulfilment of an obligation related to conditionally deferred prosecution.[74] The 2001 CPC also provided that prosecutors had a possibility but not a duty to question both the injured party and the suspect when examining possibilities for deferring criminal prosecution prior to the filing of a motion to indict or a motion for conducting an investigation.[75]

The new *Montenegrin CPC* has also kept the same solution as the 2001 Serbian CPC, which existed in the previous Montenegrin CPC as well, according to which consent from injured parties was sought in cases of conditionally deferred prosecution in connection with the imposition of measures of paying a sum of money for humanitarian purposes and of performing humanitarian work (Article 272, para. 4 of the MN CPC), with an additional provision that prosecutors should advise the injured party that he would lose his right to act as a subsidiary prosecutor if a suspect fulfilled his obligations. However, in contrast to the above-mentioned solution from the former 2001 Serbian CPC, the Montenegrin CPC does not provide that prosecutors has a possibility to apply to the judicial panel for an approval that a suspect could fulfil his obligation if an injured party refused to give their consent for unjustifiable reasons. The Montenegrin CPC provides for a possibility which does not exist in any of the other three national jurisdictions;

73 Certain statutory prerequisites need to be met in this instance as well, but no conditions are imposed on defendants. This type of prosecutorial discretion may be exercised only if several conditions have been met cumulatively: 1) the offence is punishable with a fine or a term of imprisonment of up to three years, 2) a suspect has, as a result of genuine remorse, prevented the occurrence of damage or he has already indemnified the damage in full, and 3) the public prosecutor has found that the imposition of a criminal sanction would not be fair given the circumstances of the case. Article 284, para. 3 of the 2011 CPC. According to some authors, this type of unconditional prosecutorial discretion is the only one that is in the true sense of that word based on the principle of opportunity (prosecutorial discretion) as opposed to the principle of legality (mandatory prosecution) and they subsume the previous type or the so-called conditionally deferred prosecution under the typical case of deferred prosecution which exists in modern legislations. Stanko Bejatović, Drago Radulović, *Zakonik o kivičnom postupku SR Jugoslavije,* Beograd, 2002, s. 160.

74 Article 236, para. 5 of the 2001 CPC.

75 Article 236, para. 9 of the 2001 CPC. Likewise, the Instructions A no. 246/8 of 28 August 2008 issued by the Republic Prosecutor provided that public prosecutors had a duty to consider exercising either conditional or unconditional discretion after receiving a criminal complaint and to request, among other things, an opinion from injured parties for the purpose of reaching a decision in that regard. Cited according to Goran Ilić, Jasmina Kiurski, "Prosecutorial Discretion and Experiences in its Application so Far" in Ivan Jovanović, Miroljub Stanisavljević (eds.), *op. cit*., p. 253.

specifically, prior to issuing a decision whereby some of suspect's obligations are established, the state prosecutor may conduct a mediation (victim-witness reconciliation) procedure between the injured party and the suspect.[76] Such a course of action available to prosecutors is in line with the Recommendation R(99)19 of the Council of Europe concerning mediation in criminal matters, which provides, *inter alia*, for laying down of statutory norms which would form a basis for mediation between the defendant and injured party.[77] As regards unconditional discretion – dismissal of criminal charges on grounds of fairness (to which conditions identical to those found in the current Serbian CPC apply and no duty to notify the injured party is mentioned therein) – injured parties in Montenegro cannot in any manner challenge such a decision nor has any possibility been made available to them to proceed as subsidiary prosecutors (Article 273 of the MN CPC).

The Croatian CPC is once again the code that has given the widest range of rights to injured parties, *i.e.* victims in respect of prosecutorial discretion as well. In Croatia, as opposed to other countries, it is required that state attorneys obtain prior consent from victims or injured parties so that they could resort to conditionally deferred prosecution.[78] Unlike the new Serbian CPC, which, as mentioned above, only requires that the injured party shall be notified by a decision that criminal charges have been dismissed when a suspect has fulfilled his obligation within a prescribed time limit, both in Croatia and in Montenegro, prosecutors deliver a decision whereby criminal prosecution is abandoned or deferred to injured parties as well, the only difference being that the Croatian law provides that advice on restitution claim to be filed in civil proceedings shall be delivered together with to the said decision.[79] The 2013 amendments to the Croatian CPC have broadened even more the scope of rights enjoyed by victims and injured parties in the process of exercise of prosecutorial discretion. As opposed to the situation in Serbia and in Montenegro, injured parties are presently granted a right to file an objection (*pritužba* in Croatian, which can also translate as a *complaint*) within eight days from the date of receiving a decision in cases of the so-called unconditional prosecutorial discretion[80] – or in other words, after the prosecutor's decision to dismiss criminal charges or abandon prosecution unconditionally when there are statutory grounds therefor, which are somewhat broader than in Serbia.[81] An immediately superior prosecutor shall decide on the complaint within 30 days and if he should accept it, he shall order the lower-ranking prosecutor to continue working on the case and shall also notify the injured party thereof (on the other hand, if he should uphold the lower-ranking

76 Article 272, para. 4 of the MN CPC.

77 *CoE Recommendation No. R (99) 19 concerning mediation in penal matters* adopted on 15 September 1999, para. III

78 Article 522, para. 1 or Article 206d, para. 1 of the Croatian CPC following amendments thereto made in 2013. Injured party's role has remained the same even after the amendments, the only difference being that the lawmaker has laid down by the amendments of December 2013 that within the scope of conditionally deferred prosecution prosecutors are allowed to initially defer prosecution and not only dismiss criminal charges or abandon prosecution, which used to be the case before the amendments.

79 Article 522, para. 3 or Article 206d, para. 3 of the Croatian CPC after the amendments.

80 Article 206c, para. 2 of the Croatian CPC. Prior to the amendments, injured parties were only sent such a decision, with the usual advice on the possibility of civil action, against which no appeal was allowed (Article 521, para 2 of the Croatian CPC before the amendments).

81 Unconditional prosecutorial discretion is exercised in Croatia in cases of offences punishable with a fine or imprisonment of up to five years, namely if: "1) it is likely, taking into account the circumstances, that the defendant shall be acquitted in the criminal proceedings; 2) the execution of the punishment or safety measure against the defendant in underway, and the institution of criminal proceedings for another offence has no purpose given the severity and nature of the offence, its motive and the effect of penal sanction or other measure on the perpetrator not to commit any offence in future; 3) the defendant has been extradited or delivered to a foreign country or to the international criminal court so that proceedings for another criminal offence could be conducted; 4) the defendant has been reported for several offences which constitute elements of two or more offences but it is purposeful to sentence him only for one offence, because instituting criminal proceedings for other offences would not have any significant influence on rendering the punishment or other sanctions against the perpetrator." Article 521, para. 1 of the 2008 Croatian CPC or Article 206c, para. 1 following the 2013 amendments.

prosecutor's decision, he shall notify the injured party and advise him that he may bring a civil action for the purpose of realising his restitution claim).[82] In Croatia, as well as in Serbia (both under the new and former CPCs) and in Montenegro, injured parties lose their right to undertake prosecution as subsidiary prosecutors if suspects comply with their obligations within the prescribed time limit and the prosecutor dismisses criminal charges or abandons prosecution

As regards *Bosnia and Herzegovina*, the criminal procedure codes which are in force in that country have not legislated the principle of prosecutorial discretion, except for in cases against juveniles in which unconditional discretion may be exercised. Only in such cases are prosecutors allowed to decide not to initiate criminal proceedings for the reason of purposefulness or fairness and injured parties are only entitled to be informed by prosecutors about their decision for which the prosecutor must provide a statement of reasons.[83]

Serbian lawmakers took as their starting point a belief that the public prosecution service as a state body competent, *inter alia*, for looking after the rights of injured parties would adequately safeguard their interests and that there was no reason why public prosecutors should not be allowed to decide on the issues of prosecutorial discretion freely.[84] On the other hand, there are those who are of the opinion that prosecutors' decisions to exercise prosecutorial discretion ought to be controlled and that precisely injured parties are those who should keep them under control by means of their objections filed with superior prosecutors in connection with such decisions, as provided for in the majority of national legislations.[85] Certain information about the practical application of the principle of prosecutorial discretion in Serbia under the 2001 Code has shown that in the majority of cases, injured parties did not refuse consent when it was sought from them under the above-mentioned provision of the Code for the two out of eight measures which could be imposed on defendants as a condition for deferral and subsequent abandonment of criminal prosecution.[86] Similarly, according to some analyses of Serbian practice, the fact that prosecutors could seek an opinion from injured parties – allowed under the 2001 CPC – and that the latter's opinions were taken into account had increased the frequency with which prosecutorial discretion was exercised prior to the entry into force of the new Code.[87]

At present, there are no international standards that would require states which are not EU members to allow injured parties to participate in or influence this type of conditional discretion exercised by prosecutors. The Council of Europe only recommends (Recommendation R(87)28) that "whenever possible" a complainant should be notified of the authority's decision when some

82 Article 206c, para. 2 of the Croatian CPC.

83 The principle of prosecutorial discretion may be applied in BiH in proceedings against minors for the reason of purposefulness or fairness in cases of criminal offences that carry the statutory penalty of imprisonment of up to three years or a fine. BiH CPC, Article 352, para. 4. The Code does not specify any kind of time limit before which prosecutors are bound to deliver such notification to injured parties, but considering the principle of urgency adhered to in cases against juveniles, as well as corresponding provisions governing the non-conduct of investigation, it can be concluded that the time limit is three days. H. Sijerčić-Čolić, M.Hadžiomeragić, M. Jurčević, D. Kaurinović, M. Simović, Commentary to the Criminal Procedure Code of Bosnia and Herzegovina, Sarajevo 2005 (hereinafter – *Commentary to the BiH CPC*) p. 880.

84 Commentary to the Serbian CPC, *op. cit*., p. 652.

85 Goran Ilić, Jasmina Kiurski, *op. cit*., p. 253.

86 A study conducted in eleven basic and high prosecutor's offices in Serbia by the Serbian Association of Public Prosecutors and Deputy Prosecutors for the period 1 January 2008 – 30 September 2011 has revealed that injured parties gave consent for deferral of criminal prosecution in 82.17 percent of cases and withheld it in 4.45 percent of cases, whereas information about the existence or absence of injured party's consent for applying that legal institution was not available for 13.36 percent of cases. Published in Stanko Bejatović et al., *Primena načela oportuniteta u praksi – izazovi i preporuke*, Serbian Association of Public Prosecutors and Deputy Prosecutors, Beograd, 2012, pp. 6 and 117.

87 Goran Ilić, Jasmina Kiurski, *op.cit*., p. 262.

institutions of simplified procedure are applied,[88] and prosecutorial discretion is certainly one of them. Countries are thereby allowed freedom when regulating this issue in their national laws; still, the Recommendation clearly suggests that in the law-making process, countries should be guided by the minimum requirement that injured parties should be notified of prosecutors' decisions (which is, when it comes to Serbia, required only in cases of conditionally deferred prosecution and not in cases of unconditional prosecutorial discretion), except if there are justified reasons for withholding such a notification. As regards EU regulation, the Directive 2012/29 provides that on the one hand victims shall be notified upon their own request of any decision not to undertake or to abandon criminal prosecution.[89] As we have seen, that is not the case either in Serbia or in Montenegro when prosecutors apply the principle of unconditional discretion. On the other hand, the Directive requires that victims are ensured the right to challenge prosecutors' decisions not to prosecute, but at the same time it makes an exception when it comes to out-of-court settlements with defendants, provided the settlements impose an obligation or a warning.[90] This is exactly the situation with conditionally deferred prosecution (when a defendant has to fulfil an obligation). However, the fact that there is no agreement with a defendant or an obligation on his part in cases when unconditional prosecutorial discretion is exercised would imply that the above rule laid down by the Directive required that injured parties should have the right to a review of prosecutors' decisions in case of unconditional discretion. As we have seen, this requirement has been complied with in Croatia – an EU member state, through the possibility of filing a complaint, but not in Serbia, Montenegro, or BiH; consequently, those three countries ought to harmonise their codes with the Directive in respect of this issue in the processes of their accession to the EU in the near future.

Aside from the reason of harmonisation with the law of the EU, we believe that it would be favourable from the perspective of criminal procedure policy to implement more than the minimum requirements set out in international recommendations or in the *acquis communautaire* and not to avoid assigning at least some kind of a role to injured parties when the prosecution exercises their discretionary powers. Finally, prosecutorial discretion – both the conditional and the unconditional one – exists not only for the purpose of a more efficient resolution of criminal matters, but also for the reason of justice and fairness; a question therefore arises as to why injured parties, whose interests certainly constitute an element of the totality of justice and fairness attained through criminal proceedings, should not at least be allowed to voice their opinions so that prosecutors would have an opportunity to hear their side and, as a result of that, maybe reach a more correct decision. In view of the above, the legislator at least ought to provide that public prosecutors shall have a duty to obtain injured party's opinion before making a decision to defer criminal prosecution or dismiss criminal charges. The 2012 draft version of the amendments to the new Serbian CPC prepared by the then working group of Serbian Ministry of Justice proposed that such a solution should be adopted both in cases of conditional and unconditional prosecutorial discretion.[91] If the opinions of injured parties were obtained, even though there were not binding, their interests would be taken into account and they would be helpful to

88 *CoE Recommendation R(87)18* (see footnote no. 18 *supra*), para. 10.
89 *EU Directive*, Article 6, para. 1.
90 *Ibidem*, para. 45 of the Preamble and Art. 11, para. 5
91 Amended Article 283 and proposed new Article 284a of the Draft Version of Amendments to the Criminal Procedure Code of 16 November 2012 (available in the archive of the website of the Republic of Serbia's Ministry of Justice and Public Administration at http://arhiva.mpravde.gov.rs/cr/articles/zakonodavna-aktivnost/). Ultimately, this draft version had not been adopted as amendments to the Code; however, some other future working group with the Ministry of Justice might accept the above-mentioned solution and propose its adoption while continuing to work on some potential amendments to the 2011 CPC.

prosecutors in reaching correct decisions; at the same time, prosecutors would remain the masters of the decision whether or not to prosecute. In addition, a timeframe of eight days or less could be set within which injured parties would have to provide their opinions upon prosecutor's request in order not to risk a delay of the proceedings

2.5.2. Injured Party and Agreements between Prosecutor and Defendant

In addition to prosecutorial discretion, agreements between public prosecutors and defendants are yet another important procedural tool (a relatively novel one) whereby not only the principle of legality, but also the accusatory principle is departed from. In the first place, this refers to plea agreements. Let us recall that a plea agreement, for which there are no limitations in respect of offences to which it can be applied under the new CPC, may be concluded from the issuance of an order to conduct an investigation (the same as agreements on testifying by defendant) until a defendant pleads to an indictment at the main hearing (whereas agreements on testifying by defendant may be concluded before the conclusion of the main hearing). Given the fact that a criminal matter is resolved on the merits by means of a plea agreement – as opposed to other procedural situations analysed herein – the injured party's interest does not lie in how he can react and possibly achieve the reversal of prosecutor's decision not to undertake prosecution or to discontinue it or to continue prosecution by himself. In such cases, a prosecutor has successfully brought criminal prosecution to its end, namely a judgment rendered by the court, whereas a dilemma arises about the extent in which injured parties should be allowed to influence the final result of such prosecution. For those reasons, such a procedural situation will also be included in the analysis of injured party's position during the investigation.

In contrast to the previous Serbian CPC, injured parties certainly may not propose plea agreements or participate in plea bargaining and their role in the plea bargaining process is limited; however, the lawmaker has taken care that their interests are safeguarded, at least from the perspective of substantive law. As a result, a person entitled to file a restitution claim may do so and if they have not previously filed such a claim, the public prosecutor has a duty to invite them to file it prior to the conclusion of an agreement (Article 313, para. 6 of the 2011 CPC). One of mandatory elements not only of a plea agreement, but also of an agreement on testifying by defendant, is an agreement between a public prosecutor and a defendant on a restitution claim provided it has been filed by the injured party.[92] A restitution claim is therefore a subject of plea bargain negotiations in connection with the offence with which a defendant is charged and a position taken by the injured party on a submitted restitution claim has an impact on what will be the final prosecutor's and defendant's position on the text of the agreement.[93] If such an agreement was not signed, the injured party who has put forward a restitution claim could seek its realisation by taking civil action.

Except for the above-mentioned influence on negotiations on a restitution claim as an element of the plea agreement, which is not considered a decisive one, injured parties may not in any other manner influence, let alone prevent, the conclusion of an agreement between a prosecutor

92 Article 314, para. 1, item 4, or Article 321, para. 1, item 4 of the 2011 CPC.
93 Handbook on Application of Criminal Procedure Code, *op. cit.*, pp. 278-279.

and a defendant.[94] An injured party is not summoned to a hearing on plea agreement: the law lays down that the only persons to be summoned are the public prosecutor, a defendant and his defence attorney; there is no duty to inform the injured party thereof. Even if the injured party somehow learned about the hearing, he could not attend it despite his interest therein, nor could the public, given that the Code requires that such hearings are held in a closed session (Article 315, para. 3 of the 2011 CPC). A ruling on the plea agreement is not delivered to the injured party, but only to the parties and the defence counsel, which is the most restrictive solution among herein analysed codes.[95] The ruling on a plea agreement may not be appealed.

The previous 2001 Serbian CPC placed injured parties in a considerably more favourable position in the process in which agreements on the admission of guilt were concluded (as this procedural tool introduced by the 2009 amendments to the 2001 CPC used to be termed). At that time, the court was obligated to establish, *inter alia*, that an agreement on the admission of guilt did not violate any of the injured party's rights in order to be able to grant it (Article 282v, para. 8, item 5 of the 2001 CPC). Both the injured party and his proxy had the right to attend a hearing on plea agreement and the court had to inform them thereof, while the court ruling was served on the injured party and his proxy.[96] If the court granted the agreement, they could file an appeal to the ruling within eight days, which represents an important right enjoyed by the injured party.[97] Judgments were served on injured parties even if they were prevented from attending the main hearing for justifiable reasons so as to be able to seek restoration to a prior position.[98]

Much greater importance has been given to the role of an injured party and his rights with regard to the application of plea agreements in *Montenegro* than in the new Serbian CPC. In an identical manner as the 2001 Serbian CPC, the Montenegrin Code recognises the injured party's restitution claim as an element of the agreement reached between a state prosecutor and a defendant and it sets forth that injured parties shall have the right to attend hearings on plea agreement; that the court shall have a duty to make certain that an agreement does not violate the injured party's rights; and finally that the injured party shall be entitled to appeal if the court accepts a plea agreement.[99] Besides, this Code is the only one among the four codes analysed in this paper which, just as the 2001 Serbian CPC did, limits the application of plea agreements specifically to offences punishable with a term of imprisonment of up to ten years.

At first, when the 2008 CPC was adopted, the new *Croatian* criminal procedure system did not provide for any greater extent of participation or protection of injured parties in the procedure for conclusion of plea agreements and agreements on sentences; in that respect, it was similar to the BiH CPC and surpassed the new Serbian CPC to a certain degree. It provided that a restitution claim, *i.e.* defendant's statement thereon, should form a part of plea agreements and that the state attorney should inform the victim and injured party that a statement was signed whereby an agreement between the prosecutor and the defendant was concluded; this has not been provided

94 Certainly, we do not refer here to any potential influences coming outside the realm of law, through the media or by putting the prosecution under direct pressure – which are not excluded from occurring in real life even though they belong to the domain of speculations – through which certain injured parties with such options available to them could possibly achieve a somehow different and, in their opinion, more fair agreement.
95 Article 319, para. 1 of the 2011 CPC.
96 Article 282v, para. 5 or para. 11 of the 2001 CPC.
97 Article 282 g, para. 1 and 2 of the 2001 CPC.
98 Article 282d, para. 3 of the 2001 CPC.
99 Article 301, para. 1 and 2, Article 302, para. 5, para. 8, item 4 and para. 10, item 10 of the Montenegro CPC.

for by the new Serbian CPC.[100] Judgments passed based on concluded agreements could not be contested by an appeal on grounds of decision on the restitution claim.[101] However, a quantum leap has been made in giving rights to injured parties and victims by amendments to the Croatian CPC adopted in December 2013. A rule has thus been added to the Croatian Code under which state attorneys must obtain prior consent from victims for concluding agreements in cases of criminal offences against life and limb or against sexual freedom punishable with a term of imprisonment of more than five years (Article 360, para. 6 after the amendments made to the Croatian CPC).[102] In the event a victim has passed away or is unable to give any such consent, the prosecutor must obtain it from some other person who otherwise has the right to continue proceedings after the injured party has deceased.[103] Such a rule is also unique in that it provides victims with a possibility to impose a "veto" against agreements between prosecutors and defendants in cases of certain criminal offences, namely the most serious ones.

As regards *Bosnia and Herzegovina*, the role of injured parties in the process of plea bargaining and concluding plea agreements has been limited to making a statement before the prosecutor about a restitution claim, which is verified by the court, and then receiving a notification from the court of the final result of the plea bargaining.[104] As in the case of Croatia, this is somewhat more than offered by the new Serbian CPC. Some authors cite that examples have been recorded, admittedly in BiH practice, in which injured parties were included in the process of plea agreement conclusion owing to the duty on the prosecutor's part to collect information about the restitution claim and the court granted such agreements.[105] Such an example from BiH is an indicator of how practice can sometimes lead to the involvement of injured parties in the conclusion of agreements, or at least some segments of that process.

Strong criticism has been levelled for the absence of injured party's influence and cooperation in the conclusion of such agreements from the new Serbian CPC.[106] The following has been criticised in particular: the fact that it has not provided that injured parties shall be summoned to the hearing on plea agreement, that they are not allowed to file an appeal against a ruling granting the agreement as well as that judges do not have a duty to verify if such an agreement violated the rights of an injured party.[107] On the other hand, there are those who are of the opinion that injured parties should not have any kind of role in the plea bargaining process considering that their restitution interest has been protected and prosecutors are those who safeguard both the public and private interest to punish perpetrators of criminal offences.[108] There are no

100 Article 360 para. 4, item 5 and para. 5 of the Croatian CPC.
101 Article 364, para.1 of the Croatian CPC.
102 Introduced by Article 178 of the Law on Amendments to the Criminal Procedure Code, 4 December 2013.
103 If a victim has passed away, consent is sought from a spouse or common law partner, from children, parents, adopted children, adoptive parents, or siblings (Article 360, para. 6 in conjunction with Article 55, para. 6 of the Croatian CPC)
104 Article 231, para. 6(e) and 9 of the BiH CPC. According to interpretations by certain authors, an injured party could file an appeal against a decision on a restitution claim and costs of proceedings since that right, which he is otherwise allowed to exercise in regular proceedings, has not been denied by the BiH CPC provisions on either the appeal or plea bargaining. Veljko Ikanović, "Plea Bargaining after Ten Years of Application in Bosnia and Herzegovina" in Ivan Jovanović, Miroljub Stanisavljević (ed.), *op.cit*., p. 201.
105 *Ibidem*.
106 Momčilo Grubač, "Procesnopravni položaj oštećenog prema novom Zakoniku o krivičnom postupku Srbije", *Temida*, br. 2, godina 15, Jun 2012, p. 115.
107 Milan Škulić, Goran Ilić, Reforma u stilu "jedan korak napred, dva koraka nazad", Beograd, 2012, p. 100.
108 Drago Radulović, "Aktuelna pitanja krivičnoprocesnog zakonodavstva Crne Gore – da li nam je potrebna nova reforma", in *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena*, Zlatibor 2013, p. 273.

international standards concerning the conclusion of such agreements that would require a certain degree of victim's involvement or his right to challenge them.[109]

We are of the opinion that the status of injured parties in the process of conclusion of agreements between prosecutors and defendants as governed under the new Serbian CPC should be improved. That Code is the most restrictive one among the four Codes from the region, not only in respect of the notification of injured parties of plea agreements, but also when it comes to the possibilities for influencing the agreements, not to mention that it reduces the role of an injured party only to his restitution claim. The ways of improving it would include providing at least for the injured party's right to be informed of the hearing on plea agreement as well as that injured parties have an opportunity to make a statement on the agreement, and then for the right to be notified that an agreement has been concluded. The 2012 draft version of the amendments to the new Serbian CPC proposed that injured parties and their proxies should be notified of the hearing on plea agreement.[110] Another step in the right direction would be if the court examined while making a decision on a plea agreement if it violated the rights enjoyed by an injured party, as used to be provided by the 2001 CPC. Such provisions would not decelerate in any considerable measure the process of plea bargaining and it is quite certain that an injured party could not prevent the conclusion of such agreements (except when the court deems that the rights of the injured party have been substantially violated). On the other hand, a greater degree of protection would be afforded to the interests of injured parties, which is one of the aims of proceedings, and their role would be somewhat of a corrective mechanism ensuring that the application of this procedural tool – which should be used even more often – would not be distorted into prosecutors' mere chasing after statistics on the number of concluded agreements.

2.6. Other Rights of Injured Party in Investigation

2.6.1. Presence During and Participation in Evidentiary Actions

Injured parties are entitled to point out to facts and propose evidence relevant to the subject matter of evidentiary actions; they also have the right to inspect files and examine objects used as evidence, with the exception that they may be denied that right before they are questioned as witnesses (Article 50, para. 1 and 2 of the 2011 CPC). Those same rights are enjoyed by injured parties in *Montenegro*, along with the above-mentioned restriction which is in effect before they are questioned as witnesses (Articles 58 and 281 of the MN CPC). Injured parties in Serbia have the right to attend a crime scene investigation and the questioning of witnesses and expert witnesses in the course of an investigation (Article 300, para 1 and 3 of the 2011 CPC). A public prosecutor has a duty to inform the injured party about the time and venue of the questioning of a witness or an expert witness, but those actions may be undertaken even if the said party fails to appear thereat.[111] The Code does not require that public prosecutors must notify injured parties of a crime scene investigation.

109 Since cases are resolved by a judgment on the merits based on such agreements, the victim's right to seek a review of a decision on abandonment of criminal prosecution referred to in the *EU Directive 2012/29* is not applicable here.

110 Amended Article 315, para. 2 of Draft Version of Amendments to the Serbian CPC (see footnote no. 91 supra).

111 Article 300, para. 3 of the 2011 CPC.

Injured parties are only informed that a witness or an expert witness will be questioned, whereas a "summons" to attend such actions must be sent to suspects and their defence lawyers. That represents a higher degree of procedural formality and obligation that the authority conducting the proceedings has towards defendants as opposed to injured parties, given that providing timely information to defendants and their involvement in procedural actions are one of the cornerstones of the equality of arms and fairness of proceedings in general. The European Convention on Human Rights does not require that same level of duty towards injured parties. However, prosecutors do not face any consequences if they do not notify the injured party and so it can happen in practice that injured parties are not invited to attend evidentiary actions.

Just as defendants and their defence lawyers, injured parties have the right to propose to a public prosecutor that certain questions are put forward to a suspect, witness, or expert witness for the purpose of clarifying an issue. They are also allowed to directly ask such questions, with an approval from the public prosecutor. Injured parties are allowed to propose that individual pieces of evidence are obtained. Likewise, they are entitled to request that their objections to undertaking certain actions are entered in a record.[112] Such rights are also granted to injured parties under the *Montenegrin* CPC (Article 282 thereof), in which the position of an injured party in the process of undertaking evidentiary actions has been put on an equal footing with other participants therein. They may propose that certain evidentiary actions are undertaken; unlike the Serbian Code, the Montenegrin Code also provides that injured parties may be present during a reconstruction and a search of residence conducted as evidentiary actions in the course of an investigation.[113] Injured parties in *Croatia* have the following rights: to point out the facts and propose evidence; be present at the evidentiary hearing and inspect the case file, whereas state attorneys and the court have a particular duty to advise an injured party of the fact that he has the above rights (Article 47, para. 1 of the Croatian CPC following the 2013 amendments). The rights of injured parties to attend and participate in evidentiary actions, which are regulated in the above manner in Serbia, Montenegro, and Croatia, comply with what has been set by the European Court of Human Rights as standards for the participation of injured parties (murder victims' next of kin) in the investigation, including the asking of questions, as well as to the requirements of the EU Directive 2012/29, specifically that member states are required to ensure that victims may be heard and may offer and submit evidence in criminal proceedings.[114] As regards *Bosnia and Herzegovina*, injured parties however do not enjoy almost any rights from the above-cited catalogue which would allow them to participate in an investigation. There are many authors and practitioners who have been continuously putting forward that BiH statutory provisions should be amended in such a manner as to ensure that injured parties may, among other things, have the right to inspect files, propose certain investigative actions and evidence, question defendants, witnesses, and expert witnesses.[115]

112 Article 300, para. 8 of the 2011 CPC.

113 Articles 281 and 282 of the Montenegro CPC. Both the 2011 Serbian CPC and its predecessor from 2001 provide that injured parties shall be notified and have the right to attend reconstructions when they are undertaken not only during the main hearing, but also away from it (Article 404 of the 2011 CPC and Article 334 of the 2001 CPC).

114 ECtHR, *Ayhan v. Turkey, Hugh Jordan v. UK, Oğur v. Turkey, Edwards v United Kingdom* (see footnote no. 23 *supra*) and the EU Directive, Article 10.

115 Dautbegović and Pivić, *op. cit*., p. 16, Tadija Bubalović, "Novele Zakona o kaznenom postupku Bosne i Hercegovine od 17.06.2008", *Hrvatski ljetopis za kazneno pravo i praksu* (Zagreb), vol. 15, 2/2008, p. 1155, Božidarka Dodik, "Prosecutorial Investigation – the Experiences of Bosnia and Herzegovina" in Ana Petrović, Ivan Jovanović (ed.), *op. cit*, s.35-36.

It would be suitable to mention here some other rights that do not have such a bearing on the procedural status of injured parties, but which are more relevant to treatment and support they may receive in the course of an investigation and in connection therewith. In *Croatia*, injured parties or victims of an offence against sexual freedom have the right to be interviewed by a person of the same sex from the police or a prosecutor's office,[116] which partly exceeds the requirements of the EU Directive 2012/29.[117] Likewise, even though there is a provision in *Montenegro* granting a right to a female injured party to be interviewed and to have proceedings conducted by a judge of the same sex in cases of the said offences if so allowed by the structure of court staff, some convincing arguments have been put forward by commentators on the Montenegrin Code that a broad interpretation of this provision could be applied in the context of a prosecutorial model of investigation, so that it could entail that such investigations are led by state prosecutors of the same sex.[118]

2.6.2. Filing of Restitution Claim

In all the four countries in the region injured parties have the right to file a motion for a restitution claim and evidence in support of it as well as to propose that interim measures are taken with the aim of securing such a claim; the only difference is that the 2013 *Croatian* amendments have instituted that both the prosecution and the court shall examine if there is a possibility that a defendant indemnifies the damage caused to the injured party by the commission of a crime.[119] Whenever there is a possibility that material gain may be seized, state attorneys in Croatia are obligated to contact an injured party in order to allow them to put forward a restitution claim.[120] The 2008 amendments to the CPC in *Bosnia and Herzegovina* have charged prosecutors since the beginning of the investigation with a duty to start collecting evidence which is according to their assessment relevant to making a decision on the injured party's restitution claim.[121] Even though such a provision is seemingly beneficial to injured parties because a state authority is thereby bound to look after restitution claims when private persons are concerned, there are accounts that such a solution has proven not so good in BiH practice due to the fact that overburdened prosecutors focused on the collection of evidence about offences and their perpetrators have often omitted to discharge the above duty towards injured parties.[122]

2.6.3. Representation of Injured Party by Proxy

While the *BiH CPC* does not even mention the injured party's proxy, injured parties in Serbia, Montenegro, and Croatia have the right under the current laws to hire a proxy to represent them and in all the three countries they must come from the ranks of attorneys-at-law (a legal intern may act as a substitute for an attorney-at-law before municipal courts in *Croatia*).[123] Such a restriction used not to exist under the 2001 Serbian CPC. It is certain that the legislator's intention

116 Article 45, para. 1, items 1 and 2 of the Croatian CPC.
117 Such a possibility is not requested for victims if their statements are taken by a prosecutor or a judge. EU Directive 2012/29, Art. 23, para. 2(d).
118 Article 58, para. 4 of the Montenegrin CPC. Radulović, Commentary to the Montenegrin CPC, *op. cit.,* p. 106.
119 Article 50, para. 1, item 1 of the 2011 CPC, Article 58 of the Montenegrin CPC, and Article 47, para. 1, item 2 and para. 2 of the Croatian CPC after the 2013 amendments, Articles 194 and 195 of the BiH CPC.
120 Article 540, para. 4 of the Croatian CPC.
121 Article 197 of the BiH CPC. Commentary to the BiH CPC, *op. cit*., p. 556.
122 Božidarka Dodik, *op. cit*., p. 36.
123 Articles 50 and 59 of the 2011 CPC, Article 64, para. 3 of the MN CPC, Article 54 of the Croatian CPC.

was to ensure that injured parties can have as competent as possible legal representation, even though injured parties do not have the same procedural rights and roles in the above-mentioned three countries, which is understandable and justifiable for the most part. Still, injured parties should have been allowed a possibility of choosing a proxy who would not be an attorney-at-law by profession as in a number of other countries. Most often the role of an injured party entails the above-described interventions into proceedings and in many cases injured parties will turn to non-governmental organisations, especially to those specialised in human rights or to humanitarian organisations as they used to do when the 2001 CPC was in effect. Such organisations were able to provide free assistance to them by lending their representatives, who were lawyers and often experts in the field of human rights law, but not necessarily attorneys-at-law, to act as injured parties' proxies, whereas now, the fact that they must hire attorneys-at-law will render such assistance more expensive and thus less available to injured parties.

Admittedly, there is a corrective mechanism that can lighten the burden of hiring an attorney-at-law in all of the observed countries with the exception of BiH; that mechanism is the injured party's right of an indigent person: in certain situations, a proxy is assigned to an injured party and his services are covered by the state budget if it is in the interest of proceedings or fairness and if the said party cannot cover the costs of proceedings due to their financial situation. The EU Directive 2012/29 requires that it is ensured that victims who participate in proceedings can have access to legal aid, whereas countries are left to provide in their respective laws for conditions and procedural rules under which that right can be exercised; the Directive also lays down that victims shall have the right to reimbursement of expenses incurred as a result of their participation in criminal proceedings in accordance with relevant national regulations.[124] That is possible both in Serbia and Croatia if an injured party acts as a subsidiary prosecutor (which would mean only at the main hearing in the case of Serbia) in proceedings conducted in connection with an offence punishable with imprisonment of more than five years (Article 59 of the 2011 Serbian CPC, Article 59 of the Croatian CPC). The same conditions applied under the 2001 Serbian CPC[125] with one exception – the injured party was able to acquire the capacity of a subsidiary prosecutor during an investigation, which was why that rule used to apply to that stage in the proceedings as well. In Serbia, a professional consultant can be appointed *ex officio* under the same conditions (Article 125 of the 2011 CPC). The scope of the right to a proxy free of charge has been widened in *Croatia* in such a manner that it is always recognised to children victims of crime and to victims of sex crimes.[126] In Croatia, if a victim of crime has suffered a serious mental or physical injury or more serious consequences of a criminal offence, he or she is recognised a right to free professional assistance from an advisor, while a victim of a criminal offence against sexual freedom shall have the right to an interview with a counsellor prior to being questioned.[127] A following distinction is made in Montenegro: a proxy may be appointed to an injured party even if he is not a subsidiary prosecutor for reasons of fairness and if it is in the interest of criminal proceedings provided they are conducted in connection with an offence that carries a punishment of more than three years in prison, or, if an injured party acts as a prosecutor, in connection with an offence punishable by more than five years of imprisonment.[128]

124 *EU Directive 2012/29*, Articles 13 and 14.
125 Article 66, para. 2 of the 2001 CPC.
126 Articles 44 and 45 of the post-amendment Croatian CPC.
127 Article 16, para. 3 and 45, para. 1 of the Croatian CPC after the 2013 amendments.
128 Article 64, para. 3 of the Montenegrin CPC.

3. Concluding Remarks

The position of injured parties in the investigation is regulated in various manners in Serbia, Bosnia and Herzegovina, Montenegro, and Croatia and there is a substantial discrepancy between some of their rights and possibilities for exercising those rights in the investigation. Such variances should not be regarded as a flaw in itself and they are commonly found in comparative law governing this field and also allowed to EU member states under the EU regulations. The greatest number of similar or identical solutions in the reformed codes of criminal procedure of the countries in the region has been kept in respect of the filing of a restitution claim by an injured party as well as – but to a lesser extent and with the exception of BiH – in relation to the injured party's participation in evidentiary action, representation by a proxy, and filing of a private indictment. That is indicative not only of lawmakers' different approaches and aims, but in the first place of different schools of thought existing among theorists and practitioners, the foreign ones included, who had decisive influence on the creation of the draft codes in the region. Among the observed countries, it is evident that injured parties are given the greatest range of possibilities by the recently amended CPC of Croatia, which has also introduced the concept of a victim into its procedural code, then by the Montenegrin Code, substantially less by the new Serbian CPC, whereas the most limited range of possibilities is provided in Bosnia and Herzegovina.[129] In BiH, which was the first country to adopt the prosecutorial model of investigation, injured parties are solely secondary participants in criminal proceedings (among other things, owing to the fact that all offences are prosecuted *ex officio*) and they are only entitled to file an objection against the prosecution's decision not to conduct an investigation; their procedural position has been virtually reduced to putting forward and realising restitution claims and as such, it has been met with criticism in BiH, including proposals that injured parties should be granted more rights.[130]

As regards Serbia, the new 2011 CPC has deprived injured parties of a number of rights and possibilities they used to have under the previous 2001 CPC (which had been otherwise exposed, during its application, to criticism for not giving victims an adequate and sufficiently active role). It could therefore be said that the procedural position of injured parties has been made even more secondary and worse in that regard by the current CPC when compared to the previous one. In Serbia, the capacity of a subsidiary prosecutor may now be acquired only after the confirmation of an indictment; injured parties cannot participate in a decision-making process on the application of conditionally deferred prosecution nor are they even notified in cases of the exercise of unconditional prosecutorial discretion; their position in the process of plea bargaining has been provided for in the most restrictive manner in the region, and proxies who represent injured parties must be attorneys-at-law – to mention some of the most important restrictions of rights that have been singled out in this paper. What has been new in the Serbian system is the introduction of an objection by the injured party similar to the one in BiH as a replacement for the subsidiary indictment during the investigation; it is the only procedural recourse before the

129 Even a mere linguistic analysis and summary of the number of times the words "injured party", or "injured party" and "victim", are used in the four national criminal procedure codes could lead to the same conclusion and "ranking" of the countries. As a result, those words are most frequently used in the Croatian CPC (the word injured party appears 227 times and the word victim 47 times), then comes the Montenegrin CPC (injured party – 250 times), followed by the Serbian one (203 references to the injured party in the new 2001 CPC and 233 in the previous one), and finally by the BiH CPC (76 times).

130 It is emphasised that in respect of regulations governing the position of injured parties BiH is ranked among the countries such as the United Kingdom, which have consistently excluded victims from criminal proceedings or relegated them to a marginal status (see Dautbegović and Pivić, *op. cit.*, p. 12).

confirmation of an indictment whereby injured parties may defend their interest that criminal prosecution is undertaken. Aside from objecting to individual solutions concerning the rights of injured parties, general criticism has been levelled over the fact that the interests and rights of injured parties have been even more relegated to a marginal status by the new Serbian CPC.[131] On the other hand, some authors hold that injured parties have been given a more prominent role in criminal proceedings in Serbia.[132] There are also those who are of the opinion that the rights of injured parties have been restricted in comparison to the previous CPC as a logical result of implementing a new model of investigation that is no longer controlled by the court and may not depend on "private justice".[133] A partial justification for such rights and role of the injured party may indeed be found in the new conception of prosecutorial investigation and increased burden and level of responsibility on the part of the prosecution, but it is nevertheless obvious from the examples of Montenegro and Croatia that the concept of prosecutorial investigation can be implemented while keeping or even extending the scope of certain rights enjoyed by injured parties. Still, it ought to be said that those who object to the position of injured parties under the new Serbian CPC do underline that they still have a better procedural position than injured parties in many countries in which they can be nothing more than witnesses and have no active role in the proceedings.[134]

The rights of injured parties to attend and participate in evidentiary actions are regulated in Serbia, Montenegro, and Croatia in accordance with the jurisprudence of the European Court of Human Rights, Council of Europe recommendations and EU regulations and the same can be said about the duty imposed on the authority that conducts the proceedings to notify the injured party of their course and decisions made. The ECtHR, the recommendations as well as the EU Directive insist in particular on adequate and timely notification of injured parties which is why the discharge of that duty by prosecutors, for whose neglect there are no procedural sanctions under the national law, will be among key parameters for assessing the exercise of rights of injured parties in light of the international standards.

There are a number of international recommendations which advise that injured parties should have the right to a review of decisions to abandon criminal prosecution, although, for the time being, there are no binding international rules in that respect other than those that will be awaiting the countries in the region on their way to the EU. In concrete terms, that would specifically refer to the injured party's right to put forward some kind of an objection against prosecutor's decision not to resort to criminal prosecution on grounds of unconditional discretion, in keeping with the EU Directive 2012/29 – which has been laid down in an adequate manner only by Croatia, an EU member state, whereas the other countries have yet to complete that task.

The majority of other *de lege ferenda* suggestions aimed at improving the position of injured parties in the investigation – especially under the Serbian CPC – would be based on the reasons of criminal and criminal procedure policies. The interest of injured parties should be taken into account more, but it certainly should not be the *ultima ratio* of providing for their position in

131 Tatjana Lukić, "Uticaj međunarodnih pravnih standarda na oblikovanje pripremnog stadijuma krivičnog postupka", *Annals of the Belgrade Faculty of Law, year* LIX, 2/2011, p. 161, Goran Ilić, "Position of the Public Prosecutor According to the New Serbian Criminal Procedure Code" *op. cit.*, pp. 65-66, Ivana Simović-Hiber, *op. cit.*, pp. 235-253.

132 Goran P. Ilić, "O položaju oštećenog u krivičnom postupku", *op. cit.*, pp. 153-154.

133 They maintain that if injured parties had a more active role in such proceedings, the law would be at risk of being transformed from the corrective mechanism into the retaliatory one. Commentary to the Serbian CPC, *op. cit.*, p. 201.

134 Momčilo Grubač, *op. cit.*, p. 117.

criminal proceedings; personal – and certainly legitimate – restorative and retributive interests of an injured party in respect of a specific criminal event should be considered against the public interest (which includes, among other things, the efficiency of proceedings, special and general prevention, society's restorative policy) which need not be taken into account by the injured party, as well as in the light of a need for preserving the position of the prosecutor as the person in charge of the investigation. On the other hand, the public prosecutor as a state authority should not be the only one vested with the duty of taking care of the interests of injured parties which would then discharge it only to the extent in which an injured party can be of help to him in his investigation; instead, the voice of the injured party should be heard and its relevance ought to be ensured, which would contribute to a desirable increase in the restorative level of criminal proceedings. Therefore, making some amendments to the new Serbian CPC concerning the injured party should be taken into consideration. They would include as follows: bringing back the possibility of filing a subsidiary indictment during the investigation; public prosecutor's duty to obtain an opinion from the injured party in cases of exercise of prosecutorial discretion; injured party's right to be informed of the hearing on a plea agreement, to declare his opinion about the plea agreement, and to be informed of its conclusion, as well as that the court while deliberating on the plea agreement shall have a duty to examine whether or not the agreement violates any of the injured party's rights. Finally, injured parties should also be allowed a possibility to choose a proxy who is not an attorney-at-law by profession if they wish so.

Aleksandar Trešnjev, LL.M.[1]

Judicial Review of Indictment in Serbia

1. General Overview

The bringing of indictments and their review constitute very important phases of criminal proceedings. In addition to being a form of public prosecutor's address to the court in which he requests that a specific person is put on trial in connection with a specific criminal offence, now it has taken on a role of an instrument whereby a transition from the prosecutorial to the judicial phase of proceedings is initiated. Considering that the investigation is no longer a judicial phase of the proceedings, only after an indictment has been issued does the court become fully involved in criminal proceedings, which up until that moment have not been adversarial in the full sense of the word owing to the fact that the prosecutor has fulfilled the role of the authority conducting the proceedings. Therefore, the bringing of an indictment implies that a public prosecutor, who has thus far been collecting evidence, has an intention and is ready to bring a particular criminal matter before a court of law.[2] It should also be added that only after an indictment has been reviewed and confirmed is it assigned to a presiding judge, whereas before that time it falls within the competence of the panel referred to in Article 21, paragraph 4 of the Criminal Procedure Code (CPC).

The first question to be asked in respect of the review of indictments is what constitutes an indictment. An acceptable definition would be that an indictment represents a charging document drawn up in a form laid down by the law whereby an authorised public prosecutor seeks from the competent court to schedule a main hearing against a specific person in connection with a specific criminal offence.[3] A private prosecution filed in regular proceedings has been put on a par

1 Judge of the High Court in Belgrade, Special Division (for Organised Crime).

2 G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, *Commentary to the Criminal Procedure Code According to the State of Legislation as of October 1, 2013, Belgrade, 2013* (hereinafter - *Commentary to the CPC*) p. 758.

3 M. Grubač M, T.Vasiljević, *Commentary to the Criminal Procedure Code According to the Code Enacted in 2011*, Belgrade, 2014 (hereinafter - *Commentary to the 2011 CPC*) p. 593.

with the indictment.[4] Unlike regular proceedings, summary proceedings are initiated by means of a motion to indict filed by the public prosecutor or based on a private prosecution.[5]

Unlike the CPC enacted in 2001,[6] under which an indictment could be brought even by the injured party acting as a private prosecutor, under the current CPC[7] and according to the concept of prosecutorial investigation, indictments may be brought only by public prosecutors. An indictment may be issued after conducting an investigation, in which case the prosecutor is empowered to bring an indictment for another criminal offence if the facts of the case constitute the elements of that offence (Supreme Court of Serbia, *Kž1. no. 130/01* of April 12, 2002);[8] also, indictments may be brought even without conducting an investigation.

In addition to the formal requirement, which is manifested in the fact that an indictment must be issued by a prosecutor authorised to that end, a justified suspicion that a specific person has committed a specific criminal offence represents the substantive requirement for bringing an indictment. Unlike solutions found in the 2001 CPC, under which the indictment stage was not characterised by any particularly defined degree of suspicion, the legislator has now specifically provided that indictments may be brought only when grounds for suspicion (or reasonable suspicion if detention was ordered against a defendant) have attained the degree of justified suspicion. The legislator has defined the notion of justified suspicion as a set of facts that directly support reasonable suspicion and justify the bringing of charges.[9]

There are two types of indictment review in contemporary legal systems. They include an indictment review carried out at the party's, *i.e.* defendant's or his defence counsel's motion and an indictment review conducted *ex officio*. In addition to being different in respect of the manner in which the review procedure is initiated, there is also an essential difference between these two types of review in terms of their quality. Namely, an indictment review initiated at the motion by the party is the restrictive type of the indictment review. A reason behind this is that, on the one hand, a lot of indictments are not even reviewed, which may also constitute a defence's procedural tactics not to contest a deficient indictment in order to be able to delay the proceedings on those grounds afterwards; also, the prosecutor may have his own procedural strategy to influence the course of proceedings by means of a deficient indictment. On the other hand, such a type of review is considerably restricted by the course taken by the defence when contesting the indictment. The other type of indictment review is the review carried out by the court *ex officio*. This type of indictment review is more comprehensive since a detailed review of each indictment is undertaken in that manner. The negative aspect of this type of review is that in the first place it eads to a considerable increase in the courts' volume of work because many indictments that are flawless from the legal point of view are thus reviewed.

The former CPC enacted in 2001 used to provide for the mixed system of indictment review, according to which reviews were undertaken if thus requested by the defence or the presiding judge. Aside from overcoming the weaknesses of the first type of indictment review to a certain

4 See Art. 331, para. 6 of the CPC.
5 See Art. 499, para. 1 of the CPC.
6 Criminal Procedure Code (*Official Gazette of the Federal Republic of Yugoslavia*, no. 70/01 and 68/02 and *Official Gazette of the Republic of Serbia*, no. 58/04...76/10).
7 Criminal Procedure Code (*Official Gazette of the Republic of Serbia*, no. 72/11...45/13).
8 Cited according to the Ing-pro Electronic Database.
9 See Art. 2, para. 1, item 19 of the CPC.

degree, such a concept of indictment review also had its own shortcomings. Its greatest shortcoming was manifested in the fact that when expressing his disagreement with the indictment, the presiding judge was practically forced to state his opinion about an indictment at that stage in the proceedings.

The current CPC provides for the indictment review carried out by the court acting *ex officio*, irrespective of whether or not the defence moves for it or maybe even objects to it. Even with the above-mentioned weaknesses, this type of indictment review is the better one. Review of all indictments and insistence on correcting all the deficiencies found therein at the very beginning of proceedings result in the acceleration of criminal proceedings; obstruction and delay of proceedings due to deficiencies found in an indictment are precluded in such a manner. This advantage is significant if we bear in mind that when courts used to act pursuant to the 2001 CPC, they were mostly criticised precisely on account of the duration of proceedings.

Two stages of indictment review exist in the positive law and they include formal and substantive examination of an indictment.

2. Formal Examination of Indictment

The formal examination of an indictment represents the first phase of its review. During this phase, it is only examined if an indictment has been properly drawn up.[10] An indictment is a document that is strictly formal in nature and the CPC expressly lays down all the elements it must include and therefore, if it does not include all those elements, it does not satisfy the formal prerequisite for initiating the procedure for its substantive review. Thus, when the panel referred to in Article 21, paragraph 4 of the CPC finds that an indictment does not contain any of the elements laid down by the CPC, it will return it to the prosecutor to rectify its shortcoming within three days. Procedural consequences arising from failing to comply with the order of the court may be various and they depend on whether the indictment has been brought by the public or a private prosecutor. If the indictment is issued by the public prosecutor, it will be dismissed by a ruling made by the panel, whereas in a case that a private prosecutor fails to comply with a court order, it is deemed that they have abandoned prosecution and their private prosecution will be rejected by a ruling.

It ought to be mentioned that each and every indictment that has been brought is subject to the formal examination, which is not necessarily the case with the substantive examination thereof. The indictments subject only to the formal review are those brought only together with a signed plea agreement.[11] However, since indictments of this type form an integral part of a plea agreement, if the court does not accept the agreement, they are destroyed together with it.[12] A similar situation applies in cases of indictments brought at the main hearing.[13] In respect of such indictments, the CPC expressly excludes their substantive review, as opposed to the review of their correctness in formal terms.

10 G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjev, *Commentary to the 2011 CPC*, p. 766.
11 See Art. 313, para. 5 of the CPC.
12 For more on this subject, see: A. Trešnjev, "Dileme u primeni sporazuma o priznanju krivičnog dela", Bulletin of the Supreme Court of Cassation, no. 2/2013, Belgrade, 2013, p. 261.
13 See Art. 409 of the CPC.

An opinion can be found in theoretical works in which indictments are referred to the judge presiding over the panel before which the main hearing is to be held pursuant to the regulations governing the assignment of cases and annual work schedule at the court.[14] However, such an opinion draws criticism. Namely, the Code expressly provides that an indictment is to be filed with the panel of the competent court, namely to the panel referred to in Article 21, paragraph 4 of the CPC. Actions related to the service of the indictment are undertaken by the judge presiding over that panel. The judge presiding over the panel before which the main hearing is to be held is mentioned in the text of the Code only after the indictment's confirmation.[15] Only after having received the confirmed indictment and the case file does he begin preparations for the main hearing. Therefore, it is correctly done in practice that an indictment is assigned to the panel referred to in Article 21, paragraph 4 of the CPC, while the case is entrusted with the presiding judge only after the confirmation of an indictment. Any action related to the case which must be undertaken as a matter of urgency, *i.e.* which may not be delayed, is taken by the judge presiding over the panel referred to in Article 21, paragraph 4 of the CPC or any of the panel members referred to in Article 21, paragraph 4 of the CPC. These actions commonly include: issuing orders to bring the case before the pre-trial chamber, giving approvals to visit detained persons, and the like.

The panel dealing with the review of an indictment may only establish if it has been properly drawn up or not. It is not empowered to correct the indictment, not even if there were grounds therefor based on evidence submitted in the files.[16]

The first dilemma presenting itself is the extent of review allowed to the court at this stage. Namely, it is not certain whether or not at this stage in the proceedings the court only establishes if specifically listed elements an indictment must contain are present therein or whether or not it is empowered to embark on an assessment of whether or not those elements have been properly set forth. There is no uniform answer to this question. Namely, in respect of certain elements of the indictment, the court may undertake the assessment of whether or not they have been property set forth, whereas in respect of some other elements, the court is not thus empowered at this stage in the review process. For instance, the court is empowered to examine whether or not all defendant's personal information has been enumerated and properly stated in an indictment and so, if the court finds that for example, the defendant's name and surname are not correctly stated, it will return the indictment to the prosecutor to amend it. As opposed to that, if the court found that the legal definition of the act in the indictment does not constitute elements of a criminal offence as prvided in the law, it would not have the power to return the indictment to be amended at this stage in the proceedings since it would mean that the act which is the subject-matter of the charges was not a criminal offence and that matter is subject to the following stage of indictment review. In another words, at this stage of the indictment review, the court is not empowered to deliberate on the matters on which it must reach a decision at the subsequent stage thereof. That does not mean that the court is not empowered to return an indictment to be corrected if some minor shortcomings arise from the statement of facts of the offence with which the defendant is charged or if there are printing errors in respect of numbers, names of locations, and the like.

14 M. Grubač. T.Vasiljević, *Commentary to the 2011 CPC* , p. 598.
15 See Art. 344 of the CPC.
16 M. Grubač, T. Vasiljević, *Commentary to the 2011 CPC*, p. 604.

Aside from not being strictly laid down by the Code, at this stage in proceedings it is also examined if the indictment has been submitted in the sufficient number of copies, and if not, it shall be returned to the prosecutor to submit it in the sufficient number of copies. Namely, the formal examination of an indictment does not imply only the formal examination of its contents, it also entails the verification of whether or not the indictment has been drawn up and submitted to the court in a sufficient number of copies, *i.e.* in a number of copies required by the law.

A separate question that has arisen in jurisprudence concerns the form in which an indictment should be returned to the prosecutor for amendment or correction of its formal shortcomings. The CPC does not provide an answer to this question, so there remains a dilemma about the procedural instrument whereby an indictment is returned to the prosecutor. The form in which indictments were returned to prosecutors for correction of identified shortcomings has changed since the CPC began to be applied precisely as a result of the above. At first, it used to be done in the form of an official letter and only after a number of sessions were held by justices at the Special Division of the Belgrade High Court did the Division adopt a legal opinion that an indictment should be returned to the prosecutor to rectify its shortcomings in the form of a ruling which may not be appealed (*Legal Opinion of the High Court in Belgrade – Special Division for Organised Crime,* April 26, 2102).[17] The extent of the dilemma can also be seen from the fact that in addition to the above opinion, other opinions can be found both in jurisprudence and in theory in which an indictment should be returned to the prosecutor in the form of an order.[18] Aside from disagreements both in theory and jurisprudence, it should be stressed that the above-mentioned differences have no considerable bearing on the proceedings. Namely, in respect of the further course of criminal proceedings, it is not crucial whether the court will issue a ruling against which no appeal is allowed or an order.

A practical dilemma is manifested as an issue of the form in which prosecutors are obligated to correct indictments or in other words, if a prosecutor is obligated to correct an indictment by submitting to the court an entirely new indictment with corrected sections or if he may inform the court of the sections and the manner in which he corrects the indictment by means of a special instrument. We hold that the view that the prosecutor is obligated to amend the indictment by submitting to the court a new corrected indictment is the right one. There are also practical reasons behind this because a defendant on whom an indictment is served is the non-expert party in the majority of cases and so the fact that the indictment and additional instruments amending it exist in parallel may confuse him, which may additionally complicate the preparation of his defence. Therefore, the prosecutor must within the given time frame submit to the court a corrected indictment in as many copies as necessary for the court and the opposing party. Nevertheless, exceptions to this principle should also be accepted and they include cases in which an indictment does not contain elements that are not especially relevant to understanding it – for instance, it does not contain the designation of the court before which the main hearing will be held or the full names of witnesses and expert witnesses have not be listed. It should be acceptable that in such cases the prosecutor may, for the purpose of achieving the economy of proceedings, amend an indictment also by submitting a special instrument whereby he indicates the section(s) of the indictment being amended. This is even truer if we consider that indictments

17 Cited according to the Bulletin of High Court in Belgrade, no. 82, Belgrade, 2012, p. 21.
18 M. Grubač, T. Vasiljević, *Commentary to the 2011 CPC*, p. 604.

can be extremely comprehensive, that they may even include several hundred pages, and that they may be issued against a considerable number of defendants.

The next issue to be resolved is how to act in situations when the court orders the prosecutor to amend an indictment and he refuses to act in compliance with the court order or does comply with it, but the amended indictment also contains formal shortcomings. In the first case, when the prosecutor refuses to obey the court order or as in an example from the case-law, notifies the court that he holds that he should not comply with the court order and that in his opinion the indictment does contain all the formal elements, the court must dismiss the indictment since thereby informing the court that he believes that he should not amend the indictment, he has in fact failed to correct the indictment; thus, such an action by the prosecutor should be regarded as not complying with the court order, which results in the dismissal of that prosecutor's indictment in terms of Article 333, paragraph 3 of the CPC. In the other case, when the public prosecutor only partially corrects shortcomings in an indictment to which a panel has indicated, an opinion has been taken in the previous case-law that an indictment may be returned once again with a caution that it will be dismissed if the public prosecutor fails to comply with the court order (*Legal opinion of the High Court in Belgrade – Special Division for Organised Crime*, February 28, 2012).[19] However, such a Court's opinion provokes criticism. Namely, the Court carries out the review of indictment's formal correctness and so if it should find that there are some formal elements missing, it orders the prosecutor to act within a specific time frame. If the prosecutor does not act as ordered by the court within the given time frame, but instead he erroneously or only partially amends the indictment in such a manner that the amended indictment does not include the formal prerequisites of correctness that must be contained by any indictment, such an indictment should be dismissed as incompletely or incorrectly drawn up or such an action by the prosecutor should be treated as exceeding the time limit for amending the indictment. However, even though the above opinion has been met with criticism, it should be kept in mind that such actions by the court do not constitute a violation of the CPC that could later on result in a judgment being set aside or some other type of procedural sanction. A separate issue arises in this respect, namely what will happen in situations when a private prosecutor fails to amend a private prosecution as requested by the court within a given time frame, but amends it only within the once again set time limit in order for the court to continue with the proceedings. The fact that the court has not made a ruling whereby charges would be dismissed because it holds that the private prosecutor has abandoned prosecution constitutes a substantive violation of the rules of criminal procedure in respect of the existence of charges filed by an authorised prosecutor and in consequence the court is obligated to reject the private prosecution the first time the prosecutor failed to comply with the court order.

A somewhat different situation occurs when the prosecutor (either public or private) corrects his charging document several times within the given time frame. Namely, it is possible that the prosecutor rectifies shortcomings found in the charging document within three days and thereafter submits to the court once again corrected indictment within the same deadline. In such situations, the court will take into consideration the last corrected indictment filed by the prosecutor.

19 Cited according to V. Vučinić, A.Trešnjev, *Priručnik za primenu zakonika o krivičnom postupku*, Beograd, 2013, p. 280.

An opinion can be found in theoretical works that if the public prosecutor returns an incorrect indictment, the panel will dismiss it by a ruling as any other incompletely or incorrectly drawn up submission which may be acted upon in terms of Article 229 of the CPC; an appeal filed with the higher court is allowed against the ruling. Such an opinion is supported by the reasoning that if the prosecutor holds that an indictment is correct and the panel finds that it is not correct, the matter should be discussed by a third party, namely the higher court.[20] However, such an opinion can be criticised. Namely, Article 465, paragraph 2 provides, *inter alia*, that an appeal is not allowed against a ruling issued by the panel in the course of the indictment phase, unless expressly allowed by the CPC. Given that the process of indictment review is governed by Chapter XVII of the CPC titled "Indicting" and since the CPC expressly does not allow appeals in such situations, it follows that a ruling by which a public prosecutor's indictment is dismissed because he failed to amend it may not be appealed. This is even truer if we bear in mind that the provision contained in Article 229 is subsidiary in character since it lays down that charges are to be dismissed unless otherwise provided for by the Code and in light of the fact that Article 465 of the CPC resolves this situation in a different manner, Article 229 cannot be applied in that specific situation. The above opinion is also supported by the fact that the situation in which the prosecutor does not correct an indictment as ordered by the court should not be differentiated from the situation in which he does not correct the indictment at all, which would be regarded as exceeding the time limit by the prosecutor. Since the CPC expressly provides that failure by the public prosecutor to meet the deadline shall result in dismissal of the indictment, it must be acted in the same manner even when the prosecutor has not fully complied with the court order. A similar situation occurs when the private prosecutor submits a private prosecution, the only difference being that the court will reject the charges.

Aside from the fact that the Criminal Procedure Code does not provide for a possibility to interpret in a different manner a situation in which a court order to correct charges is not complied with or is complied with only in part, the statutory solution according to which it is not possible to appeal a ruling whereby an indictment is dismissed or a private prosecution is rejected in cases provided for in Article 333, paragraph 3 of the CPC can also be met with criticism. The reason behind this is that in such situations, the panel decides in the first and only instance, in particular if we consider that it is the private prosecution that is being rejected, which is precisely why the review of the first-instance ruling by the higher court should be allowed.

An opinion has been noticed in the jurisprudence that when a panel finds that an indictment has been properly drawn up, its decision is entered on the record prepared pursuant to a provision contained in Article 232, paragraph 1 of the CPC in connection with an action undertaken pursuant to Article 333, paragraph 2 of the CPC, which also includes advice of the right to file an answer.[21] It is not certain if Article 232 of the CPC pertains to the above situations. Namely, the said provision governs the keeping of records in which undertaking of procedural actions is entered, whereas the finding if an indictment has been properly drawn up or not is the result of a decision rendered by the panel referred to in Article 21, paragraph 4 of the CPC and so a record of deliberation and voting should be kept in such a situation and not a record of an action. In that regard, the court would have to make a decision that the indictment has been properly drawn up, which

20 M. Grubač, T. Vasiljević, *Commentary to the 2011 CPC*, p. 599.

21 A. Stepanović, "Uloga suda i standardi dokazivanja u postupku potvrđivanja optužnice i pripremnog ročišta", Bulletin of High Court in Belgrade, no. 84.

can only be done in the form of a ruling against which no special appeal is allowed. Thereafter, the presiding judge shall issue an order that the indictment shall be served on a defendant and his defence counsel.

This phase in the process of indictment review is concluded by rendering a decision that an indictment is properly drawn up and by issuing an order to serve it on the defendant and his defence counsel. After that moment, the court is left with no possibility to return the indictment for correction. All formal deficiencies must be eliminated before the moment the above-mentioned decision is rendered.

3. Substantive Review of Indictment

The second phase of the review process is entered into after the court rules that an indictment has been properly drawn up. It is initiated by serving the indictment on a defendant. Following the service of the indictment, the defendant and his defence counsel may file an answer to the indictment in writing within eight days from the date of its service. Despite the fact that the defendant and his defence counsel are entitled to file an answer to the indictment, its review is not thereby initiated. The review is conducted *ex officio*, while the defence counsel and the defendant only state their opinion about the indictment. In that process, the court is by no means bound by the filed answer to the indictment. Even though the Code does not expressly provide that the examination of indictment's substantive correctness is carried out by the panel sitting in the same composition as the one that carried out the formal review of the indictment, there are no impediments to such action by the court. What is more, that will certainly become the norm for composing panels in the practice of courts, particularly in those in which there are not many judges.

The panel shall examine the indictment within 15 days from the date on which the time limit for filing an answer to the indictment expires, whereas in cases involving several co-defendants, it will carry out the examination within 15 days from the date on which the time limit for filing an answer expires in respect of the defendant on whom the indictment was last served.

The Criminal Procedure Code does not require that an indictment must be served on a defence counsel. Namely, Article 335 of the CPC has a title "Service of Indictment on Defendant" and there is no provision in the text of the Code under which the indictment shall be served on the defence counsel. Even though the Code does not expressly provide for the above, the indictment should also be served on the defence counsel. The fact that the defence counsel is entitled to file an answer to the indictment points to such a conclusion, while on the other hand Article 333, paragraph 1 of the CPC provides, *inter alia*, that the prosecutor shall submit as many copies of the indictment as there are defendants and their defence counsels, as well as one copy for the court.

In the process of the substantive review of an indictment, the court may rule to discontinue the proceedings, reject the charges or confirm the indictment. In addition to those decisions, whereby the indictment review procedure is finally settled, the court may also render some procedural decisions in the process of substantive review of indictments; these decisions include court's ruling on not having jurisdiction over the matter or a ruling on returning the indictment for the purpose of supplementing the investigation, conducting an investigation or collecting specific evidence.

When the court finds that it does not have jurisdiction over a case, it will hand down a ruling to that effect in terms of Article 34 of the CPC. The indictment is still in place, it has not been rejected. When the case is received by the competent court, the panel referred to in Article 21, paragraph 4 of the CPC shall carry out a review of the indictment and may render any decision that may be rendered at the stage of substantive examination of an indictment except for the ruling on not having jurisdiction over the matter, since if the court believes that it is not competent, it must initiate proceedings for resolving the conflict of jurisdiction.[22]

An indictment is returned to the public prosecutor for the purpose of conducting or supplementing the investigation so that specific ambiguities or inconsistencies found in the indictment and evidence submitted therewith could be eliminated. The indictment is returned in the form of an order, which follows from the very wording of the Code given that it provides that the court shall order that the investigation be supplemented or conducted or it shall order that specific evidence shall be collected.[23]

If a panel cites the provision that pertains to the return of an indictment for the purpose of supplementing the investigation, it must not return the indictment for the purpose of supplementing the investigation if it holds that insufficient evidence has been submitted therewith since in such a situation it would be obligated to issue a ruling on the discontinuance of the proceedings having found that there is no sufficient evidence to support justified suspicion that the defendant has committed the offence which is the subject-matter of the charges.[24]

When the Code provides that an indictment shall be returned to the prosecutor for the purpose of collecting specific evidence, that part of its text pertains to a private prosecutor given that he autonomously collects specific evidence with the aim of substantiating his private prosecution.

Should the panel find once again after an investigation has been supplemented or conducted by the prosecutor that doubts have arisen in connection with the collected evidence, it is empowered to return the case once again with the order to the prosecutor to supplement his investigation.

After the prosecutor has obtained the evidence requested from him, he may, in the supplemented investigation, submit to the court, in addition to the notification that he has obtained the requested evidence, the evidence concerned and state by that same submission that he stands by his already brought prosecution or he may amend the charges. Charges may be amended if the prosecutor cites in a separate instrument the sections of the indictment/prosecution he amends or specifies or by submitting to the court an entirely amended indictment/prosecution. After the prosecutor has complied with the order to conduct or supplement the investigation or collect certain evidence, the panel referred to in Article 21, paragraph 4 of the CPC holds another session at which they should render a final decision in the process of substantive review of the indictment.

During the phase of indictment review, the panel may also dismiss the charges if it finds that there is no request by the authorised prosecutor, required motion or approval for criminal prosecution,

22 See Art. 35 of the CPC.
23 A. Stepanović, "Uloga suda i standardi dokazivanja u postupku potvrđivanja optužnice i pripremnog ročišta", Bulletin of High Court in Belgrade, no. 84.
24 G.P.Ilić, M.Majić, S.Beljanski, A.Trešnjev, *Commentary to the 2011 CPC*, p. 773.

or should it find that there are other circumstances temporarily preventing prosecution; the panel will act in the same manner in respect of the private prosecution.[25]

In the course of indictment examination the panel referred to in Article 21, paragraph 4 of the CPC shall make a ruling whereby it is found that the charges are unfounded and that criminal proceedings are terminated provided that any of the following three conditions has been met: that the act which is the subject matter of the charges is not a criminal offence and the conditions for applying a security measure do not exist; the statute of limitations on criminal prosecution has run out or the criminal offence is covered by amnesty or pardon or there exist other circumstances which permanently preclude criminal prosecution; and finally, that there is not sufficient evidence to support justified suspicion that the defendant has committed the act which is the subject-matter of the charges.[26] When the court issues such a ruling, criminal proceedings conducted in connection with a given criminal matter are finally concluded because the *ne bis in idem* principle applies to such decisions.[27]

When judging if the act which is the subject-matter of the charges is a criminal offence or not, the court is bound only by the statement of facts provided in the indictment. The court shall find that charges are unfounded and that criminal proceedings shall be discontinued if elements of the crime cannot be derived from the statement of facts or if the prosecutor fails to set forth any of the elements of the criminal offence. Nevertheless, if the statement of facts given in the indictment does not correspond to the legal classification or if the legal classification provided in the indictment does not follow from the statement of facts, the court shall not discontinue the proceedings; instead, it acts as if the defendant was charged was offence that that follows from the statement of facts.

The panel shall find that charges are unfounded and discontinue criminal proceedings when there is any circumstance which permanently precludes criminal prosecution. In that regard, the lawmaker has cited the statute of limitations, amnesty and pardon as the most common examples of circumstances which permanently preclude prosecution.

The most common reason for discontinuing proceedings found in the case-law is when the court finds that there is insufficient evidence to support a justified suspicion that the defendant has committed the act which is the subject-matter of the charges. In that case, the panel will assess whether or not the prosecutor has submitted to the court sufficient evidence which justifies the bringing of the defendant before the court. In the process of indictment examination, the panel shall judge on grounds of the above if there is sufficient evidence for reasonable suspicion (that specific persons have committed a criminal offence) to attain the level of justified suspicion, a mandatory condition for bringing an indictment, provided that the assessment of the quality of each individual piece of evidence shall be carried out by the panel before which the main hearing is held (Court of Appeal in Belgrade, *Kž2 Po1 no.* 100/12 of March 15, 2012).[28] However, the existence of justified suspicion does not mean in itself that defendants have committed the criminal offence they are charged with; instead, the assessment of individual pieces of evidence as well as of their interrelatedness shall be the subject of an adversary

25 See Art. 339, para. 2 of the CPC.
26 See Art. 338 of the CPC.
27 M.Škulić, *Commentary to the Criminal Procedure Code*, Belgrade, 2007, p. 920.
28 Cited according to: A. Trešnjev, *Zbirka sudksih odluka iz krivičnopravne materije, deveta knjiga*, Beograd, 2013, p. 265.

proceeding conducted by the court of first instance at the main hearing (Court of Appeal in Belgrade, *Kž2, Po1 no. 318/12* of July 24, 2012). Furthermore, it is emphasised in a substantial number of decisions that at this stage in the proceedings the panel is not empowered to make a finding of non-existence of subjective elements of a crime (Basic Court in Belgrade, *Kž. no. 542/01* of April 11, 2001;[29] Court of Appeal in Belgrade, *Kž. no. 2245/10* of June 3, 2010[30]), then whether or not the perpetrator acted in self-defence (Basic Court in Belgrade, *Kž. no. 1708/00* of October 19, 2000),[31] nor is the panel empowered to make a finding of whether or not the defendant acted with fraudulent intent since the trial panel is the one competent for making such assessments at the main hearing in the course of adversary proceedings (Court of Appeal in Novi Sad, *Kž2. no. 1893/10* of May 25, 2010).[32]

According to the case-law, the panel is even denied the right to make a finding of an offence of minor significance in the course of an indictment review since such a conclusion can be reached only based on the results of the main hearing (Supreme Court of Serbia, *Kž1. no. 1435/06* of September 26, 2006).[33]

Even though the difference between the reasons for discontinuing proceedings listed under item 1 and item 3 of Article 338 of the CPC is clear from the perspective of theory, this is often not the case in practice, so it is difficult to establish if charges should be rejected and proceedings discontinued because certain acts with which a defendant is charged do not constitute a criminal offence or because there is no evidence that the defendant is justifiably suspected of committing an offence. Therefore, it should be underlined that if elements of a crime with which a defendant is charged or of any other crime for that matter do not follow from the statement of facts made in a charging document, the proceedings are to be discontinued under item 1; on the other hand, if elements of a crime do follow from the statement of facts made in the charging document, *i.e.* what has been described constitutes a criminal offence, but evidence enclosed with the indictment do not corroborate the existence of justified suspicion that the event occurred in the manner set forth in the indictment, a ruling is to be issued to the effect that charges are unfounded and the proceedings are to be discontinued under Article 338, paragraph 1, item 3 of the CPC.

In the event that the court does not issue any of the above rulings, it will hand down a ruling whereby the indictment if confirmed.[34] Pursuant to the new concept of criminal procedure, the moment at which an indictment is confirmed is very relevant to the entire proceedings. As of that moment, the proceedings have gone through the prosecutorial and reached the judicial stage.[35] As of that moment, they become adversarial proceedings in the full sense of the word.

The ruling by which an indictment is confirmed must not prejudge the defendant's guilt since that matter should be resolved only after the main hearing has been conducted. That is precisely the reason why the rationale of the ruling whereby an indictment is confirmed must be limited to establishing that there is evidence that supports justified suspicion that a specific

29 Cited according to: I. Simić, *Zbirka sudksih odluka iz krivičnopravne materije, četvrta knjiga*, Beograd, 2002, p. 252.
30 Cited according to the Paragraf Electronic Database.
31 Cited according to: I. Simić., *Zbirka sudksih odluka iz krivičnopravne materije, četvrta knjiga*, Beograd, 2002, p. 251.
32 Cited according to the Intermex – Sudska praksa Electronic Database.
33 Cited according to the Paragraf Electronic Database.
34 See Art. 341 of the CPC.
35 G.P.Ilić, M.Majić, S.Beljanski, A.Trešnjev, *Commentary to the 2011 CPC* , p. 780.

defendant has committed a specific criminal offence. An appeal is allowed against the ruling by which an indictment is confirmed. The appeal may be filed by the defendant, as expressly stated in the Code,[36] but it also may be filed by a defence counsel (Court of Appeal in Belgrade, *Kž2, Po1 no. 317/13* of August 5, 2013), regardless of the fact that the Code does not explicitly provide for that possibility.

The next issue to be resolved concerns the extent of the order issued by the court of second instance in case it decides to overturn the first-instance decision. A question remains whether or not the second-instance court may return proceedings only to the phase of substantive examination of an indictment or it may order the first-instance court to return the proceedings to the phase of formal examination of the indictment. In addition to the fact that the Code provides for two stages of indictment examination, namely the formal and substantive examinations with different decisions to be rendered in respect of each one, a solution should be accepted according which in the process of overturning the ruling, the court of second instance would have an opportunity to order the first-instance court to embark even on the examination of indictment's formal correctness. The reason behind this is that the first opportunity for reviewing the work of the panel referred to in Article 21, paragraph 4 of the CPC on appeal arises only after the completion of the substantive review of an indictment. In accordance therewith, the court of second instance has authority to carry out the review of indictment's formal correctness within the scope of the appeal. It should not be forgotten that such situations occur rarely in practice because it is hard to imagine that in the process of formal review of an indictment, the court would omit to establish that any of its formal elements are missing; however, it must be accepted that something like that may happen and the defence should be allowed to challenge not only the indictment's substantive, but its formal correctness as well.

In respect of second-instance proceedings, the opinion adopted in jurisprudence that in addition to citing reasons in support of the discontinuance of proceedings or rejection of charges in an appeal against the ruling on confirmation of an indictment, it may be contended therein that some other right of defendant's has been violated in the course of the proceedings, such as the right to prepare a defence, is the correct one (Court of Appeal in Belgrade, Kž2 Po1 number 199/12 of May 16, 2012).

There is an opinion that a defendant is not allowed to cite new evidence in his answer to the indictment or to submit it therewith.[37] The reasoning behind such an opinion is that the court will make a decision that such evidence must be presented at the main hearing or leave it to the trial panel to decide whether or not it needs to be presented. It is further stated that the sufficiency or absence of justified suspicion cannot be judged based on new evidence enclosed to the defendant's answer, but that it should be judged based on the evidence available to the prosecutor in the process of drawing up an indictment. Such an interpretation is open to criticism given the fact that prosecutors do not present evidence during the investigation phase, they only collect it. Thus, the court renders its decision on whether or not there is justified suspicion solely based on evidence collected, so it remains unclear why the court may not base its decision on evidence submitted by the defence together with their answer to the indictment. Certainly, should doubts about the quality or lawfulness of their evidence arise, the court may

36 See Art. 343 of the CPC.
37 M.Grubač, T.Vasiljević, *Commentary to the 2011 CPC*, p. 608.

order the prosecutor to expand the investigation for the purpose of establishing specific facts to which the evidence indicated by the defence points. Such an opinion also has its basis in the opportuneness of conducting the proceedings. Namely, the process of indictment review is aimed at establishing if an indictment is of such quality that it points to the existence of justified suspicion or not and so in case of the latter, proceedings should be terminated. It is therefore unclear why the court should be limited in the process of making such a decision only to evidence collected by the prosecutor in the course of the investigation phase.

Finally, it should be remembered that the Code expressly states that the fact that a judge acted in the decision-making procedure for the confirmation of an indictment constitutes grounds for recusal.[38] Such a solution should be welcomed since the 2001 CPC did not expressly make such a provision. The reason for this is that a judge who acts in the process of indictment review has in a certain way already taken his position on the indictment, in particular if he participated in taking a decision whereby charges have been rejected or dismissed or proceedings have been discontinued. Thus, the judge who acted in the case has already given his opinion about the quality of evidence or some other legal issue relevant to the charges. In contrast to the regular proceedings, the legislator's solution according to which the review of an indictment in summary proceedings is carried out by the judge sitting alone who afterwards also schedules the main hearing and conducts the first-instance proceedings is not clear and should be met with criticism. Namely, it is not a rare situation that in practice a judge, while conducting the review of a motion to indict in summary proceedings, rejects the charges or dismisses the motion to indict or a private prosecution and thus he states his opinion about the charging document to a certain extent in a rationale of his decision, after which the second-instance court overturns his decision and orders that he schedule the main hearing. In that process, the judge's work has been made more difficult by the fact that in a certain manner he has already taken his position on the motion to indict. Therefore, it would most certainly be a better solution if the review of a motion to indict was carried out by one judge and the main hearing was scheduled and presided over by another, in line with the solution from the regular proceedings.

38 See Art. 37, para. 1, item 4 of the CPC.

Conclusion

Obviously, there is no single universal model of indictment review. Two types of review are present in contemporary legal systems. They include the review carried out at the motion of a party and the review carried out *ex officio*. In addition to the difference in respect of the manner in which these two types of indictment review are initiated, there is also an inherent difference between them, they are of different quality. The Criminal Procedure Code provides for the review of indictments that is conducted *ex officio*. As a result of its quality, this system has some advantages over the review conducted at the motion of the parties.

Two phases of indictment review exist in positive law and they include the formal and substantive examination of indictments. The formal examination of an indictment forms the first phase of its review. During this phase, it is only examined if the indictment has been properly drawn up, whereas in the process of substantive exmanination the court may discontinue proceedings, reject the charges or confirm the indictment. In addition to these three decisions whereby the indictment review has been finally resolved, during the phase of substantive review, the court may also render some procedural decisions such as a ruling on not having jurisdiction over the matter or a ruling on returning the indictment for the purpose of supplementing the investigation, conducting an investigation, or collecting specific evidence.

In spite of various dillemas that have arisen in respect of the application of this procedural institute, none of them is of such character that prevents the work of the court at this stage in the proceedings. It should not be disregarded that that the Criminal Procedure Code has been implemented for a relatively short period of time and that many dilemmas will be resolved through the harmonisation of the courts' jurisprudence, so that we are free to say that this stage in the proceedings has been provided for in a manner that in terms of its quality surpasses the previous statutory solution.

Miroslav Bašović[1]

Investigative Judge as a Participant in the Investigation According to the Criminal Procedure Code of Montenegro

1. Introduction

Criminal Procedure Code (hereinafter: CPC), which is currently in application in Montenegro, was passed on 27 July 2009; it entered into force on 26 August 2009 and has been in application since 26 August 2010 in the proceedings involving criminal offences of organised crime, corruption, terrorism and war crimes. In the proceedings involving other criminal offences it has been applied since 1 September 2011. The most important and the most prominent change that this Code has brought, compared to earlier provisions in this area, is certainly putting the investigation under the jurisdiction of the state prosecutor. The legislator has obviously intended to enable the court through this change to focus on the function of conducting the main criminal proceedings and rendering the judgment, i.e. to distance itself from the activities whose purpose is the discovery and clarification of the criminal offence and the collection of evidence for a potential indictment. In addition, it was intended to activate the state prosecutor more during the stages that precede the indictment which increases his responsibility for the standard of quality of the evidence on which the indictment is going to be based. It should be also noted that this change aims at accelerating the proceedings. Although the CPC has introduced "the prosecutorial investigation conducted by the state prosecutor", a lot of competences have been left in this segment to the court, i.e. the investigative judge.[2] So the investigative judge is seen as "human rights judge" as many say, since he decides solely on the measures and actions which involve issues related to human rights and fundamental freedoms such as detention, secret surveillance measure, searches, temporary seizure of items, exhumation of a body, other measures for securing the presence

1 Judge of the Higher Court in Podgorica.

2 In Montenegrin language the term is "sudija za istragu", which, literally translated, means judge for investigation *(note by Editors*).

of the defendant etc. The competences of the investigative judge shall be discussed below, however, the said competences are not discussed in order of their actual importance either for the proceedings or the defendant but in the order they are mentioned in the CPC. Article 24 of the CPC prescribes the composition of the court and the court's jurisdiction. For the purposes of this paper, it should be noted that the CPC no longer recognizes lay judges and instead whenever the court is presided by a panel of judges at the first instance, it shall consist of professional judges. Paragraph 5 of this Article determines the jurisdiction of the investigative judge by prescribing that the investigative judge of the first instance court should participate in the preliminary investigation and the investigation in accordance with this Code, while paragraph 7, *inter alia*, prescribes that the first instance court shall decide, as a three-judge panel, appeals against the decisions made by the investigative judge.

2. Investigative Judge's Jurisdiction

2.1. The Role of the Investigative Judge in Securing the Right of the Defence Attorney to Examine the File and Inspect the Items

The defence attorney has the right to analyze and copy the file and examine the collected items which are to be used as evidence. Under special circumstances he may be deprived of this right during the preliminary investigation and the investigation with regard to certain documentation if examining or copying such documentation would endanger the purpose of the investigation, national security and the protection of a witness, which must not violate the right to a defence during the proceedings. If the defence attorney believes that the prosecutor has unlawfully deprived him of the right to examine and copy the file, he may request from the investigative judge to allow him to examine and copy the file by rendering a ruling. The ruling of the investigative judge allowing the defence attorney to examine and copy the file cannot be appealed.

2.2. Search of the Residence, Items and Persons

If there are grounds for suspicion that a search would lead to the apprehension of the defendant or that some traces of a criminal offence would be found or items relevant to the criminal proceedings, a search may be conducted of the residence or other premises of the defendant or some other person and of the movables which are outside of the residence. A search includes the search of a computer and other similar devices used for automatic data processing which are connected to a computer. At the court's request, the person using the computer must allow access to the said computer and portable data storage devices which contain data related to the subject of the search (discs, USB – flash memory sticks, USB external hard discs, floppy discs, tapes etc.) and provide the necessary information regarding the use of the computer in question as well. If the person refuses to do so and there is no reason for the refusal (it is not related to the right to refuse to answer certain questions if it is likely that this would expose the said person or his close relative to great disgrace or criminal prosecution), he may be sentenced to pay a fine of up to 1,000.00 EUR and if he continues refusing to comply, he may be imprisoned until the item is handed over or until the criminal proceedings are concluded but not more than for a period of two months.

As a rule, the search is conducted based on a court order – issued by the investigative judge at the request of the state prosecutor or at the request of a police officer who has been authorised by the state prosecutor to file such a request. The order is executed by the police. There are exceptions to this rule. For instance, a police officer may enter somebody's residence and other premises and, if necessary, perform a search without a court order. This occurs when the occupant of the residence requests it or if this is necessary in order to prevent the commission of a criminal offence or in order to apprehend a perpetrator of a criminal offence or for the purpose of saving people or property.

The occupant of the residence has the right to state objections to the search and the police officer must advise him of this right and include his objections into the report on the conducted search. If the residence or other premises have only been entered and not searched, the occupant shall be issued a notice on entry listing the reasons for entering the residence and other premises as well as the occupant's objections. When a residence or other premises are being searched without a warrant, the rules concerning the search with a warrant shall apply. Without a search warrant, a police officer may perform a search of a person when enforcing an order to bring them in under coercion or during the arrest if there is reason to suspect that the said person has a weapon or an instrument which can be used for an assault or if it is suspected that the person would discard, hide or destroy the items which are to be seized from him as evidence in the criminal proceedings.

A search without a warrant is also possible when there are grounds for suspicion that a criminal offence which is prosecuted *ex officio* has been committed, in which case a police officer may search without a court order transportation vehicles, passengers, luggage and other movables, except computers and similar devices. When a police officer performs a search without a search warrant, he must file a report on this with the investigative judge.

As it has already been mentioned, the request for a search warrant is filed by the state prosecutor or an authorised officer who has the approval of the state prosecutor. Such a request is filed in writing and under special circumstances it may be presented orally as well. Written or verbal request by the police officer is allowed in order to prevent damage which any delays might incur to the proceedings.

Verbal request for the issuance of a search warrant may be communicated to the investigative judge by radio, phone or some other electronic communication device. The investigative judge shall record the course of the conversation in writing and if it has been recorded as an audio recording or in shorthand, a transcript shall be made within 24 hours and its authenticity shall be verified and the said transcript shall be kept with the original report.

In any case, the request for a search warrant contains: the indication who is the requestor, the name of the court the request is filed with, facts which provide probable cause for a search (grounds for suspicion), the first name and the surname and if necessary a description of the person who is to be apprehended during the search of the residence or other premises, i.e. the expected traces and the description of the items which are being searched for, specifying what is subject to being searched and the address of the place, personal data on the owner, i.e. the occupant of the said residence or other premises or the holder of the items in question , and other data relevant to the identification, the signature of the requestor.

If the investigative judge grants the request for a search warrant, the said search warrant shall be issued containing: the data cited regarding the request, the provision that the search is to be conducted by the police, the instructions the person subject to search is to receive, the signature of the investigative judge and the official seal of the court. The investigative judge does not have to grant the request for the issuance of a search warrant. If he does not grant the request, it shall immediately refer the request to a pre-trial criminal panel of judges which shall pass its decision within 24 hours.

Search warrant is given to the person who is subject to the said search prior to conducting the search and the said person shall be asked to voluntarily hand over a person or items that are being searched for. The said person shall be advised of his right to retain a lawyer – defence attorney – who may be present during the search. The beginning of the search shall be postponed until the defence attorney arrives and not for more than two hours.

The search may be started without first presenting a warrant and asking the person to hand over the person or items in question and without an instruction on the right to a defence attorney, i.e. a lawyer, if this is necessary in order to prevent the commission of a criminal offence or in order to save people or property, or if the search is to be conducted on public premises.

The search is conducted during the day from 6.00 AM to 21.00 PM and it may be continued during the night if it has started during the day and has not been completed or upon the court's express order due to the risk of delay or if there are reasons for entering someone's residence and search without a warrant.

The search is to be conducted according to the rules which require: that the occupant of the residence or other premises has been invited to be present during the search and if he is absent than his representative or some of the adult household members or a neighbor shall be asked to be present; that the locked premises or other objects shall be forced open only if their occupant/ holder is not present or is not willing to open these voluntarily but the unnecessary damage shall be avoided when opening such locks; that the search is witnessed by two adult citizens unless it is impossible to secure the presence of witnesses immediately and there is a risk of delay; the search of individuals is done by the members of the same sex and the witness is chosen to be of the same sex as well; that the witnesses of the search have the right to state objections if they deem that the content of the report is not accurate; that the search shall be approached with caution while fully preserving human dignity and the right to privacy, without breaking any house rules and disturbing the citizens, that the report shall be written and signed by the person whose premises are or who personally is subject to search and by the persons whose presence is required; that only the items and documents which are subject to search are to be seized and the report shall specify which items and documents exactly are being seized, which shall also be included in the receipt which shall be immediately issued to the person whose items or documents are being seized.

2.3. Temporary Seizure of Items, Material Gain and Property

This refers to the items which are subject to seizure pursuant to the Criminal Code or the items which may serve as evidence in the criminal proceedings. Such items shall be temporarily seized by a court ruling passed at the request of the state prosecutor and shall be handed over to the court for safekeeping or their safekeeping shall be secured in some other way.

The ruling on the temporary seizure of items shall be passed during the investigation by the investigative judge and after the indictment is issued, the presiding judge of the panel. Such a ruling contains: the name of the court passing the said ruling; legal grounds for the temporary seizure of items; reference number and description of the item which is to be temporarily seized; data on the person whose item is subject to temporary seizure and a place where, or in which, certain item is to be temporarily seized. The person who is holding the items which are subject to temporary seizure must hand them over and if he refuses to do so, he may be ordered to pay a fine of up to 1,000.00 EUR and should he continue refusing to comply with the order, he may be imprisoned. Imprisonment shall last until such time the item is handed over or until the conclusion of the criminal proceedings and not longer than two months.

Data stored on devices for automatic, i.e. electronic, processing and the devices on which the data in question is stored may be subject to temporary seizure of items, which must be handed over at the request of the court in a readable and comprehensible format while the court and other authorities shall abide by the regulations regarding data confidentiality.

An appeal may be filed against a ruling on temporary seizure of items which shall be decided on by a pre-trial criminal panel of judges, but the appeal shall not delay the execution of the said ruling. If a suspect, i.e. the defendant, or a person exempted from the duty of testifying refuse to hand over an item which is subject to seizure, they cannot be subject to penal measures for this reason.

At the request of the state prosecutor, the investigative judge may order postal services, other companies and legal entities whose registered activity is information transfer to halt the delivery of letters, telegrams and other mailed items addressed to the suspect or the defendant or sent by them and hand them over, for which a receipt shall be issued, if there are circumstances which indicate that it is reasonable to expect these mailed items may be used as evidence during the proceedings. The mailed items are opened by the judge in the presence of two witnesses. When opening these, it shall be especially guarded that the seals remain intact and that envelopes/wrapping and addresses are kept. A report on the opening shall be written. The investigative judge shall inform on the contents of the sent items the state prosecutor and at the prosecutor's request supply him with a copy of it and the report on the opening of the said item. If it is not against the interest of the proceedings, the content of the sent item may be in its entirety or in part conveyed to the suspect or the defendant or the person to whom it was addressed, and the sent item may even be handed over to them. If the suspect or the defendant is absent, the sent item shall be returned to the sender if this does not interfere with the interest of the investigation.

At the state prosecutor's motion, the court may pass a ruling on temporarily halting the execution of a certain cash transaction for which there is reasonable suspicion that it constitutes a criminal offence or that it is intended for the purpose of the commission or concealment of a criminal

offence or that it represents proceeds from crime. The court's ruling on such a request shall determine the funds to be temporarily seized in their transferable form or in cash and deposited into a special account for safekeeping until the final conclusion of the criminal proceedings, i.e. until the requirements for their return are met. Such a ruling may be appealed by the parties to the proceedings and the defence attorney, i.e. an appeal may be filed by the owner of the said funds or a person with his power-of-attorney or the legal entity whose funds have been temporarily seized. Such an appeal is decided by a pre-trial criminal panel of judges. This is referred to under Article 89, paragraphs 4, 5 and 6 of the CPC and as it is evident, the jurisdiction for passing such a ruling is not clearly referred to, instead it is stated that the said ruling shall be passed by the Court. Bearing in mind a clear provision on who should decide the appeal, it is apparent that the order on temporarily halting a cash transaction should be passed by the investigative judge.

2.4. Temporary Seizure of Assets and Financial Investigations for the Purpose of Extended Seizure of Assets

When the proceedings are being conducted with regard to a criminal offence for which the Criminal Code prescribes the possibility of the extended seizure of assets from the convicted person, his legal successor or the person to whom he has transferred his assets if he is unable to prove that its origin is legal and there are grounds for suspicion that the said assets have been acquired illegally, the court may, at the request of the state prosecutor, order temporary seizure of assets. If this is the case, the state prosecutor shall initiate a financial investigation which shall provide evidence on the assets and income of the suspect, i.e. the defendant, his legal successor or the person to whom the defendant has transferred the assets. During the proceedings for temporary seizure of assets, legal provisions which regulate enforcement procedure shall be applied accordingly. An investigative judge shall decide on the temporary seizure of items, material gain or property immediately or within 8 days from the day of the receipt of the request filed by the state prosecutor. If the proceedings are at the stage of the main hearing, then such a request by the state prosecutor is decided by the presiding judge of the panel before which the main hearing is held. The prosecutor's request contains: the description of the items, material gain or property, the data on the person who owns the said items, material gain or property, the reasons why the said items, material gain or property are suspected to have been illegally obtained and the reasons why it is likely that the seizure of items, material gain or property before the end of the proceedings would become significantly more difficult or impossible.

Appeals against the ruling on temporary seizure of items, material gain and property shall be decided by the pre-trial criminal panel of judges. An appeal shall not delay the execution of such a ruling. If the court denies the request for temporary seizure of items, material gain or property, the ruling denying the request shall not be served on the person whose assets are in question.

The court shall indicate in the ruling on temporary seizure of items, material gain or property the type and value of items, material gain or property which are to be seized, the amount of material gain and the period of time during which they are to be kept. The court may specify in such a ruling that the temporary seizure does not include items, material gain or property which should be exempted according to the rule on the protection of a *bona fide* proprietor. The court shall serve the ruling on temporary seizure of items, material gain or property with justification

on the person subject to the said ruling, the bank or some other organisation competent to perform payment operations and if necessary, on other persons and state authorities.

A panel of judges shall schedule a hearing summoning the person who is subject to the ruling, his defence attorney and the state prosecutor. This hearing shall be held within 30 days from the day the appeal was filed. The summoned persons shall be heard at that time and their failure to appear shall not prevent the hearing from being held. The panel shall overturn the ruling on temporary seizure of items, material gain or property if the suspect, i.e. the defendant proves that the said items, material gain or property have been obtained legally by credible documentation or in the absence of credible documentation proves it to be likely that the said items, material gain or property have been obtained legally. The panel shall commute the ruling on temporary seizure of items, material gain or property if the suspect or the defendant proves or proves it to be likely that the temporarily seized items, material gain or property have been obtained legally. Temporary seizure of items, material gain or property may last at the latest until the pre-trial criminal panel of judges decides on the state prosecutor's request for permanent seizure of items, material gain or property the legal origin of which has not been proven and such a request may be filed no later than within a year from the day the judgment, which pronounces the defendant guilty for a criminal offence for which the Criminal Code prescribes the possibility of extended seizure of assets from the convicted person, his legal successor or the person he has transferred his assets to, the origin of which cannot be proven to be legal, becomes final. If temporary seizure of items, material gain or property has been ordered during the preliminary investigation, it shall be revoked *ex officio* if the investigation does not start within six months from the day the ruling on temporary seizure was passed.

2.5. Measures for Securing the Presence of Witnesses and Procedural Penalties

The court is authorised to sanction by a ruling at the request of the state prosecutor a witness who fails to meet with the prosecutor after being properly summoned and does not offer a valid reason for doing so or who leaves the place where he is to be questioned without authorisation or valid reason. Such a witness may be brought in under coercion and may be fined in the amount of up to 1,000.00 EUR as well. The same penalty applies if the witness refuses to testify without a legally valid reason after being duly warned about the duty to testify. If the witness refuses to testify even after being fined, the said witness may be imprisoned. The imprisonment shall last until the witness agrees to testify or until his testimony becomes unnecessary or until the proceedings end but no more than two months. The same amount may be charged as a fine if a witness insults the authority conducting the proceedings or other participants in the proceedings or if he threatens them.

The appeal against the ruling ordering a fine to be paid or imprisonment shall be decided by a pre-trial criminal panel of judges. Under the provisions on penalising the witnesses of the CPC, the expression "court" is used, but bearing in mind who decides the appeal, it is clear that the investigative judge shall decide on penalties imposed on witnesses at the request of the state prosecutor.

2.6. Deciding on Special Participation and Questioning of the Witnesses and Data Protection

If there are valid concerns that a witness might by giving a statement or by answering certain questions expose themselves, their spouse, a close relative or person close to them to physical danger or endanger their life, freedom or property on a larger scale, the said witness may refuse to give their personal data and data related to the address of their residence or to answer certain questions or to give a statement at all until the protection is provided. If refusal to give a statement is deemed to be evidently unfounded, the authority conducting the proceedings shall warn the witness about the potential penalty.

Protection of witnesses and other persons close to them includes special type of participation and questioning of the witness during the criminal proceedings and it may be provided outside of the criminal proceedings in accordance with the law regulating witness protection. The court must advise the witness of the possibility of witness protection.

Special methods of participation and questioning of the witness during the criminal proceedings are: questioning the witness under a pseudonym, questioning the witness with the help of technical devices (protective wall, voice altering device, a device for audio-visual transmission) etc. If the special methods of questioning the witness refer only to concealment of the data regarding the identity and place of residence, the questioning shall then be conducted under a pseudonym, and in other respects the general provisions of the CPC shall apply. If it is necessary to hide not only the identity but the voice and appearance of the witness, the questioning shall be conducted through the use of technical devices for audio-visual transmission and the voice and appearance of the witness shall be altered. During this type of questioning, the witness shall be in a special room separated from the premises where the investigative judge and others who are present at the hearing are located. The investigative judge is not going to allow any questions the answer to which might reveal the identity of the witness. The witness shall sign the record after the hearing using the pseudonym solely in the presence of the investigative judge and the court reporter while the persons who learn the data on a protected witness in any capacity must treat them as confidential.

Ruling on the special form of participation and the questioning of the protected witness during the investigation is passed by the investigative judge at the motion by a witness, the defendant, the defence attorney or the state prosecutor and during the main hearing it is decided by a panel of judges and the motion must contain the justification. The investigative judge shall, prior to passing the said ruling, decide whether the witness's testimony is so important that he should be awarded the status of a protected witness. For the purpose of determining such facts, the investigative judge may schedule a hearing summoning the state prosecutor and the witness in question.

Data related to a witness who is to participate in the proceedings under special circumstances shall be sealed in a special envelope and it shall be kept by the investigative judge and the envelope shall be marked "Protected Witness – Secret". Such envelope may only be opened by the panel presiding over the main hearing and the second instance court in the proceedings on the appeal but it shall be recorded that it has been opened specifying the members of the panel who have seen its content. After this, the envelope is to be sealed again and returned to the investigative judge.

2.7. Secret Surveillance Measures

There are two sets of secret surveillance measures. The first set consists of those stipulated under Art. 157, para. 1 of the CPC which are ordered by the investigative judge in a written order at the motion by the state prosecutor and these are:

1) Secret surveillance and technical recording of telephone conversations or some other communication using remote communication technical devices and private conversations which took place on private or public premises or in the open.
2) Secret photographing and video recording on private premises
3) Secret surveillance and technical recording of individuals and objects.

The second set consists of measures referred to under Art. 157, para. 2 of the CPC which are under the jurisdiction of the state prosecutor, who is responsible for imposing them by a written order at the request made by the police, and these are:

1) Simulated purchase of items or persons and simulation of offering and accepting bribes.
2) Monitoring the transport and delivery of items related to a criminal offence.
3) Recording conversations provided that one of the participants has given his consent upon being informed about it.
4) Using undercover investigators and collaborators.

Secret surveillance measures may be imposed if there are grounds for suspicion that a certain person has committed, is in the process of committing or is preparing the commission of a criminal offence, alone or with accomplices, for which such measures can be imposed and they are:

1) criminal offences punishable under law by a term in prison of 10 or more years
2) criminal offences with elements of organised crime
3) criminal offences with elements of corruption, specifically: money laundering, causing false bankruptcy proceedings, abuse of assessment, accepting a bribe, offering a bribe, disclosing an official secret, trading in influence as well as the abuse of power in business, abuse of official powers and fraud related to performing official duties punishable under law by a term in prison of 8 or more years.
4) kidnapping, extortion, blackmail, acting as an intermediary in the criminal offence of prostitution, showing pornographic materials, usury, tax evasion and contributions fraud, smuggling, illegal processing, disposal and storage of dangerous substances, assault on an officer while on duty, obstruction of evidentiary proceedings, criminal association, illegal possession of weapons and explosive materials, illegal crossing of state borders and smuggling of human beings.
5) criminal offences against computer data security.

The state prosecutor's request with its justification precedes the investigative judge's order on the imposition of the measure of secret surveillance. The order and the request shall be an integral part of the criminal case file and should contain available data on the person who is subject to such measures, the criminal offence that has been the reason for imposing the measure, the facts which confirm the need for the imposition of such measures, how long are the measures to be in place which must be adequate for meeting the objective of the imposed measure, as well as the

method and scope of the said measures and the place where the measures are to be implemented. If there is a risk of delay, under special circumstances, the measure of secret surveillance may be allowed to start by a verbal order in which case a written order must be issued within no more than 12 hours from the moment verbal order was issued.

A motion requesting a simulated purchase of items or persons and simulated offering and accepting of bribes may refer just to a single act and any subsequent motion for undertaking of such a measure with regard to the same person must specify the reasons which justify repeated use of the said measure. Other secret surveillance measures may last as long as they are necessary and not more than 4 months and if there are valid reasons, a time extension of another 3 months may be allowed.

2.8. Measures for Securing the Presence of the Defendant and Ensuring Unobstructed Criminal Proceedings

2.8.1. Supervision Measures

If there are circumstances which suggest that the defendant might flee, hide, move to an unknown location or another state or obstruct the course of the criminal proceedings, the court may *ex officio*, at the state prosecutor's or the injured party's motion, impose one or more measures of supervision by a ruling with enclosed justification, and the said measures include:

1) A ban on leaving the residence,
2) A ban on leaving the place of residence,
3) A ban on frequenting certain places or areas,
4) An obligation to report periodically to a certain state authority,
5) A restraining order on approaching certain individuals,
6) Temporary confiscation of passports,
7) Temporary confiscation of a driver's licence.

During the investigation, such measures are ordered and revoked by the investigative judge and after the indictment is issued by the presiding judge of the panel.

Supervision measures may last as long as there is a need for them and not longer than until such time the judgment becomes final. The investigative judge, and after the investigation - the presiding judge of the panel, must review whether the imposed measure is still necessary every two months. An appeal may be filed against the ruling by which the measure was imposed, extended or revoked by the parties to the proceedings, while the state prosecutor may appeal the ruling by which his motion for the imposition of a supervision measure was denied. Pre-trial panel of judges shall decide the appeal within three days from the day of the receipt of the appeal but the appeal does not delay the execution of the said ruling.

2.8.2. Bail

The defendant who is supposed to be detained or the defendant who is already placed in detention, only because there are circumstances which indicate that he would flee, may remain free, i.e. may be released, if he personally or someone else vouches for him that he would not flee before the end of the criminal proceedings and the defendant himself pledges that he would not go into hiding and that he would not leave his place of residence without permission.

Ruling on setting bail before and during the investigation is passed by the investigative judge. Bail is always set in the form of the amount of money to be paid which should reflect how serious the criminal offence is, personal and family circumstances of the defendant and the financial circumstances of the person posting the bail. If the defendant flees, a ruling shall be passed to transfer the bail money to a special section of the budgetary funds allocated for functioning of the courts.

The defendant for whom the bail was posted shall be remanded in custody if he fails to appear after being duly summoned and does not provide a valid excuse for doing so or if, after being released, some new legal grounds for detention emerge. In such a case the bail is revoked, the deposited money, valuables, securities or other movable items are returned and the mortgage is lifted. This shall be the case also if the criminal proceedings are concluded with a final ruling on the suspension of the proceedings or a judgment.

2.8.3. Detention

Detention is ordered by the investigative judge in a ruling according to which the defendant may remain in custody up to a month from the day of the arrest. During the investigation the detention may last six months in total, but the pre-trial panel of judges may extend it for two months and a panel of judges of the Supreme Court for another three months. Ordering or extending the detention is not possible without a motion by the state prosecutor.

During the investigation detention may be terminated by the investigative judge at the motion of the state prosecutor or the defendant, i.e. the defence attorney. An appeal against the ruling on ordering, extending or terminating the detention does not delay its execution.

Detention is ordered after the defendant has been questioned and the ruling contains: first and last name of the defendant, the year and the place of birth, the criminal offence he is charged with, legal grounds for detention, duration of the ordered detention, the time of the arrest, instruction on the right to an appeal, justification of the grounds and the reason for detention, official seal and the signature of the judge who has ordered the detention. An appeal against the ruling ordering the detention may be filed by the detainee or his defence attorney with the panel within 24 hours from the moment the ruling was served. The ruling by which the state prosecutor's motion for placing the defendant in detention was denied, an appeal may be filed by the state prosecutor with the panel within 24 hours from the moment the ruling was served. The panel must decide on the appeal against the ruling ordering the detention or denying the motion to order the detention within 48 hours.

Detention may be ordered only in cases stipulated by the CPC and only if the same purpose cannot be achieved by another measure and it is necessary in order to ensure unobstructed course of the proceedings and the detention shall be terminated as soon as the reasons for ordering it cease to exist but if the defendant is in detention, all of the authorities which participate in the criminal proceedings must proceed with special urgency.

The CPC stipulates as the reason for detention the existence of a reasonable suspicion that a certain person has committed a criminal offence but the detention is not mandatory, it is optional and applied if:

1) the defendant is in hiding or if it is impossible to establish his identity or if there are other circumstances indicating that there is a risk of flight;
2) there are circumstances which indicate that he would destroy, hide, temper with or falsify evidence or traces of a criminal offence, or that he would obstruct the proceedings by influencing the witnesses, accomplices or persons who assisted them in concealment;
3) there are circumstances which indicate that he would repeat the criminal offence or complete the attempted criminal offence or that he would carry out a threat that he would commit a criminal offence;
4) the criminal offence in question is punishable under law by a term in prison of ten or more years and if the said offence is particularly serious due to the manner in which it was committed and its consequences, and if there are special circumstances which indicate that releasing him would pose a serious threat to the maintenance of public order.

The fifth grounds for detention are not mentioned here since they do not fall under the jurisdiction of the investigative judge.

There are two situations when the investigative judge may order detention. The first one is ordering detention during the preliminary investigation and the other one is ordering the detention during the investigation. In both of these situations the state prosecutor has rendered a decision on detaining the suspect (during the preliminary investigation) i.e. the defendant (during the investigation) and the said person has been brought before the investigative judge at the motion of the state prosecutor requesting his detention. The investigative judge shall question the detained person who has been brought in about the circumstances relevant to the decision on the detention in the presence of the state prosecutor, and immediately upon this hearing, and not later than within 24 hours from the moment the said person has been brought before him, the judge shall decide whether to order the detention or deny the motion. The defence attorney shall be present during the hearing of the detainee. The difference between the two aforementioned situations is that in the first one there is no investigation order and in the second, such an order has been issued. In the first situation, if the investigative judge should place the person in detention, the state prosecutor must submit to the investigative judge an investigation order before the time set for detention expires and within 48 hours from the moment the detention was ordered at the latest, and if he fails to do so, the detainee shall be released.

2.8.4. Treatment of Detainees

During the investigation, the investigative judge may temporarily deny or restrict the defendant's access to and use of newspapers if their use might harm the course of the criminal proceedings. The investigative judge may order this *ex officio* or at the motion filed by the state prosecutor in a ruling against which an appeal may be filed with the panel of judges. At the detainee's request, the investigative judge may allow the detainee to work on the prison's premises on tasks which suit his psychological and physical capabilities and in agreement with the prison administration provided that allowing this cannot harm the criminal proceedings.

Detainees are entitled to receive visits by:

- a spouse or person they live with in a permanent common law marriage and close relatives and at the request of the defendant by a medical doctor and other persons approved by the investigative judge and if necessary under his supervision or the supervision of the person the judge assigns; some of these visits may be denied if they could potentially harm the course of the proceedings;
- representatives of diplomatic and consular missions of foreign states if the detainee requests to see them and the investigative judge is informed of his request, of which the investigative judge shall inform the head of the institution where the said detainee is placed;
- the representatives of international committees against torture, Red Cross committee as well as the representatives of international organisations dealing with the protection of human rights when this is stipulated by a ratified international agreement.

The detainee may correspond with persons outside of the prison provided that the investigative judge knows about it and under his supervision and the judge may prohibit sending or receiving mail which may harm the course of the proceedings. This ban shall not apply to letters the detainee is sending to international courts and local legislative, judicial and executive authorities or which he receives from them. It is not allowed to prohibit sending a petition, a complaint or an appeal.

Investigative judge shall decide on appeals filed by the detainee against the rulings rendered by the prison administration pronouncing disciplinary sanctions. Such appeals shall not delay the execution of the said rulings and should be filed within 24 hours from the receipt of the ruling and the investigative judge must decide on them within 3 days from the receipt of the appeal.

The investigative judge may visit the detainees at any time, talk to them and receive complaints from them. When the detention is ordered, the investigative judge shall notify thereof the authorities where the defendant is employed or his employer within three days.

2.9. Protecting the Reputation of the Court, Parties to the Proceedings and Other Participants of the Proceedings

The investigative judge is authorised to impose a fine of up to 1,000.00 EUR on the defence attorney, the person who has the power-of-attorney, legal representative, the injured party, private prosecutor or the injured party as the prosecutor if they offend the court or the person participating in the proceedings in the filed motion or verbally. When this occurs before the state prosecutor, he shall submit a copy of the motion or the report on what has been said to the investigative judge who may pass a ruling on the sanction. An appeal against such a ruling may be filed.

2.10. Obtaining Information from Detainees

The state prosecutor, and under special circumstances - the police, may obtain information from detainees if this is necessary in order to uncover and resolve cases regarding other criminal offences and perpetrators. This shall be done with the investigative judge's approval at a time he sets for this and in his presence or in the presence of a judge he assigns and the defence attorney has the right to be present as well at the detainee's request.

2.11. Exclusion from the Records

The investigative judge shall *ex officio* or at the request of the parties to the proceedings pass a ruling on the exclusion from the file of the record of the testimony of the defendant, a witness or an expert witness or a report on the search or material obtained through the use of secret surveillance measures if the court decision may not be based on such evidence according to the provisions of the CPC. The ruling on the exclusion shall be passed by the investigative judge immediately and by the conclusion of the investigation at the latest.

2.12. Costs of the Criminal Proceedings

When the criminal proceedings are not initiated or are suspended during the investigation, the decision related to the costs is rendered by the state prosecutor. If the state prosecutor does not grant the request for reimbursement or does not decide on it within 2 months from the day the request is filed, the suspect, the defendant and the defence attorney may request that the decision regarding the costs is rendered by the investigative judge.

2.13. Imposing Temporary Measures

The person who is authorised to file a restitution claim in the criminal proceedings may request temporary measures for securing a restitution claim which resulted from the commission of a criminal offence according to the provisions of the Law on Enforcement and Security Procedures. Prior to the issuance of the indictment, the investigative judge shall pass a ruling regarding this issue.

2.14. Suspension of the Proceedings due to Death

When the defendant dies during the investigation, the proceedings shall be suspended in a ruling passed by the investigative judge.

2.15. Judicial Preservation of Evidence

If there is a risk that the person would not be available to be questioned at the main hearing due to old age, illness or other relevant reasons, the state prosecutor shall file a motion with the investigative judge to question the witness according to the provisions on questioning witnesses. The investigative judge does not have to grant the motion, in which case the decision on the said motion is rendered by a panel.

2.16. Jurisdiction over the Investigation

The investigation is conducted by the state prosecutor but at the request of the parties to the proceedings certain evidentiary actions during the investigation may be undertaken by the investigative judge according to the rules prescribed by the CPC if special circumstances indicate that it would not be possible for these actions to be repeated during the main hearing or that the presentation of such evidence at the main hearing would be impossible or significantly more difficult. The investigative judge does not have to grant the said request, in which case the decision on the request shall be passed by a panel within 24 hours.

2.17. Sole Jurisdiction of the Investigative Judge

At the request of the state prosecutor, the investigative judge shall issue an order for an exhumation of a body. If the investigative judge does not grant the request filed by the state prosecutor, the decision on the request shall be passed by a panel within 24 hours.

2.18. Maintaining Order during the Investigation

The state prosecutor, i.e. the investigative judge, must maintain order while undertaking evidentiary actions, protecting the participants of the proceedings from insults, threats and any other type of assault. The investigative judge may, on his own or at the request of the state prosecutor, impose a fine of up to 1,000.00 EUR on the participant in the proceedings or some other individual who has disturbed the order, insulted the participants of the proceedings, threatened them or has endangered their safety in the course of evidentiary actions even after being warned against it. If the participation of such a person is not necessary, the said person may be removed from the scene where the evidentiary action is taking place.

The defendant may not be fined but it is possible to remove him from the scene where the evidentiary action is taking place. If the state prosecutor disturbs the order, the investigative judge shall inform the competent state prosecutor and may terminate the evidentiary action and request from the competent state prosecutor to assign another person to be the acting state prosecutor in the case.

2.19. The Indictment Filed by the Injured Party as the Prosecutor

When the injured party as the prosecutor assumes prosecution, he may file a direct indictment but if he decides that certain evidentiary actions must be conducted first, he may file a motion with the investigative judge requesting from him that these actions are undertaken. If the said request is granted, the investigative judge shall without delay undertake the necessary evidentiary actions and inform the injured party thereof. If the investigative judge does not grant the said motion by the injured party, he shall request that a panel should decide on the motion, which must render its decision within three days. An appeal against the decision of the panel is not allowed.

If the criminal panel finds during the review of the indictment filed by the injured party as the prosecutor that further clarification of the matter is necessary, the indictment shall be submitted to the investigative judge requesting certain evidentiary actions to be undertaken within 2 months.

2.20. Appeal against the Ruling

Appeals against the state prosecutor's rulings shall be decided by the investigative judge unless it is otherwise stipulated by the CPC.

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Effectiveness of Criminal Proceedings and Some Strategic Aspects of Conducting Investigations Into Economic Crimes

1. Introduction into Economic Crime

Over the previous years, a growing economic, commercial, and financial crisis has been spreading across the world. Its main specific features have been manifested in a fall in production and investment rates, a low level of use of production capacities, a drop in real income, rising unemployment rates, a decline in exports, a trade crisis and a decrease in its volume on both the micro- and macro-levels. Another characteristic of this global crisis is that it has been going against the dominant trends of the present day, such as globalisation and shifting wealth; population growth; issues related to the environmental and natural resources protection, as well as changes in technology.[2]

As both national and transnational phenomena, two types of crime, namely the organised and economic ones, have added to the concerns raised by this generally unfavourable economic and financial climate. A wealth of literature, various strategies, recommendations, conventions and acts, numerous conferences and symposiums, as well as the public opinion (in particular formed by media reports and articles) never cease to remind us of the links between economic and organised crime and how they jointly threaten the fundamental social values such as the eminent trio – democracy, rule of law, and fundamental rights and freedoms of the individual (Situation Report on Organised and Economic Crime in South-eastern Europe, 2006).

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2 Secretary-General's Report to Ministers (2013). OECD. http://www.oecd.org/about/secretary-general/secretary-general-report-to-ministers-2013.pdf, p. 52.

Even though this paper does not focus on the criminological analysis of crime and its types, we would nevertheless like to underline some more recent theoretical studies of the impact of social changes on the development of modern-day and serious types of crime, in particular of the organised and economic crime, in the transition economies of Central and Eastern Europe. While drawing our attention to the importance of such research after the fall of the Berlin Wall and changes that have occurred in that part of Europe, Alenka Šelih stresses that "…changes that took place after 1989 in the countries of Central and Eastern Europe have been enormous and unique to such a great extent that it would be extremely difficult, even impossible, to clarify them using only one theoretical model" (2013:316). By association with Naomi Klein's "shock doctrine", Alenka Šelih has adopted the expression *"shock approach"* to account for the causes of a sudden increase in crime rates in the first years following the fall of socialism. She draws the conclusion that changes in the transition countries have had an impact not only on life in general, but also on crime, and that on "… a societal level, a number of developments caused an economic shock: the transition from state economy to private market economy, the privatisation of enterprises, denationalisation of previously nationalised property, the opening of markets to foreign competition and in consequence a breakdown of entire branches of national economies… This shock was transmitted to the individual level very often in a most painful way: through the loss of work, loss of social security network, loss of the possibility of educating one's children, loss of "safety nets" for old age, among many others… All of these developments may well be described as "shocks" on a societal as well as on individual level. It is not surprising that the shock combining on both levels left ideal terrain for crime to increase" (2013: 316).

Returning to the above-mentioned Report by the Council of Europe on organised and economic crime, we can read that "…serious crime has, thus, achieved an advantage which BiH authorities are trying to catch up with through many institutional and legal reforms, some completed in the past several years, but many being in the pipeline" (2006: 80). The Report especially singles out economic crime and includes a description of its "rise" caused by many factors, not only those explicated and researched in detail (*e.g.* in respect of the countries of the former Yugoslavia, they include profound changes in political, social, and economic relations, additionally intensified by the challenges of the transition process in the post-war period), but also those specific to Bosnia and Herzegovina reflected in its fragmentation in various respects.

According to the *Bosnia and Herzegovina Strategy to Combat Organised Crime (for the period 2009 – 2012)*, there are three determining factors that influence organised crime in Bosnia and Herzegovina: its geopolitical position, transitional processes taking place in the country and region, and disrupted social and economic system. Its main characteristics are manifested in the following: - each and every member of a criminal organisation has a task or role assigned in advance, *i.e.* that is clearly definable; - the activities of criminal organisations are planned for a longer or unlimited period of time; - the activities of such organisations are based on the application of specific rules of internal control and member discipline; - their activities are planned and executed on the international scale; - violence and threats are used in the carrying out of their activities, or there is willingness to use them; - economic or business structures are used to carry out such activities, as well as money laundering or illegally acquired gains: - such organisations or elements thereof exert influence on political authorities, the media, the legislative, the executive, or the judicial branch of government or on other relevant social or economic factors. The Strategy mentions that available information points to the existence of various manifestations of organised crime in the territory of Bosnia and Herzegovina, such as unlawful production and

trafficking in narcotics; illicit trafficking in firearms and military equipment; trafficking in persons; smuggling of persons and illegal immigrants; economic crime and tax evasion; counterfeiting of money and securities; abuse of office; high-tech crime; motor vehicle theft and sale; blackmail, extortion, grand larceny, etc.[3]

Despite the fact that economic crime has been identified as a special social problem whose suppression, detection, prosecution, and proving is given priority in view of the protection of the national and international economic, legal, and political order, it is nevertheless differently viewed when it comes to defining its notion and general characteristics. It is believed that the main reason for the above lies in its complexity, adaptability to a particular social and economic setting, and fast transformations of its manifestations which keep up with the changes taking place in the economy, politics, society, or some other segments thereof. There is a general consensus of opinion that it poses a constant danger to fundamental social values and causes incalculable damage to the country, its socioeconomic system and the individual, as well as that it is difficult to uncover and prove.

A wealth of definitions of economic crime and descriptions of its principal characteristics can be found in literature and it has been so since Sutherland used the famous expression "white-collar crime" to define the phenomenon of economic crime from the aspect of criminology in the mid-1930s. Today, it can be read that a distinction can be made between three types of economic crime: the conventional economic crime, economic crime occurring in the process of privatisation and economic crime occurring after the process of privatisation (Ferme, 2013). One of more comprehensive studies of economic crime described it as "…the modern world's topic of the day, both in the post-industrial society and in developing countries. Regardless of its type, be it conventional, organised, entrepreneurial, corporate, etc., its interest lies in the generation of profit involving, if possible, the lowest level of risk and none or minimum investment" (Pečar, 1992: 338). Economic crime is also defined as an umbrella notion covering various threats to business operations and economic processes, both in respect of gaining national and special economic benefit. Most frequently, it occurs as part of legal business operations; offenders may be either individuals acting for their own benefit (the so-called professional crime) or representatives of companies who thereby facilitate the making of unjustifiable gain (entrepreneurial crime) (Dvoršek, 2001).

In general, economic crime has three characteristics: considerable damage is caused not only directly to a specific legal or natural person, but also indirectly to the economic system of a country; the perpetrators of such offences are different corporate or business entities, which distinguishes them from the perpetrators of typical criminal offences; special methods are employed by perpetrators (*e.g.* use of modern technologies, abuse of trust, complex methods are used when such offences are committed, their detection and proving is complicated).[4] These specific features of economic crime can also be viewed in the following way: "it is complex and difficult to perceive; there is a diffusion of responsibility and victimisation; there are difficulties in respect of its detection and prosecution; sentences are light; ambiguities in the law and unclear status of delinquents" (Kovčo Vukadin, 2007: 435).

3 *Bosnia and Herzegovina Strategy to Combat Organised Crime (2009-2012)* (2009). Bosnia and Herzegovina: Council of Ministers. Sarajevo, pp. 6–7.

4 For more on this topic, see Novoselec, P. (2007). Aktualni problemi hrvatskog gospodarskog kaznenog prava. Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 14, broj 2, pp. 371–434.

The above statements confirm that economic crime has been actively analysed from various aspects, *e.g.* from the perspective of criminology, criminal law, criminalistics, sociology. Thus, we conclude this overview with an opinion that trying to define the notion of economic crime is "…a Sisyphean task, while providing individual definitions /can be seen/ as "an intellectual nightmare" (Pečar, 1992: 330).

The study of economic crime does not only require a multidisciplinary approach for its notion and characteristics to be defined in a manner that is adequate and useful as much as possible.[5] This type of deviance requires that it is specified which criminal offences should be classified into that category. Approaches to this issue are also heterogeneous, ranging from those who believe that only criminal offences characterised by the substantive criminal law as "criminal offences against the economy and economic system" should be considered economic crime, to more encompassing opinions that "criminal offences against official duty", "criminal offences of corruption", and "criminal offences of organised crime" also ought to be counted in economic crime. Such an approach to the issues related to economic crime can also be seen in international instruments that have long since been adopted on the matter in hand. According to Pečar (1993), the European Committee on Crime Problems recommended back in 1981 that the following should be regarded as economic crime in the broad sense of the term: cartel offences; fraudulent practices and abuse of economic situation by multinational companies; abuse of state or international organisations' grants; computer crime; bogus firms; faking of company balance sheets and book-keeping offences; fraud concerning economic situation and corporate capital of companies; violation by a company of standards of security and health concerning employees; fraud to the detriment of creditors; consumer fraud; unfair competition and misleading advertising; fiscal offences and evasion of social costs by enterprises; customs offences; offences concerning money and currency regulations; stock exchange and bank offences; offences against the environment.

Research results have shown that not only has economic crime been developing quickly, it has been taking various forms, which is why no single all-embracing definition of it could be provided until today; as a result, various types of prohibited behaviour that threaten the economic system of a country and its fundamental values to a greater or lesser extent are referred to as economic crimes. A question arises in that regard: which criminal offences constitute economic crime? There are various classification systems ranging from the narrower to the broader ones; national systems of criminal law offer dozens of diverse criminal offences which precisely because of their nature are classified under different chapters of a special part of the criminal code and special provisions of subsidiary criminal law. By adopting special provisions of the criminal law and providing for criminal offences that are usually considered to belong to economic crime, legislators define the limits of the protection under the criminal law for those social values that are related to the county's economic system, the way business is transacted, its market, its payment system, as well as to other values. Therefore, the provisions of the special part (contained either in general or subsidiary legislation) confirm that economic crime is a complex and heterogeneous phenomenon, which is the reason why the economic criminal law at the national level "is a contentious issue on a global scale" (Novoselec, 2007: 373).

5 Pečar (1992) states that this refers to commercial law and its jurisprudence, then to commercial criminal law, criminology, victimology, criminal law policy, penology, criminalistics, criminal psychology, and some other disciplines.

Despite a lack of consensus about all the individual criminal offences that should be counted into the domain of economic crime, some classifications are still offered in literature.[6] As a rule, criminal offences defined in the criminal law as *criminal offences against economy,*[7] *criminal offences against official or other duty* are taken as the starting point, as well as *criminal offences of corruption* and *criminal offences related to taxes*. Even the criminal law in Bosnia and Herzegovina, within the framework of divided jurisdictions at the level of the country and entities or the District of Brcko,[8] provides for the following: - *criminal offences against economy and payment system* (Chapter XVIII of the BiH CC – Criminal Offences against the Economy, Market Integrity, and in the Area of Customs; Chapter XXII of the BD BiH CC – Criminal Offences against Economy, Business Operations, and Safety of Payments; Chapter XXII of the FBiH CC – Criminal Offences against the Economy, Trade, and Security of Payment Systems; Chapter XXIV of the RS CC – Criminal Offences against the Economy and the Payment System); - *criminal offences of corruption and criminal offences against official or other duty* (Chapter XIX of the BiH – Criminal Offences of Corruption and Criminal Offences against Official Duty or Other Responsible Duty; Chapter XXXI of the BD BiH CC – Criminal Offences of Bribery and Criminal Offences against Official and Other Responsibility; Chapter XXXI of the FBiH CC – Criminal Offences of Bribery and Offences against Official Duties or Other Duties of Responsibility; Chapter XXVII of the RS CC – Criminal Offences against Official Duties); - *criminal offences related to taxes* (Chapter XXIII of the BD BiH CC – Criminal Offences Involving Taxes; Chapter XXIII of the FBiH CC – Tax-Related Criminal Offences; Chapter XXIV of the RS CC – Criminal Offences against the Economy and the Payment System).[9] Generally speaking, in addition to being numerous and diverse, the above-mentioned offences covered by the criminal law in force in Bosnia and Herzegovina are committed in various areas of commercial, economic, and market operations; various social relations that occur in such areas are protected by providing for the said offences in the law. Also, they have been "burdened" by criminal law reforms (which have, in turn, been brought about by the changes in the economic, social, and political system of Bosnia and Herzegovina) and requirements imposed by the legal order of the European Union.

6 One such classification can be found in a paper by Novoselec, P. (2007). Aktualni problemi hrvatskog gospodarskog kaznenog prava. Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 14, broj 2, p. 394 etc. as stated therein. In view of the amendments made to the criminal law of Croatia in 2011, it would be useful to compare the above paper with the one by Novoselec, P., Garačić, A. (2012). Primjena blažeg zakona nakon stupanja na snagu novog Kaznenog zakona. Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 19, broj 2, pp. 533-553. Also, compare Orlović, A., Pajčić, M. (2007). Policijski izvidi kaznenih djela gospodarskog kriminaliteta. Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 14, broj 2, pp. 698-700, which recalls that economic crimes may be encompassed by charges related to criminal offences against freedoms and rights of man and citizen, offences against property and offences against human health.

7 *E.g.* Chapter XXIV of the Criminal Code of Croatia – Criminal Offences against Economy (*Official Gazette*, 125/11, 144/12), or Chapter 24 of the Criminal Code (CC-1) of Slovenia – Criminal Offences against the Economy (*Official Gazette* 55/08), Chapter 22 of the Criminal Code of Serbia – Criminal Offences against Economic Interest (*Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 – corrigendum, 107/2005 – corrigendum, 72/2009, 111/2009, 121/2012 and 104/2013).

8 Criminal Code of Bosnia and Herzegvina (*Official Gazette of BiH*, no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10; BiH CC), Criminal Code of the District of Brcko of Bosnia and Herzegovina (*Official Gazette of the BD BiH*, no. 10/03, 45/04, 6/05, 21/10, 52/11; BD BiH CC), Criminal Code of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11; FBiH CC), Criminal Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, no. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13; RS CC).

9 Those criminal offences are extensively elaborated upon in: Babić, M., Filipović, Lj., Marković, I., Rajić, Z. (2005). Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini. Knjiga I i II. Sarajevo, 2005; Babić, M., Marković, I. (2007). Krivično pravo. Posebni dio. Drugo izmijenjeno izdanje. Banja Luka, Faculty of Law; Tomić, Z. (2007). Krivično pravo II. Posebni dio. Drugo izmijenjeno i dopunjeno izdanje. Sarajevo, Faculty of Law.

2. On Efficiency of Criminal Proceedings Conducted in Connection with Economic Crimes

The efficiency of the criminal justice system, the duration of criminal proceedings, and effective suppression of economic crime are matters that are often discussed and researched and action is taken in that regard, not only in practice, but also on the theoretical and normative level. Such steps are additionally promoted by the media and politicians that quite often offer answers to the question why the national system of criminal justice is slow, lengthy, and inefficient (if that is the case). These discussions and writings are not deficient in well-intentioned conclusions, but they also include unjustified and obfuscated criticism of the criminal justice authorities that lacks arguments and, in a close connection therewith, encourage the adoption of measures whose purpose includes uncompromising fight against economic crime and more severe punishment for the perpetrators of economic crimes. This deterioration of the relation between the efficiency of criminal proceedings and the protection of fundamental rights and freedoms of the individual to the benefit of a more successful response to the new challenges posed by the present-day crime requires that we recall that criminal proceedings are the means of protecting the society and its institutions and at the same time, a means of protecting the individual, his personality and integrity (Kobe, 1983).[10] In other words, discussions about the efficiency of the criminal justice system and the use of repression under criminal law may not compromise the protection of citizens from unfounded criminal prosecution or conviction or the right to defence. The above confirms that formulating and implementing a criminal and sentencing policy (even the one on economic crime) does not entail only repressive, but preventive measures as well. It is traditionally emphasised that repressive measures taken under criminal law are the *ultima ratio* in the fight against any type of crime, the economic one included, while preventive measures ought to be at the forefront of any strategic activity undertaken by society and the state when endeavouring to bring and keep economic crime under control.

We will discuss below the degree of success in detecting and proving economic crimes achieved by authorities that conduct criminal proceedings in Bosnia and Herzegovina. Before embarking on that task, we plan to devote several lines to the *Rulebook on Timeframes for Processing Cases in Courts and Prosecutor's Offices in Bosnia and Herzegovina*,[11] adopted by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina with the view to resolving the "syndrome of tardiness". The Rulebook lays down criteria and methodology for defining and overseeing the compliance with optimal and foreseeable time limits for resolving cases in courts and prosecutor's offices in accordance with the guidelines of the European Commission for the Efficiency of Justice: (a) optimum time limits for proceeding in cases in courts and prosecutor's offices; (b) the methodology used for defining foreseeable time limits for resolving cases; (c) the procedure for notifying the parties about foreseeable time limits for resolving cases and informing the public about the optimum and foreseeable time limits in effect in courts and prosecutor's offices; (d) management of statistical data on compliance with optimum and foreseeable time limits; (e) oversight of the implementation of the Rulebook. The optimum time limits for processing cases represent a standard timeframe for resolving cases in courts and prosecutor's offices in a lawful and efficient manner. When setting optimum time limits for resolving cases, the following is taken as a starting point: time limits for individual phases of the proceedings or individual actions

10 For more details on the legitimacy and possibility of the protection under criminal law, modern trends in criminal law, and crime suppression policy, see: Stojanović, Z., Kolarić, D. (2010). Krivičnopravno reagovanje na teške oblike kriminaliteta. Faculty of Law. Belgrade.

11 The Rulebook was published in the *Official Gazette of BiH*, no. 5/2013.

undertaken over the course thereof provided for by the law, depending on the type of proceedings and cases or the actual time needed to take the necessary procedural actions for which time limits are not set by the law, which are instead established based on experience given the nature and subject matter of those procedural actions. A foreseeable time limit is a realistic timeframe within which it can be expected that proceedings in a specific case will be concluded, starting from the moment a document whereby proceedings are initiated is received by the court or a prosecutor's office. In cases when the foreseeable time limit is longer than the optimum one, continuous measures aimed at its reduction need to be taken.

According to the *Annex to the Rulebook on Timeframes for Processing Cases in Courts and Prosecutor's Offices in Bosnia and Herzegovina – Optimum Time Limits for Resolving Cases*,[12] optimum time limits for conducting investigations into economic crimes expressed in days and per types of economic crime as classified above (*criminal offences against economy, criminal offences of corruption, and criminal offences against official or other duty, criminal offences related to taxes*) would be as follows:

Table 1

Criminal Offences against Economy and Payment System

Actions	Statutory time limit	Additional time – based on experience/ actual	Optimum time limit
Receiving and analysing a report on committed criminal offence or criminal charges		Three days	
Issuing order to conduct an investigation		Three days	
Evidentiary actions (questioning of witnesses and expert witness evaluation)		90 days	
Issuing an indictment		Five days	
TOTAL		101 days	101 days

12 The Annex was published together with the Rulebook (Official Gazette of BiH, no. 5/2013).

Table 2

Criminal Offences against Economy, Market Integrity, and in the Area of Customs

Actions	Statutory time limit	Additional time – based on experience/ actual	Optimum time limit
Receiving and analysing a report on committed criminal offence or criminal charges		30 days	
Issuing order to conduct an investigation		Ten days	
Evidentiary actions (questioning of witnesses and expert witness evaluation)		120 days	
Issuing an indictment		20 days	
TOTAL		180 days	180 days

Table 3

Criminal Offences of Corruption and Offences against Official or Other Duty

Actions	Statutory time limit	Additional time – based on experience/ actual	Optimum time limit
Receiving and analysing a report on committed criminal offence or criminal charges		Ten days	
Issuing order to conduct an investigation		Ten days	
Evidentiary actions (questioning of witnesses and expert witness evaluation)		90 days	
Issuing an indictment		Ten days	
TOTAL		120 days	120 days

The recommended optimum time limits for conducting investigations into economic crime (Tables 1 – 3) raise the question of the duration of criminal proceedings conducted in connection with such criminal offences and the results achieved by the criminal justice authorities in the fight against economic crime. Efforts to answer the above questions have been futile since only the total and average duration of investigations in prosecutor's offices in Bosnia and Herzegovina can be discussed based on the Case Management System used in prosecutor's offices (TCMS) and not the duration of investigations into specific types of criminal offences.

As a result, we have opted to present in this disquisition on the efficiency of the authorities that conduct criminal proceedings in connection with economic crimes statistical data about taken over, opened, (un)completed and discontinued investigations, and issued and confirmed indictments, both in terms of cases and individuals for the period 2011-2013.[13] [14]

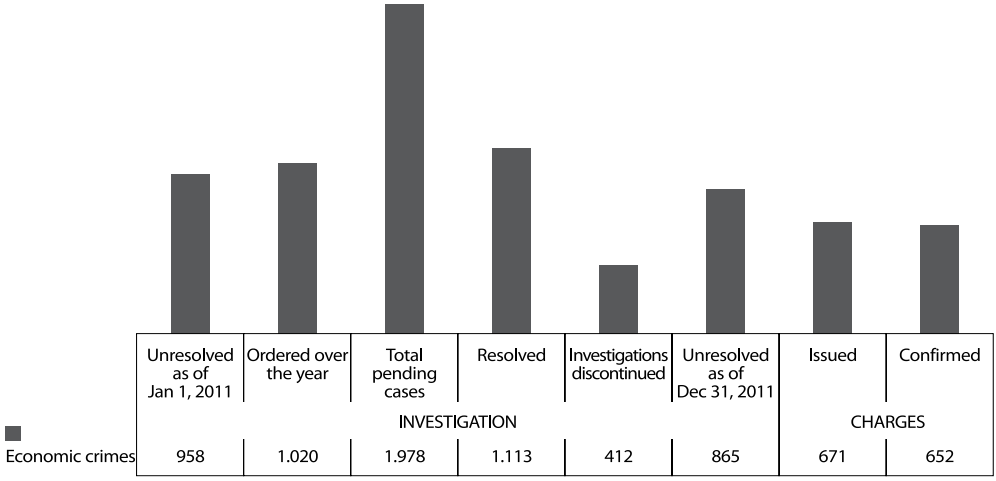


Chart 1 – Economic crimes in 2011 (in respect of cases)

It can be concluded based on information from Chat 1 that out of the total of 1,978 pending cases, 1,113 or 56 percent of them were resolved in 2011, whereas 865 or 44 percent were carried over into the next calendar year. The above information points to the conclusion that 652 indictments had been confirmed (out of the total of 671 issued indictments). If we collate the information about the number of confirmed indictments with the total number of economic crime cases handled by prosecutor's offices in 2011, it can be concluded that indictments were confirmed in 33 percent of cases.

13 We would like to extend our gratitude to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina for making the information available to us.

14 Some other statistical data on economic crimes can be found in Sijerčić-Čolić, H., Findrik, N., Gurda, V., Lepir, M, Mahmutović, Dž., Pajić, D., Pivić, N., Stipanović, I., Vranj, V. (2013). Stanje i kretanje kriminaliteta u Bosni i Hercegovini za punoljetne osobe u periodu od 2003. do 2012. godine. High Judicial and Prosecutorial Council. Sarajevo.

2012 - in respect of cases

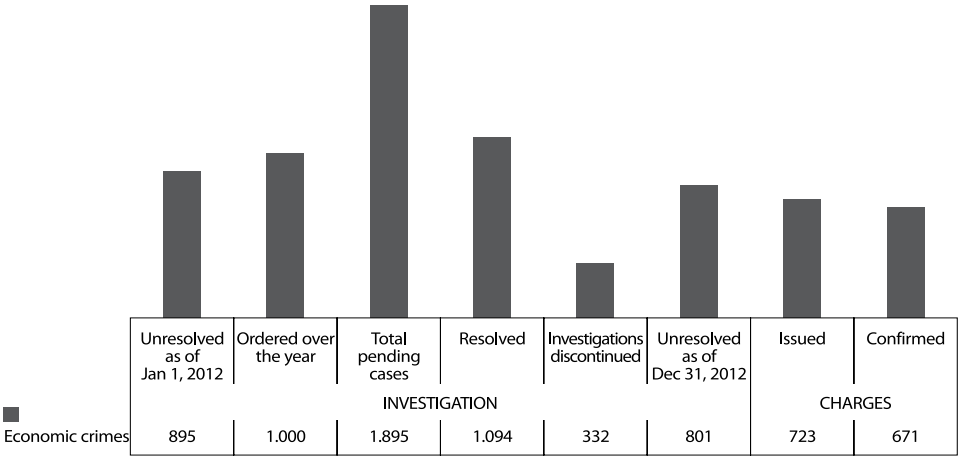


Chart 2 – Economic crimes in 2012 (in respect of cases)

According to information for 2012, out of the total number of 1,895 pending cases, 1,094 or 58 percent of them were resolved, whereas 801 or 42 percent were carried over to 2013. The number of confirmed indictments was 671 (out of the total of 723 issued indictments). If we collate the information about the number of confirmed indictments with the total number of economic crime cases handled by prosecutor's offices in 2012, it can be concluded that indictments were confirmed in 35 percent of cases.

2013 - in respect of cases

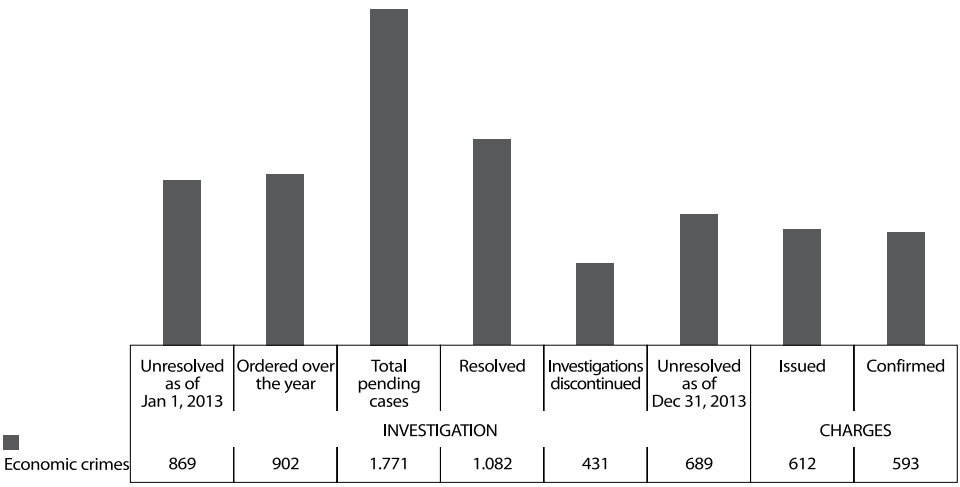
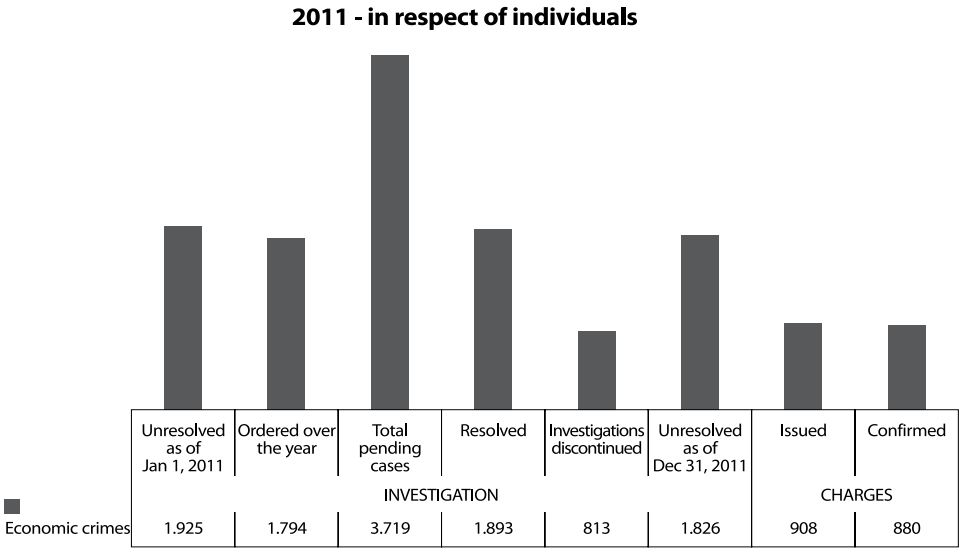


Chart 3 – Economic crimes in 2013 (in respect of cases)

Out of the total number of 1,771 pending cases in 2013, 1,082 or 61 percent of them were resolved, while 689 or 39 percent of cases remained unresolved. The number of confirmed indictments was 593 (out of the total number of 612 issued indictments). By collating information about the number of confirmed indictments with the total number of economic crime cases handled by prosecutor's offices in 2013, it can be concluded that indictments were confirmed in 33 percent of cases.



Graph 4 – Economic crimes in 2011 (in respect of individuals)

The information presented in Graph 4 leads to a conclusion that in 2011, out of the total number of 3,719 persons against whom the order to conduct an investigation had been issued, investigations were completed in cases of 1,893 or 51 percent of individuals, while investigations against 1,826 or 49 percent of persons still remained to be completed in 2012. If we collate the information about the number of individuals against whom an indictment was confirmed with the total number of persons against whom an investigation had been conducted in connection with economic crimes, it can be concluded that indictments were confirmed against 24 percent of suspects.

2012 - in respect of individuals

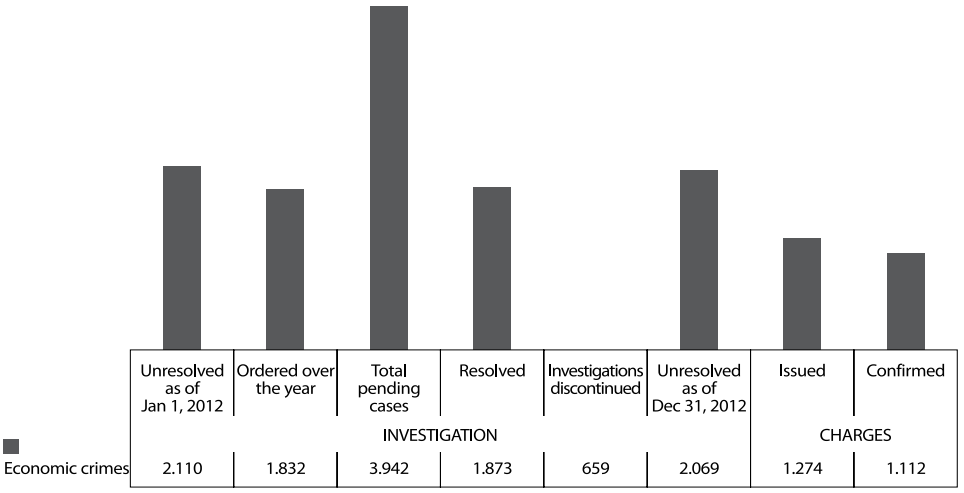


Chart 5 – Economic crimes in 2012 (in respect of individuals)

According to the graphical presentation, out of the total number of 3,942 individuals against whom an investigation was ordered, investigations against 1,873 or 48 percent of individuals were completed in 2012, whereas the investigations against 2,069 or 52 percent of individuals still remained to be completed in 2013. By comparing the information about the number of individuals against whom indictments were confirmed with the total number of persons against whom an investigation had been conducted, it can be seen that indictments were confirmed against 28 percent of suspects.

2013 - in respect of individuals

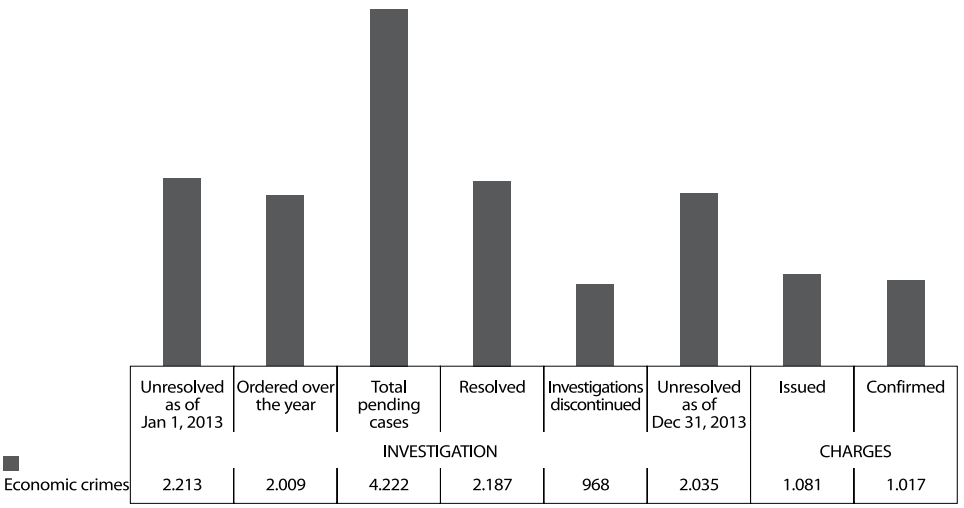
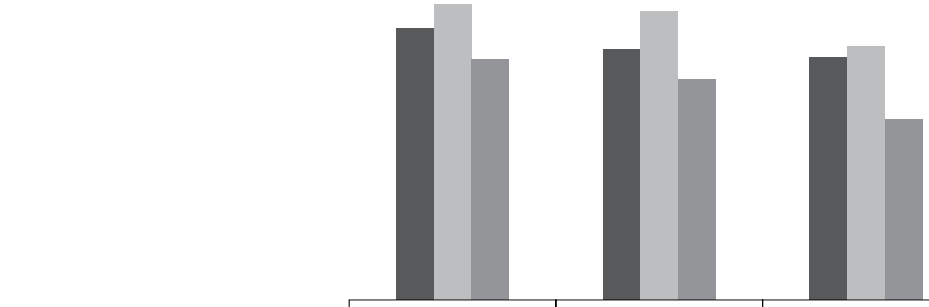


Chart 6 – Economic crimes in 2013 (in respect of individuals)

According to the data for 2013 from Chart 6, investigation was ordered against a total of 4,222 individuals. The number of completed investigations was 2,187 or 52 percent, whereas investigations against 2,035 or 48 percent of individuals remained to be completed. Indictments were confirmed against 1,017 individuals (out of the total of 1.081 indictees). If we collate the information about the number of individuals against whom an indictment was confirmed with the total number of individuals against whom an investigation had been conducted, it can be concluded that indictments were confirmed against 24 percent of suspects.

Backlog, ordered and unresolved cases



	2011	2012	2013
Unresolved - beginning of the year	958	895	869
Unresolved - throughout the year	1.020	1.000	902
Unresolved - end of the year	865	801	689

Chart 7 – Backlog, ordered, and unresolved cases in the period 2011-2013

What can be noticed based on the information from Chart 7? In the first place, that each year prosecutor's offices inherited a fairly consistent number of cases from the previous year (ranging from around 860 to 1,020). Secondly, the number of new cases, i.e. cases in which an investigation was ordered in connection with economic crime in a current year, was also relatively consistent (895 in 2011, 1,000 in 2012, and 801 in 213). Thirdly, no significant oscillation was recorded in respect of the number of cases that were not resolved over the year and were carried over into the following calendar year (865, 801, and 698). The above confirms that the level of (in)efficiency in conducting investigations into economic crime had been maintained, that it had been comparatively flush and that it required that appropriate measures be taken in order to shift such quantitative rations towards more successful detection and proving of criminal offences and prosecution of their perpetrators. Such a conclusion is also supported by findings from other research projects carried out in the previous several years since they showed that the percentage of completed investigations had been the lowest for each observed year (in addition to war crime cases) precisely in respect of economic crime cases.**15**

15 Taken from: Support to Judiciary in Bosnia and Herzegovina – Strengthening Prosecution Capacitates in Criminal Justice System (2011). Component A (Project Component A2). Report. Sarajevo. High Judicial and Prosecutorial Council of Bosnia and Herzegovina, pp. 19-20.

3. Some Strategic Aspects of Conducting Investigations into Economic Crimes

The above leads to the question: are standard and to a certain degree universal measures and actions sufficient and appropriate for detecting and proving economic crimes or some other activities are necessary to be performed in that respect? It is a particularly topical question in transition economies in which a growing consensus of opinion has been emerging that conventional actions and measures aimed at detecting and proving economic crimes must be enhanced by the new and more specific ones. Likewise, an increasing number of international documents which provide for new actions and measures to suppress economic crime and encourage countries to adopt and introduce them into their own legal order and practice of the criminal justice system support the fact that the awareness of the above aspects has also spread.

Theoretical and empirical analyses of criminal legislation and the practice of criminal justice systems on both the national and international levels have exposed weaknesses in detecting and proving economic crimes. Those weaknesses are manifold and only some of them are highlighted below (others are left aside, such as financial investigations, seizure of illegally acquired assets, and undercover investigative actions): inadequate approach to demands for multidisciplinary engagement in detecting and proving economic crime; lack of strategic planning when it comes to conducting investigations into such criminal offences; protracted criminal proceedings; limited knowledge of forensic accounting or total lack thereof; the fact that it is necessary from the perspective of criminal policy to legislate the liability of legal persons for economic crimes. Only at first glance does it seem that the above weaknesses are segments of a paper on the efficiency of the criminal justice system and legislation on suppression and prosecution of economic crimes that do not correlate to each other. It is important that all the pieces of the puzzle fall into place since their interrelation represents a certain balance created by legal norms between calls for (more) efficient suppression of economic crime and demands that the criminal justice system safeguard the fundamental rights and freedoms of the individual which are traditionally "tested" precisely in criminal proceedings.

The fact that the multidisciplinary approach is not sufficiently used in detecting and proving economic crimes poses one of the obstacles to more efficient suppression of economic crime. The multidisciplinary approach to resolving issues entails teamwork of professionals from various fields and their concerted efforts to complete a certain task and achieve the aim of such concerted efforts. When applied to our subject matter, that means that the suppression, detection, and proving of economic crime as a complex and covert type of deviant behaviour requires targeted and concerted efforts of a number of different professions (in which process each profession conducts research within the limits of its scientific and practical knowledge and methods).

A brief comparative overview of how the multidisciplinary approach and actions of specialised investigation teams are provided for by the law will show that for instance the *Decree on co-operation between state prosecution service, the police, and other competent government authorities in detecting and prosecuting criminal offences and actions of specialised and joint investigation teams* was adopted in Slovenia in 2010 based on necessary amendments to the criminal procedure law.[16] Which amendments to the

16 Decree on co-operation between state prosecution service, the police, and other competent government authorities in detecting and prosecuting criminal offences and actions of specialised and joint investigation teams (*Official Gazette of the Republic of Slovenia*, 83/10).

Criminal Procedure Code allowed this Decree to be adopted?[17] They pertain to the right of a state prosecutor to set up a specialised investigation team (either *ex officio* or at the written initiative of the police) in cases of more complex criminal offences (in particular if they pertain to the cases of economic crime, corruption, and organised crime) that require time and concerted efforts of several authorities and institutions. The state prosecutor will lead and direct the activities of such a specialised investigation team; its members are designated by the head of the competent state authority or institution (*e.g.* state authorities and institutions in the field of taxation, customs, financial operations, securities, prevention of money laundering, prevention of corruption, inspectorial oversight, etc.). The Criminal Procedure Code also sets out that the head of the competent prosecutor's office shall make a decision on setting up a specialised investigation team, its members, tasks, and modes of operation by issuing an order in writing after having obtained an approval from the head of the competent authority or institution whose representatives constitute the specialised investigation team. The order shall also designate the person who would be in charge of team's operations and his duties. The head of the competent prosecutor's office will promptly notify the Chief Prosecutor that the specialised investigation team has been formed. In view of the fact that the specialised investigation team is run by the state prosecutor who directs the actions of the police and other authorities and makes necessary decisions, it has been laid down that all the collected information and documents that form a part of the state prosecutor's file shall be submitted to him. Upon the approval from the prosecutor's side, that information is passed on to the police official who is the head of operations because he needs that information to draw up a complete and competent criminal charge or report on a criminal offence. The head of operations (who is a police officer or criminalist as a rule) is in charge of police actions, forensic activities, coordinating activities with the state prosecutor, expeditious exchange of information among team members, and other forms of operation activities. In such a manner, team's efforts are channelled and coordinated during every phase of the investigation. The formation of such investigation teams allows state prosecutors to have at their constant disposal the services of professionals from various fields, such as taxation, customs, securities, the protection of competition, the prevention of money laundering and corruption. As regards other members of the investigation team, they are given an opportunity to participate as professionals in a synchronised criminal investigation. It is important to underline that the members of the investigative team retain their original powers granted to them by relevant laws and exercise them in the course of the investigation. It is particularly important that the members of the investigation team cooperate with each other and that trust is developed between them. A thorough and coordinated investigation whose purpose is to uncover and prove economic crimes is ensured in such a manner. For that reason it can be emphasised that a multidisciplinary action allows that the knowledge of law and experience of the public prosecutor is combined with the tactics, technique, and methods of criminalistics and knowledge of experts from other state authorities and institutions. According to authors from Slovenia, such changes made to the law and in practice have led to considerable progress in solving economic crimes because: - a better coordination of actions by various state authorities and institutions that participate in uncovering and proving complex criminal offences against the economy has been facilitated; - the manner in which investigative actions are performed, information is collected, and other measures are taken has been improved; - criminal proceedings are more expeditious; - participants' knowledge is focused; - the strengthening of the accountability of the heads of state authorities and institutions has been facilitated.[18]

17 Criminal Procedure Code (*Official Gazette of the Republic of Slovenia*, no. 32/2012, official consolidated version).

18 For more information on the activities of specialised investigation teams, their results, and identified problems, see: Bobnar, T. (2013). Delovanje specializiranih preiskovalnih skupin kot (nov) izziv pri preiskovanju gospodarske kriminalitete. Revija za kriminalistiko in kriminologijo. Ljubljana, vol 64, br. 2, pp. 163-168.

As opposed to Slovenia, the formation of *ad hoc* investigation teams in Bosnia and Herzegovina is governed in more detail by the *Instructions on procedure to be followed by and cooperation between authorised officers and prosecutors in undertaking evidentiary actions during investigations*.[19] The Instructions provide that after a prosecutor who is on duty has been notified that there are grounds for suspicion that a criminal offence punishable with a statutory penalty of ten or more years has been committed or in cases of more complicated and complex criminal offences regardless of the penalty they might carry, the prosecutor may form an investigation team in cooperation with law enforcement agencies. When the team is formed, the prosecutor and members thereof shall formulate a joint plan for undertaking investigative actions aimed at collecting evidence. The plan for undertaking investigative actions shall elaborate in detail on measures and activities, the dynamics of their undertaking, as well as tasks to be completed by persons in charge of those activities and their performance timeframes. The prosecutor may act in the manner described above not only in pre-investigation proceedings, but also after he issues an order to conduct an investigation.

The degree of complexity of detecting and proving economic crimes becomes even greater if we are aware of the fact that it is to be expected that in cases of such criminal offences, criminal proceedings may be conducted not only against a natural person, but also against a legal person through which, as a rule or in most cases, economic activities within whose scope a criminal offence was committed were performed. It is a challenging and demanding task to establish the liability of a legal person for any criminal offence. When it is combined with the calls for a more efficient criminal prosecution of economic crimes and rendering lawful court decisions within a reasonable time, any estimate of the duration of criminal proceedings become pointless. Namely, there are many who endorse the view that one of the main obstacles to answering the above demands has been the long duration of criminal proceedings. The opinion that "…trial within a reasonable time is important when such proceedings are concerned so that the legality of business operations may be reinstituted into the economy as soon as possible if a judgment of conviction is passed or to ensure as soon as possible that business transactions not burdened by criminal proceedings are executed without obstructions should it transpire that suspicions of a criminal offence were unfounded" speaks to the importance of trial within a reasonable time and establishment of liability of legal persons for economic crimes (Florjančič 2013: 176).

It can be seen from literature that it is not known how prosecutors and authorised officers (the police, in the first place) manage to uncover and prove economic crime that is connected with accounting; this pertains both to accounting activities as the subject matter of those criminal offences (economic crimes in the field of accounting) and evidence of economic crime to be found in accounting (Kolar, I., Zdolšek, D., 2013). As a result of the above, discussions have been initiated about forensic accounting and its role in detecting and proving economic crimes; this topic has also been the subject matter of research. One such research project had been carried out in Slovenia and its findings were published in 2013. The findings have shown that the representatives of the police and prosecution found that forensic accounting can be of help when it comes to investigating economic crimes in the following manner or for the following reasons: - due to their respective specialisations, police officers and prosecutors lack knowledge in the field of

19 The Agreement on Adoption and Application of the Instructions on procedure to be followed by and cooperation between authorised officers and prosecutors in undertaking evidentiary actions during investigations between the representatives of the prosecutor's office and police authorities in Bosnia and Herzegovina was signed on September 27, 2013.

accounting, which, parenthetically, has been developing rapidly and thus has contributed to (il) legal editing and presentation of information about the business activities of business entities; - the fact that police and prosecutors lack knowledge in the field of accounting has had a negative effect on criminal prosecution of economic crimes as well as on uncovering, collecting, explanation, and presentation of evidence in the form of accounting documents; - the complexity of investigations into economic crimes in the area of accounting on the one hand, and uncovering and obtaining evidence found in accounting on the other, require the enlisting of assistance of forensic accountants; - experts in forensic accounting (forensic accountants or forensic auditors) have the required knowledge and may provide professional assistance to the police, prosecutors, as well as to court-appointed expert witnesses, which is of particular interest given that indictments are not confirmed in practice due to the fact that evidence has not been collected in the proper manner; - experts in forensic accounting may help police and prosecutors acquire new knowledge pertaining to the use of accounting as well as to accounting abuses (Kolar, I., Zdolšek, D., 2013).

4. In Lieu of Conclusion

Based on the above, we are of the opinion that for the purpose of making the process of detecting and proving economic crime effective, a modern and realistically feasible synthetical approach to its study needs to be adopted, without exaggerations, revolutionary transformations of economic relations in the field of production, exchange, distribution, money or market flows and without making any such changes in the criminal legislation or the criminal justice system. If we associate the above with the fact that the protected object of such criminal offences, which is neither unique nor simple and whose manifoldness fairly corresponds to the variousness of economic crimes, has been continually changing, it is safe to conclude that whether or not they will be detected and prosecuted and if a lawful judicial decision will be rendered in that respect depends on a number of factors; some of them include as follows: the legislator's degree of adroitness in creating and passing regulations that may be implemented in real life; whether or not it is in the interest of the holders of power that economic crimes are detected and proven; capabilities and possibilities of the prosecuting authority; the interests of those who have a duty to report a criminal offence. Certain changes have occurred in Bosnia and Herzegovina in respect of the criminal law's response to economic crime; those changes have been brought about by new regulations that encourage its more efficient detection, proving, and prosecution as well as by their practical implementation in terms of the criminal prosecution of economic crimes. Notwithstanding the expressed optimism, attention should be focused on some issues. On the one hand, it should be remembered that some economic crimes from the group of *criminal offences against the economy and payment system, criminal offences of corruption, and criminal offences against official or other duty* as well as *criminal offences related to taxes*[20] have been on the rise, and their rise may as well be referred to as constant. On the other hand, the political will to prosecute economic crimes constitutes one of prerequisites for the state's active involvement in the creation of criminal policy and suppression of economic crime. And last, but not the least important – it is necessary to promote more efficient and consistent detection and prosecution of economic crimes by giving it professional, personnel, and economic impetus. That would send a positive message to the public because economic crime is thus being given due attention which it deserves.

20 See footnote 13.

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Financial and Criminal Investigation – Identity or Parallelism?
(an example of the Republika Srpska)

1. Law on Seizure of Assets Acquired through Crime as Statutory Basis for Financial Investigations

When the Law governing the seizure of the commission of a criminal offence was passed in the Republika Srpska in 2010, it provided a statutory framework for conducting financial investigations in that territory. Reasons for passing the Law could also be found in the requirements of the European Union, whereby for the purpose of acceding to the Union, short-term goals included improving the legislation and strengthening the capacities for seizure of assets acquired through illegal activities, while conducting simultaneous financial and criminal investigations. Pursuant to former solutions and case-law, in order for material gain to be forfeited, the cause-and-effect relationship between a specific criminal offence which is the subject of a judgment of conviction and specific material gain acquired through that offence had to be proven with absolute certainty. Courts used not to decide on such matters even though they were bound under the law to act thereupon *ex officio* nor did competent prosecutor's offices given that thus far the matter had not been precisely or sufficiently provided for by the law.[2] In addition, a number of international instruments encourage or require the member states and accession countries to create special legislative mechanisms for identification, confiscation and seizure of the proceeds from criminal activities as well as for conducting financial and criminal investigations simultaneously – in parallel.

1 Head of Financial Investigation and Money Laundering Suppression Unit with the Ministry of Interior of the Republika Srpska.
2 Law on Seizure of Assets Acquired through Crime, *Official Gazette of the Republika Srpska*, no. 12/10.

A radical breakthrough has been made in comparison with the previous system of seizure of material gain obtained through crime by introducing the application of statutory presumptions and through shifting the burden of proof to perpetrators of criminal offences because the tracing of origins of total assets has been rendered easier due to the fact that prosecutors are not obligated to prove causation between a criminal offence and assets subject to seizure. The system of seizure includes assets that have not been acquired directly through a criminal offence of which a certain individual has been pronounced guilty. A conviction for a criminal offence laid down in Article 2 of the Law on Seizure of Assets Acquired through Crime (Law on Seizure) does not mean that assets have been obtained through that very offence; instead, the conviction itself represents a presumption that the assets have been acquired through criminal activity, *i.e.* that they have been obtained through perpetration of any criminal offence which does not have to be proven. Such solutions have opened up a road towards more efficient fight against organized crime, corruption and other serious offences.

The scope of the Law is provided in Art. 1 whereby the Law on Seizure lays down requirements, procedure and authorities competent for tracing, seizing, and managing assets acquired through the commission of criminal offences. The criminal offences laid down by the Criminal Code of the Republika Srpska to which the provision of the Seizure Law shall apply are specifically cited in Article 2 thereof.[3] Provisions of that Law also apply to other criminal offences laid down by the Republika Srpska Criminal Code if material gain or value of items used or intended for commission of a crime or acquired through it exceeds the amount of BAM 50,000.

Article 3 defines terms used in the Law and the definitions of asset(s) are certainly relevant – "assets shall denote a body of property rights and obligations of property owners over movable and immovable objects". Assets also denote an income or other benefit derived from a criminal offence either directly or indirectly as well as any good into which it has been converted or with which it has been merged and assets acquired through the commission of a criminal offence. The assets acquired through the commission of a criminal offence are assets of a perpetrator thereof, the owner of those assets acquired before proceedings in connection with a criminal offence referred to in Article 2 of the Seizure Law have been instituted that are manifestly disproportionate to their lawfully earned income. Lawful income denotes financial assets available to the assets

3 Provisions contained in this Law apply to criminal offences laid down by the Criminal Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, no. 49/03; 108/04; 37/06; 70/06; 70/2006 and 73/2010), namely to the following offences: a) against sexual integrity: trafficking in human beings for the purpose of prostitution (Article 198); exploiting children or juveniles for pornographic purposes (Article 199); production and showing of child pornography (Article 200); b) against human health: unlawful production and circulation of narcotic drugs (Article 224); c) against economic interests and payment system: forging and using of securities (Article 275); forgery of credit cards and other non-cash payment cards (Article 276); forging value tokens (Article 277); money laundering (Article 280); illicit trade (281); tax and contributions evasion (Article 287); d) against official duty: abuse of office or authority (Article 347); embezzlement (Article 348); fraud in service (Article 349); accepting bribes (Article 351); bribery (Article 352); unlawful mediation (Article 353); e) organized crime (article 383a); f) against public peace and order: manufacturing and obtaining weapons and items intended for commission of criminal offences (Article 398); illegal manufacturing and trading in weapons or explosive substances (Article 399); and g) against humanity and other values protected under international law.

owner for which it can be established that they have been acquired in a legal manner.[4] This definition of assets is in line with the definitions of assets found in international conventions and it is based thereon. A fundamental difference between assets and assets acquired through crime on the one hand and the institute of the proceeds of crime can be seen from the definition of the former two. It constitutes gain obtained directly or indirectly through crime and acquired prior to the proceedings in connection with a given criminal offence have been instituted and there is a manifest disproportion between such assets and one's lawful income. This provision allows seizure of assets acquired through crime whose origin has not been proven irrespective of any relevant temporary connection that may exist between the offence and the time at which certain assets were acquired.

In order for assets to be considered as derived from a criminal offence in terms of Article 3 of the Law, certain conditions need to be met: the first one concerns their owner and the second one their relation to owner's lawful income. The legislator had limited a period for identifying assets and lawful income by its Draft Law on Seizure and Seizure Law Bill, having set January 1, 1997 as the date from which identification could begin.[5] Such a solution has been abandoned and under the present Law, there are no limitations in that regard.

There has to be a manifest disproportion between owner's assets and his lawful income and other property he may own. The standard of manifest disproportion shall be set by the case-law, but it will certainly differ from one case to another: *e.g.*, different standards will apply to a drug dealer who has not had any income for years and a company owner whose business has generated certain profit. Thus, it does not indicate any kind of disproportion; instead, only disproportion that can be deemed manifest does allow prosecutors contend that assets have been acquired through crime.

The Law on Seizure specifies authorities in charge of detection, seizure and management of assets acquired through crime (the prosecutor's office, the court, the Republika Srpska Ministry of Interior and Agency for Management of Seized Assets), whereas Articles 6 and 7 govern the establishment of a specialized organizational unit within the Ministry of Interior tasked with the detection of assets acquired through crime and other activities pursuant to the Law (Article 5).

4 The owner of assets may be the defendant, bequeather, legal successor, third party, or associated person. A bequeather denotes a person against whom criminal proceedings have not been brought or have been stayed due to his passing, whereas in criminal proceedings against other persons, it has been found that he had assets acquired through crime;
- A legal successor denotes an heir to a convicted person, the bequeather or heirs thereto;
- A third pary denotes both natural and legal persons to whom assets derived from crime have been transferred;
- Associated persons denote natural person's family members such as a spouse, direct blood relatives, siblings, adoptees and their descendants who live together in a common household and relatives up to the third degree of kinship; a person who controls a legal person or persons who control the legal person together by owning no less than 50 percent of property or at least 50 percent of interest in a joint-stock company either directly or through one or several natural or legal persons, and other natural and legal persons; perpetrators, co-perpetrators, organizers of a criminal association, aiders and abettors (hereinafter: assets owner);
- Seizure denotes temporary or permanent seizure of assets acquired through crime.

5 Sponsors of the Bill were of the opinion that only from that date onwards tax and other records based on which lawful income could be identified had been kept in the Republika Srpska.

Provisions contained in Articles 8 through 14 of the Law lay down that Agency for Management of Seized Assets shall be established within the Ministry of Interior of the Republika Srpska.[6]

2. Financial Investigations and Their Methods

There are three stages in the process of seizure of illegal assets which include a) financial investigation; b) seizure; c) administration of the seized assets.

The stage of financial investigation is the most important of the three and it involves a range of special investigative measures aimed at discovering illegal material gains or assets acquired through crime. The asset seizure procedure is contingent on the completion of this stage to a great extent. A financial investigation ought to be conducted in parallel with a criminal investigation in order to promptly collect and secure evidence and for the purpose of temporarily securing (temporarily seizing) assets in order to allow for their permanent seizure in the future. The aim of any criminal investigation is to resolve and document a criminal offence, while the aim of a simultaneous financial investigation is to temporarily secure or seize the gains acquired through crime. It is important that the financial investigation should begin at an early stage of the criminal investigation since the results of both investigations are joined together for the purpose of achieving both aims. Successful detection and temporary seizure of assets preclude their concealing and usage and allow permanent seizure at the end of criminal proceedings.

International conventions provide for or require the application of statutory mechanisms or financial investigative techniques for the purpose of facilitating the collection of evidence.[7] In its Recommendation on simultaneous investigations (of April 25, 2002), the European Council addressed the issue of necessity of improving investigation methods in the fight against organized crime, simultaneous investigations into drug trafficking by criminal organisations and their finances (from the very outset of each illicit activity of an organization) and identifying the finances and assets owned by the organisation.

The framework decision EU 2007/845/JHA governs cooperation between financial institutions in this field, *i.e. Asset Recovery Offices (ARO)*. The decision provides that each member state shall set up a special financial intelligence unit, *i.e. an asset recovery office* for the purposes of the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent

6 The Agency is responsible for a) the management of seized assets acquired through crime, instruments of crime referred to in Article 62 of the Republika Srpska Criminal Code (CC), material gain obtained through crime referred to in Articles 94 through 96 of the CC and assets deposited as bail in criminal proceedings; b) carrying out expert assessments of the seized assets acquired through crime; c) storing, safekeeping, and selling of the seized assets acquired through crime and administration of thus obtained funds; d) keeping records of assets it manages in terms of item a) hereof and records of court proceedings in which decisions have been made on such assets; e) participating in rendering mutual legal assistance; f) providing civil servants with training in connection with the seizure of the assets acquired through crime; and g) performing other tasks in accordance with the present law.

7 United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances of October 20, 1988 – the Vienna Convention on Narcotics (*Official Gazette of the SFRY* – International Treaties no. 14/1990); Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime of December 8, 1990 – the Strasbourg Convention (*BiH Official Gazette*, no. 04/06 – International Treaties); Criminal Law Convention on Corruption, ETS 173, Strasbourg, January 27, 1999 (*BiH Official Gazette*, no. 3/01 – International Treaties); UN Convention against Transnational Organized Crime – the Palermo Convention (*BiH Official Gazette*, no. 3/02 – International Treaties); United Nations Convention against Corruption adopted in New York on October 31, 2003 (*BiH Official Gazette*, no. 5/06 – International Treaties); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – the Warsaw Convention (*BiH Official Gazette*, no. 14/07 – International Treaties).

judicial authority in the course of criminal or, as far as possible under the national law of the Member State concerned, civil proceedings (Article 1 of the Decision).[8] Even the latest Finacial Action Task Force (FATF) recommendations require that proactive financial investigations in connection with money laundering, predicate offences and terrorist financing are conducted in parallel – including as well criminal offences from other countries. Competent authorities are required to promptly identify, trace and initiate the freezing and seizure of the proceeds of crime. Investigations ought to be conducted in cooperation with other countries (Recommendation 30).

The powers of law enforcement agencies and investigation authorities are extended in the new Forty Revised Recommendations by the FATF – the list of special investigative techniques has been expanded – controlled delivery, undercover operations, interception of communications, accessing computer systems. Competent authorities should have access to mechanisms for identifying persons who hold or control accounts as well as powers to complete such tasks without prior notification (Recommendation 31). It is requested that proactive parallel investigations are conducted into money laundering, predicate offences and terrorism financing. Multi-disciplinary groups should be engaged and multi-disciplinary investigations should be conducted in cooperation with other countries (Recommendation 30).

A financial investigation report is drawn up based on evidence collected on assets and lawfulness of income earned by an assets owner prior to the initiation of criminal proceedings in connection with criminal offences, proof of property he inherited as a legal successor and proof of property and compensation for transferring property to a third party. A financial investigation should be adopted as a standard course of action when investigating income-generating crimes. Investigators have to specialize in financial investigation and there has to exist cooperation and trust between an investigator and the competent prosecutor.

Depending on statutory solutions and jurisprudence, the gross and net worth method of proof are used in financial investigations, as well as the expenditures method of proving income.

2.1. Net Worth Method

The net worth method of proof is used to measure increases or decreases in a person's net worth of assets and income. An increase in net worth that cannot be accounted for is a result of undeclared or illegally generated income, depending on the nature of the investigation. The analysis of net worth is used to find out if a suspect or defendant owns property that is beyond his lawful income or income from legal business operations.

In order to apply this method, the initial net worth of suspect's or defendant's assets needs to be identified, after which increases therein over the following years are determined and shown together with expenditures. This method began to be applied by the US law enforcement agencies in the 1930s. A theoretical basis for the net worth method of proof is provided by what has been done with unlawfully obtained assets; have they been spent, invested or accumulated. The

8 Out of 27 EU member states, 25 of them have set up Asset Recovery Offices for conducting financial investigations. In the territory of BiH, a Financial Investigation Unit has been set up in the Republika Srpska pursuant to the Law on Seizure of Assets Acquired through Crime and it has been conducting investigations since September 1, 2010.

net methods of proof are employed to follow financial transactions and provide explanations for spent, invested or accumulated monetary resources.

The net worth method is used to calculate how much money a person has spent, invested or accumulated over a given period of time, after which the amount arrived at is compared with the amount for which it is known to have been available to that person over the same time period (lawful incomes). A surplus of assets represents an undeclared or illegally earned income, depending on the type of investigation being conducted. The first period for which net worth is calculated represents the initial year. The initial year is necessary as a starting point for all subsequent periods. A suspect accumulates assets. The net worth method of proving income represents the priority indirect method of proving illegally earned or undeclared income when dealing with cases involving chiefly assets accumulation.

The purpose of calculating income by utilizing the net worth method is to arrive at a taxable or illegally earned income. The basic calculation is done by subtracting liabilities from assets. A change in net worth represents a difference in the net worth from one period of time to another, for instance one calendar year over another. Changes in net worth may be a result of buying or selling assets, or of a decrease or increase in liabilities. Then, expenses are added to each change in net worth in order to determine the total amount of funds used by a person over a given time period.

A net worth report (assets less liabilities equals net worth) is similar to a balance sheet (assets less liabilities equals owner's equity). A successful criminal investigation is a process that involves two steps. The first step is to show that a suspect has been involved in an illegal activity, whereas the second step is to provide documentation that clearly proves that his financial gain is a result of illegal activity. The task is to determine the amount of lawfully and illegally generated income earned by the owner in the calculation period.

The formula for calculating net worth is: assets and funds minus liabilities equals net worth, minus the initial year net worth equals an increase (or decrease) in net worth, plus personal expenses, plus personal losses equals total funds, minus legal income, equals undeclared or illegal income.

Namely, the application of the net principle means that actual and necessary expenditures met by the offender would have to be deducted from the total amount of acquired gain, providing they have been incurred as a result of perpetrator's legal activities.[9]

Perpetrator's personal efforts put into his criminal activity, which belong to the very criminal offence may not be deducted from the expenditures when identifying material gain; nevertheless,

9 Ivičević, E., Utvrđivanje imovinske koristi stečene krivičnim djelom u hrvatskoj sudskoj praksi /Identifying Material Gain Acquired Through Crime in Croatian Jurisprudence/, *Croatian Annual of Criminal Law and Practice,* Zagreb, 2004, p. 233.

according to the case-law, if the net worth method is utilized, the purchase price of for instance narcotics which represents defendant's expenditure is not considered material gain.[10]

When determining the value of material gain obtained through crime, the relevant worth is the objective value of assets at the time of the criminal offence, except when there has been an increase in the value of assets and then the amount by which the assets have grown should be taken into account. Aside from financial investigations, this method is also used in tax investigations conducted to identify undeclared taxable income.

A question arises about whether or not expenditures incurred by perpetrators of criminal offences as a result of the perpetration of a criminal offence should be recognized or should his lawful income be recognized and deducted from the material gain prior to its seizure. Under the Republika Srpska Law on Seizure, lawful property may not be seized as a replacement value, which is why the net worth principle and the expenditure principle are applied when analysing the origin and use of assets.

Personal expenses incurred by a perpetrator or participant as a result of the perpetration of a criminal offence are also deducted according to the net worth method. Thus, a person who bought narcotics may file an objection stating that he incurred expenses because he needed to rent a car to buy the narcotics, that he bought the narcotics at a higher cost, as well as that he had to pay overnight accommodation and other expenses.

An Example of Financial Net Worth Method

For years, a Perpetrator A had owned real property – plots of land in a town A (worth around € 10,000). He bribed the head of a department at the town hall by giving him € 10,000. Thereby, after some time, he has managed to turn those plots into buildable land through changes made to the urban plan. At present, the land is worth € 150,000. The department head has gained € 10,000 through the crime of accepting bribes. That sum is subject to confiscation – permanent seizure.

By committing the crime of bribery, the Perpetrator A has managed to increase the value of his real property by € 140,000. This increase is confiscated. It has been mentioned that the original land, the plots worth € 10,000, were property that was legally his and consequently, their worth may not the seized according to the net worth method. In such cases, the land (real property) cannot be subject to direct confiscation by the state.

The Table 1 shows how illegally earned income for the period December 31, 2007 – December 31, 2009 is calculated by using the net worth method of proof.

10 Since no person may keep material gain acquired through crime, the Court is, given that statutory presumptions have been met, bound to order the seizure of the material gain provided that it shall be established with certainty over the course of proceedings whether or not the money seized from the accused indeed represents material gain he acquired through crime by selling narcotics in this specific case, which has not been established with certainty thus far. Over the course of a retrial, the court of first instance shall correct the above-mentioned shortcomings, present all of the previously adduced evidence, and thoroughly assess the defence raised by the accused (in which he contends that the money seized by the police was not earned by selling narcotics), and if the Court should find that all the statutory requirements for seizing material gain have been satisfied, it is obligated to determine the amount of the gain, deducting the purchase price of narcotics included in the worth thereof, which was an expense the accused must inevitably have incurred." (Supreme Court of the Republic of Croatia, number I Kzz-856/1999-8 of March 8, 2000).

ITEM	Dec. 31, 2007	Dec. 31, 2008	Dec. 31, 2009	WITNESS	EVIDENCE	DESCRIPTION
TOTAL ASSETS	711,840	799,064	2,515,923	INVESTIGATOR	PRILOG A-1	IMOVINA
PERSON	APPENDIX A-1	ASSETS	-90.000	ISTRAŽILAC LICE	PRILOG A-2	OBAVEZE
MINUS: TOTAL LIABILITIES	-510,000	-285,000	-90,000	INVESTIGATOR		
PERSON	APPENDIX A-2	LIABILITIES				
NET WORTH	201,840	514,064	2,425,923			
MINUS:						
NET WORTH FROM PREVIOUS YEAR	N/A	-201,840	-514,064			
INCREASES IN NET WORTH		312,224	1,911,859			
PLUS:						
PERSONAL LIVING EXPENSES		205,550	153,850	INVESTIGATOR		
PERSON	APPENDIX A-3	PERSONAL LIVING EXPENSES	-57.309	ISTRAŽILAC LICE	PRILOG A-4	POZNATI IZVORI SREDSTAVA
TOTAL INCOME		517,774	2,065,709			
MINUS:						
KNOWN SOURCES OF FUNDS		-62,124	-57,309	INVESTIGATOR		
PERSON	APPENDIX A-4	KNOWN SOURCES OF FUNDS				
UNDECLARED OR UNLAWFULLY EARNED INCOME		455,650	2,008,400			

Table 1 [11]

Appendix A-1A – funds deposited in bank accounts
Appendix A-1 – assets
Appendix A-2 – liabilities
Appendix A-3 – personal living expenses
Appendix A-4 – known sources of funds

11 The table is cited according to the ICITAP Program.

Total assets include funds deposited in bank accounts, cheques, securities, ready money – cash on hand, jewellery, works of art, cars, etc. It is evident from the table that assets have grown over years, *i.e.* amounts have considerably increased. The following is subtracted from the total assets: total financial liabilities for each year, credits and loans, mortgage loans, car instalment payments, real estate instalments, etc. The table shows how the liabilities have decreased over years, whereas the assets have increased. Net worth from previous years for each consecutive year (as in the table) is subtracted from thus calculated net worth and a total increase in net worth is thereby determined. Personal living expenses are added to the increased net worth and the total income is thus established. Personal living expenses include income taxes, interests paid on a mortgage loan, gifts made to other people, travelling expenses, vacations, fees for motor vehicle registration, electricity, water, and telephone bills, property tax, cost of fuel, and the like. The known sources of funds and lawful income such as interest income, inheritances, property purchased with income or financial gain – based on information obtained from the Revenue Service are subtracted from the calculated total assets. Finally, the result we have obtained is undeclared or illegal income and its increase over years and therefore we are in a position to establish the increase in illegal income per calendar year in an easy-to-consult manner.

2.2. Expenditures Method of Proof

The expenditures method of proof or an analysis of the origin and use of funds is basically similar to the net worth method. It is used when a perpetrator spends most of his illegal income and leads an extravagant life. This method is also employed to prove that a suspect or defendant has acquired illegal assets which exceed his lawful income. Person's income has to be linked to his known and legal income as well as to his unknown or illegal and undeclared income. The method is used to prove that one's habits as a consumer are indicative of their acquiring and using illegal assets and a life style involving extremely consumerist habits.

In cases when the expenditures method of proof is employed, the first thing to be done is to establish with reasonable certainty the initial net worth of suspect's assets and/or funds. When applying this method, accurate amounts do not have to be presented for each individual account in the income and expenses segment either for the initial year or for years under investigation. However, all the accounts for which it can be established that withdrawals have been made therefrom should be taken into consideration. The next step is to determine a likely source of surplus funds. Evidence should be presented in an investigation that documents that over the period which is being investigated a suspect was engaged in some type of illegal activity. Evidence also includes testimonies about the suspect's involvement in illegal business operations. Then, it is very important to verify all the evidence in cases not related to a specific criminal offence that is used to prove the legal sources of suspect's funds. The expenditures method of proof in based on circumstantial evidence; consequently, if some form of legal source of funds is not factored in, it will have an impact on the credibility of results yielded at the end of its application. The method is based on making a comparison between a source of assets and/or funds and the manner of their use, although it should be mentioned that over the course of any year, a suspect can have several different sources of assets and/or income. In cases when the value of assets and/or funds decreases, it may imply that the assets or funds have been turned into cash. Also, an increase in financial obligations (expenses) implies that sums

of money have been borrowed from financial institutions, individuals or other persons with interest and then deposited in some other account or spent.[12]

There are three main steps when performing an analysis of expenditures. The first step is classifying transactions into three categories: usage, spending or source of funds. The second one entails the computation of total expenditures and known sources of funds for each year that is under investigation. The third one is to subtract the total known sources of funds from the total expenditures for the analysed period, thereby arriving at the value of undeclared or illegal financial gain. In that regard, a formula for the analysis of expenditures is as follows: *undeclared or illegal gain (N) equals a difference between total expenditures (ut) and known sources of funds (pi).*[13]

The Table 2 shows how illegally acquired income in the period 2009-2008 is calculated using the expenditures method of proof.

12 See: Bošković, G., Marinković, D., Metodi finansijske istrage u suzbijanju organizovanog kriminala /Financial Investigation Methods in Suppression of Organised Crime/, NBP – Journal of Criminalistics and Law, Beograd, 2010, pp. 93–94.

13 Manning, G. M., *Financial Investigation and Forensic Accounting*. Boca Raton: CRC Press, 2005, p. 98.

ITEM	2008	2009	WITNESS	EVIDENCE	DESCRIPTION
APPLICATIONS					
INCREASE IN ASSETS	88,224	1,772,859	INVESTIGATOR,	DODATAK C-1	SUMARNI PRIKAZ POVEĆANJA IMOVINE
PERSON	APPENDIX C-1	INCREASE IN ASSETS SUMMARY	ISTRAŽILAC, LICE	DODATAK C-2	SUMARNI PRIKAZ SMANJENJA OBAVEZA
DECREASE IN LIABILITIES	225,000	285,000	INVESTIGATOR,	DODATAK C-3	SUMARNI PRIKAZ LIČNIH IZDATAKA
PERSON	APPENDIX C-2	DECREASE IN LIABILITIES SUMMARY			
PERSONAL EXPENSES	205,550	153,850	INVESTIGATOR, PERSON	APPENDIX C-3	PERSONAL EXPENSES SUMMARY
APPLICATIONS IN TOTAL	518,774	2,211,709			
SOURCES					
DECREASE IN ASSETS	1,000	56,000	INVESTIGATOR, PERSON	APPENDIX C-4	DECREASE IN ASSETS SUMMARY
INCREASE IN LIABILITIES					
CAR LOAN - Bentley 2009.	0	90,000	REPRESENTATIVE	W4-1	RECORD OF INTERVIEW WITH THE PERSON CONDUCTED ON APRIL 9, 2010
			OF COMMERCIAL BANK, LIABLE PERSON	W4-7	DOCUMENTATION ON LOAN AND MORTGAGE LOAN
				W4-8	PREVIOUS INFORMATION ABOUT LOAN AND MORTGAGE PAYMENTS
KNOWN SOURCES	62,124	57,309	INVESTIGATOR,		
PERSON	APPENDIX C-5	KNOWN SOURCES OF FUNDS SUMMARY			
TOTAL SOURCES	63,124	203,309			
TOTAL APPLICATIONS	518,774	2,211,709			
MINUS: TOTAL SOURCES	-63,124	-203,309			
UNDECLARED/ ILLEGAL INCOME	455,650	2,008,400			

Table 2

2.3. Gross Worth Method of Proof

When using the method of proof based on gross income, legal expenses are not recognized to the perpetrator of a criminal offence, *i.e.* legal assets are calculated in gross worth and its equivalent value is subsequently seized (when it is not possible to forfeit illegal assets – they have been sold to a *bona fide* buyer, spent, etc.). The gross worth method is used to add together the total assets of the perpetrator, owner, and third party without deducting any real or necessary expenses covered by the perpetrator and resulting from his legal activities. The application of the gross principle allows taking greater special and general prevention measures in order to preclude the perpetrator or associated person from keeping the ownership of illegally acquired assets even though they "spent" them as well as in order to restore the previously disrupted ownership balance by seizing his legal assets. This method ensures the full application of the principle of fairness in criminal law. It is a method entirely opposite to the net worth method based on which the real and necessary expenses which must arise as a result of allowed, legal activity are deducted from the total amount of acquired gain or total assets, *i.e.* legal income is – legal assets are deducted.

An Example of Seizure Based on the Principle of Gross Worth

For years, a Perpetrator A had owned real property – plots of land in a town A (worth around € 10,000). He bribed the head of a department at the town hall by giving him € 10,000. Thereby, after some time, he has managed to turn those plots into buildable land through changes made to the urban plan. At present, the land is worth € 150,000. The department head has gained € 10,000 through the crime of accepting bribes. That sum is without doubt subject to seizure.

By committing the crime of bribery, the Perpetrator A has managed to increase the value of his real property by € 140,000. This increase is confiscated. The land which was worth € 10,000 was legally his and in consequence undisputable. The case would have be different, if A had agreed with the town hall official that he would buy the land – plots when the bribed man made sure that the plots were turned into buildable land immediately thereafter. If the gross worth principle was applied to that case (as opposed to the net worth principle), the legal land would be directly subject to seizure by the state, i.e. the original legal worth of the real property is also seized (the € 10,000).

The gross worth method is applied in the majority of European countries, which is in accordance with international and European conventions governing the seizure of illegally obtained material gain.[14]

14 The net worth principle had been applied in Germany until 1992, when their Criminal Code was amended to include the gross principle and to legislate the seizure of lawful property whose value is equivalent pursuant to Article 2, paragraph 1 of the 1990 Strasbourg Convention – Article 73 of the German Criminal Code. The Constitutional Court of Germany ruled that the seizure of legal – replacement value was in accordance with the Constitution. Pursuant to the above Article, the court will order a seizure of material gain even if there is no evidence of perpetrator's illegal activities, provided that it may be presumed based on specific circumstances that such assets have been acquired through crime or in connection therewith. Pursuant to Section 1006 of the German Civil Code, "it is presumed in favour of the possessor of a movable thing that he is the owner of the thing". The gross principle has been applied in Austria, since 2011 when the Criminal Code was amended – Article 20, paragraph 3 of the Austrian Criminal Code (seizure of legal property). The Criminal Code of Switzerland, Article 59, Chapter 3, provides for the restitution of material gain from legal sources. Under Article 144, paragraph 1 of the Polish Criminal Code, if illegally acquired gain cannot be seized, legal property can be seized as a replacement value – the gross principle. A similar solution exists in the Czech Republic, Article 5.1 of the Czech Criminal Code, etc.

Under Article 5, paragraph 1 of the United Nations Convention against Illicit Traffic in Narcotics and Psychotropic Substances (the Vienna Convention on Narcotics), "Each Party shall adopt such measures as may be necessary to enable confiscation of proceeds derived from offences established in accordance with Article 3, paragraph 1 or property the value of which corresponds to that of such proceeds."

The 1990 Strasbourg Convention provides in its Article 2, paragraph 1 that each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

The United Nations Convention of 2000 (the Palermo Convention) lays down in its Article 12, paragraph 1 that States Parties thereto shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds.

The Warsaw Convention provides for a similar solution in Article 3, paragraph 1 which reads, "Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property."

The Framework Decision by the European Council of June 26, 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the Framework Decision by the European Council of February 24, 2005 on confiscation of Crime-Related Proceeds, Instrumentalities, and Property also provides for seizure of legal property under the above-mentioned conditions.

The above Conventions and other documents[15] and framework decisions, as well as certain recommendations by the European Union, also provide for confiscation of legal property as replacement property in cases when material gain or assets acquired or derived from crime cannot be confiscated, which allows the application of the gross principle.

Pursuant to current solutions found in criminal laws at all four levels in BiH (BiH, Republika Srpska, Federation BiH and Brčko District), legal property may not be seized as replacement value and the gross principle may not be applied in that respect; instead, the net principle is applied as well as the principle of expenditures analysis of the origin and use of funds.[16]

15 The Council of Europe's Criminal Law Convention on Corruption, Strasbourg, January 27, 1999; the 2003 United Nation Convention against Corruption.

16 The Law on Seizure of the Proceeds from Crime, *Official Gazette of the Republic of Serbia* number 97/2008, provides for this issue in an identical manner.
Article 111, paragraph 2 of the BiH CC lays down that when the proceeds of a criminal offence have been merged with property acquired in a lawful manner, such property may be subject to confiscation but only to the extent which does not exceed the assessed value of the proceeds of crime. The BiH Criminal Code includes this solution, but on one condition: assets acquired in a lawful manner must be merged with the proceeds from crime. It is presumed that assets have been merged with the proceeds from crime in order to preclude their seizure. Legal property which has not been merged with illegal property (inheritances) may not be seized under this provision if illegally acquired property has been spent or abalienated. This provision is not contained in the Republika Srpska CC.

2.4. Financial Investigations Procedure

A procedure for conducting financial investigations is provided for in Chapter III, Articles 15 through 20. The Financial Investigation Division executes orders for initiating financial investigations issued by relevant prosecutor's offices. A financial investigation is led by a prosecutor. In terms of time limits, passing the final judgment by which criminal proceedings are concluded is the last procedural situation for instituting a financial investigation.[17]

As a result, investigations must be conducted prior to the expiration of the one-year time limit before which, pursuant to Article 28, paragraph 1 of the Law, a public prosecutor may file a motion for permanent seizure of the proceeds of crime. Certainly, that should be happen only in exceptional circumstances since the earlier financial investigations are conducted, the better the guarantees that evidence will be obtained in terms of Article 15, paragraph 2 of the Law.[18]

Over the course of a financial investigation aimed at identifying the proceeds of crime, it is necessary to determine the legal income of the assets owner. The legal income should be understood to mean assets subject to taxes, such as earnings, income from self-employment, agriculture, copyright, capital income, income from real estate, capital gains, rental income, proceeds from games of chance, insurance, inheritances, gifts, etc. Legal income also includes a share in the profits of a company if profit tax has been paid thereon.

After receiving an order for conducting a financial investigation, evidence is collected at the prosecutor's request or *ex officio* by the Financial Investigation Division under the supervision of the prosecutor. Police gather information about associated persons (natural person's family members, perpetrators, co-perpetrators, organisers of a criminal alliance, etc.) and third parties (persons to which assets acquired through crime have been transferred). When information has been collected, requests for submission of information and documents are sent to competent authorities in the Republika Srpska (FBiH and the Brcko District respectively), namely Tax Administration, relevant Banking Authority, Republic Administration for Geodetic and Property Affairs, JP *Elektrodistribucija (*a state-owned company for electricity supply and distribution), Water Supply and Sewage joint-stock company, Town Heating Plant, Central Registry of Securities, the competent municipality, Basic Court's Land Registry Office, etc.

Republic and other authorities, organisations and public services have a duty to submit to the Financial Investigation Unit and allow it to access information, documents, and other proof of property and legal income acquired or generated by the assets owner before the initiation of criminal proceedings in connection with a criminal offence from Article 2 of the Law, proof of property inherited as a legal successor as well as proof of property and compensation for transferring it to a third party.

The access and submission may not be denied by invoking the duty of confidentiality in respect of a trade, official, state or military secret and competent authorities are obligated to comply with such requests as a matter of urgency.

17 The first international standard for setting up specialised authorities for conducting financial investigations has its origins in international instruments. This refers to Article 20 of the 1999 Criminal Law Convention on Corruption (the Strasbourg Convention), then the United Nations Convention against Corruption of 2003, the Palermo Convention, the Warsaw Convention, etc.

18 Ilić, P. G. *et al.*, Commentary to the (Serbian) Law on Seizure of the Proceeds from Crime, Belgrade, OSCE, 2009, p. 82.

From the moment a financial investigation is launched until a report thereon is submitted along with relevant information by which a prosecutor is guided throughout the investigation, there may be a window of opportunity for the assets owner to abalienate some of the assets. For that reason, information concerning any financial investigation is confidential and represents an official secret and is submitted with utmost urgency because the owner may abalienate assets for which there is suspicion that have been acquired through crime. When necessary, the prosecutor will either autonomously or at a proposal of financial investigators take appropriate urgent measures in order to secure such assets if the investigation's course and results indicate that specific measures are required and he will do so by filing a motion for temporary seizure of assets or a motion for imposing a temporary measure as a security.

Pursuant to the Law, the Unit is authorised to take certain evidentiary actions, conduct searches, temporary seize objects, take special investigative actions, etc.

Special attention should be given to potential evidence uncovered during searches such as information about income tax, bank information, information about investments and travelling, purchase invoices, debt instruments, personal/business financial data, employment statements, bankruptcy statements, buyers' lists, lists of debts, handwritten messages, letters, or instructions, photographs/ video footage, foreign correspondence.[19]

The question of whether or not a financial investigation has been completed should be viewed in the light of evidentiary material collected over its course. If evidence indicates that there is reasonable suspicion that assets have been derived from a criminal offence, the time is ripe for instituting procedure for their temporary or even permanent seizure. In most cases, this also signifies the conclusion of the financial investigation. However, there are no impediments to continuing the financial investigation even after the procedure for temporary seizure of the proceeds of crime has been concluded provided that the prosecutor should make a decision to that end.

A financial investigation report is prepared based on evidence collected in the course of an investigation about total assets and legal income acquired or generated by the assets owner prior to the institution of criminal proceedings in connection with the criminal offences laid down by Art. 2 of the Law on Seizure of Assets Acquired through Crime, proof of property inherited as a legal successor, proof of property and compensation for property transferred to a third party. It is important to conduct financial investigations in a competent manner in cases when property has been fictitiously transferred to third parties who are neither suspects nor defendants. Pursuant to the provisions contained in the Law on Seizure, assets are also seized from owners so the burden of proof has been transferred to those third parties according to the principle of balance of probabilities, which is a lower standard of proof than proving illegal material gain obtained through

19 Documentation related to income tax should always be seized, even if it seems incomplete or insignificant; documents concerning property/investments, safety-deposit boxes, loans, business interests, contracts with stockbrokers and shares/bonds are a source of information that can be used to indentify a person's net worth; bonds and other types of securities are property that is subject to seizure; documents about travels may lead investigators to explore another line of investigation; purchase invoices, in particular for major items such as vehicle, boats, sport utility vehicles, furniture, electronic equipment, etc. Notes and jottings may be as source of valuable information about one's assets as well as business cards, letters, and similar even if they seem worthless. Seemingly meaningless scribbles on a piece of paper may provide an entirely new perspective when looked at in the context of other obtained information. Photographs or video footage in which a suspect can be seen together with the property (*eg*. a vehicle, boat, house, etc.) or his associates render it difficult for him to distance himself from either. Foreign correspondence can provide leads to assets kept abroad. A list of debts indicates to money derived from illegal sales operations and may be considered for being included in one's financial profile.

crime. The following needs to be collected: evidence of legal income, documents on potential business cooperation, living circumstances and business, across-border money transfers, etc. A procedure for conducting financial investigations is similar when it comes to witnesses who try to support the alleged lawful income of the owner or suspect by giving statements and providing certain documents.[20]

A financial investigation ought to be conducted simultaneously with a criminal investigation in order to promptly collect and secure evidence and for the purpose of timely securing (temporarily seizing) the assets in order to allow for their permanent seizure in the future. The aim of any criminal investigation is to resolve and document a criminal offence, while the aim of a simultaneous financial investigation is to temporarily secure or seize the proceeds of crime. It is important that the financial investigation should begin at an early phase of the criminal investigation since the results of both investigations are joined together for the purpose of achieving both aims. Successful detection and temporary seizure of assets preclude their concealing and usage and allow permanent seizure at the end of criminal proceedings.[21]

A financial investigation should be adopted as a standard course of action when investigating income-generating crimes. Investigators have to specialize in financial investigation and there has to exist cooperation and trust between an investigator and the competent prosecutor.

It is characteristic of financial investigations that they are time-consuming proceedings and sometimes may last even several years and therefore require a lot of investing both in terms of personnel and finances. When conducting financial investigations, competent authorities should take two strategic approaches:

1) Financial checks integrated in the proceedings – financial connections are also investigated as part of investigations into a criminal offence ("a prior offence");
2) Financial checks done independently of the proceedings – with the "prior offence", only information about a possible money launderer received through a report about suspicious activities from a financial institution or otherwise.

20 A ruling by the Basic Court of Banja Luka no. 71 0 K 151263 12 Kpp of December 5, 2012 on temporary seizure. A citation from the ruling's rationale: "That same person's (witness') claim that he had lent him BAM 300,000 (by which the defence attempts to account for the legitimacy of income used to buy the real property) is illogical since no document has been presented in support of the terms of any potential business cooperation; also, given the general living circumstances and conditions for doing business in 2007, it makes no sense that such a large amount of money was lent to anyone; not even the loan agreement presented by the defence can throw doubt on the above findings of the Court since it is evident that the said contract was concluded 5 years later, for which reasons the Court finds the contract to be fictitious or concluded with the aim of keeping the assets acquired through crime. This witness has, *inter alia*, failed to present to the Court the basis for earning the above-mentioned sum of money and all of his claims of his monthly and annual income are general and lacking in arguments. Furthermore, the statement made by the suspect's girlfriend is not acceptable to the Court because it has already been explained why the Court finds that it was precisely the suspect who bought /it/ and then fictitiously transferred its title to the witness. In addition, neither this witness has succeeded in presenting to the Court any proof of the origin of the money allegedly used to buy the vehicle concerned and precisely because of his relationship with the suspect, the Court deems that that statement is also aimed at keeping the property concerned."

21 Recommendation of the Council of Europe on Simultaneous Investigations of April 25, 2002; Framework Decision by the European Union Council 2007/845/JHA which governs cooperation between authorities that conduct financial investigations (*Asset Recovery Offices – ARO*) in the field of tracing and identification of proceeds from and other property related to crime.

3. Results and Experiences from Financial and Parallel Criminal Investigations

Since September 1, 2010, when the Financial Investigation and Money Laundering Suppression Unit began to conduct investigations in the Republika Srpska, 59 financial and other reports (criminal reports), 6 preliminary reports as well as 17 amendments to the financial and criminal reports have been submitted to competent prosecutor's offices based on which motions have been filed; in deciding on those motions, sitting courts handed down rulings by which assets worth a total of BAM 46,206,769.35 have been temporarily frozen or permanently seized. Out of that amount, a sum of BAM 19,583,970.12 has been temporarily seized and assigned to the Agency to manage it pursuant to orders by competent courts. Assets worth BAM 20,879,783.62 have been permanently seized and became the property of the Republika Srpska. Pursuant to a decision by the RS Government, the ownership of permanently seized assets worth BAM 500,000 (cars, computers, motorcycles) has been transferred to the Republika Srpska's Ministry of Interior. A total of 759 persons have been investigated (235 suspects, 445 associated natural persons and 79 associated legal persons).

The practical effects of the Law on Seizure can be seen if we consider statistical indicators, decisions by competent courts, enforcement cases, and decisions ordering the seizure of material gain obtained through crime in BiH from 2003 through the end of 2011.[22]

22 Over the past 8 years (2003-2011), competent courts in BiH delivered a total of 106 judgments to the BiH, FBiH, and RS public attorney's offices by which it was ordered that illegally acquired proceeds in the amount of 36 million BAM should be seized (24 judgments were delivered to the BiH Public Attorney's Office, 36 judgments to the RS Public Attorney's Office, and 46 to the FBiH Public Attorney's Office). What is upsetting is that only two orders were executed by which assets in the value of BAM 741,500 were seized and sold.

A table below shows the results of financial investigations conducted in the period 2010-2013.

No.	FINANCIAL INVESTIGATIONS AND IDENTIFICATION OF THE PROCEEDS FROM CRIME	2013	2012	END OF 2010 - 2011	TOTAL
1.	Financial investigations/ CASES	59 (35+24)	37	19	119
2.	Financial and other reports	24 (21+3)	21	14	59
3.	Preliminary reports	4	4	2	6
4.	Amendments to financial and other reports	12 (9+3)	3	2	17
5.	Persons investigated	467	138	154	759
6.	Value of property that has been frozen (BAM 000)	7.000.000,00	12.538.885,50	24.667.883,85	46.206.769.,35
7.	Value of temporarily seized property (BAM 000)	269.000,00	19.314.970,12	0	19.583.970,.12
8.	Value of permanently seized property	379.783,62 + 20.000.000,00 (u 2014.)	500.000,00	0	20.879.783,62

In a considerable number of financial investigations conducted thus far evidence has been obtained that persons who have been the subjects thereof committed the crime of money laundering since suspects concealed the illegal origin of the proceeds or assets acquired through crime or other unlawful activity by a number of activities and financial transactions aimed at attempting to hide the real origin of the property. Until now, the Unit has in the course of its work submitted to the competent prosecutor's offices criminal reports about the committed crimes of money laundering amounting to more than BAM 32,000,000 /in connection with which/ financial and criminal investigations have been conducted in parallel.

Under the Law on Seizure, prosecutors shall initiate each phase in the proceedings. Their role in the procedure for seizing the assets acquired through crime has been defined in such a manner that they initiate financial investigations, file motions for temporary or permanent seizure of assets acquired through crime; also, the role fulfilled by prosecutors together with the Financial Investigation Unit in the process of international cooperation and naturally in the activities of courts before which proceedings are conducted is important for this procedure.

Articles 21 through 27 of the Law govern the procedure for temporary seizure of assets. When there is a risk that a subsequent seizure of the assets acquired through crime could be hindered

or precluded, a prosecutor may file a motion for temporary seizure of assets; the motion is decided upon by the competent court.

In the course of a hearing, the prosecutor presents evidence of assets in possession of the owner, facts in support of reasonable suspicion that the assets have been obtained through crime and circumstances indicating a risk that their subsequent seizure could be hindered or precluded. The owner and his defence counsel or attorney-in-fact present evidence that prosecutor's allegations are unfounded or evidence of legal origin of the assets (Article 24, paragraph 2), which is in accordance with the 1990 Strasbourg Convention, the Palermo Convention, the Vienna Convention on Narcotics and other international instruments providing for a possibility or obligation of countries parties thereto to request from the perpetrators of criminal offences and assets owners to prove possible legal origin of their assets. According to the correct interpretation of the above provision found in the case-law, a temporary seizure of the proceeds from crime presupposes the existence of reasonable suspicion that the assets have been derived from crime and therefore during a hearing on temporary seizure of the proceeds from crime, which shall be concluded without an adjournment, it is sufficient to establish facts relevant to a finding of reasonable suspicion that the proceeds have been derived from crime and not facts that reliably indicate that the proceeds have been derived therefrom; consequently, under such circumstances, the person from whom the proceeds of crime have been temporarily seized may after the hearing on the temporary seizure offer new evidence to the Court which will be deliberated on at a hearing on the permanent seizure of assets, if such a hearing should occur.[23]

Upon the confirmation of an indictment and not later than one year after the final conclusion of criminal proceedings, the public prosecutor files a motion for permanent seizure of assets.

Under the CPC, criminal proceedings conducted against the perpetrator of a criminal offence laid down in Article 2 of the Law on Seizure, with financial investigation being conducted in parallel (a report on financial investigation has been submitted and manifest disproportion has been identified), can be also concluded by a plea agreement. The plea agreement should also include a decision – agreement on assets. The Law on Seizure is applied in such cases, as well as the Criminal Procedure Code *mutatis mutandis*. In one specific criminal case, the prosecutor who handled the case issued an order for financial investigation at the same time he issued an order for initiating an investigation. Special investigative measures, which were one of the bases for preparing a financial investigation report (assets had been fictitiously transferred to third parties and associated persons), were taken. The prosecutor deemed that in those proceedings it was more opportune, for the purpose of urgency, to request from the competent Court pursuant to Article 138 of the CPC to impose a temporary measure against the suspects and other persons banning the use, abalienation or administration of monetary resources in their accounts held with a number of banks as well as certain real property. The competent Court accepted a plea agreement and approximately BAM 500,000 worth of assets which had been transferred to third parties

23 See: Ruling by the Appellate Court in Belgrade Kž2 Po1, no.75/10 of March 31, 2010.
A citation from the ruling by the Basic Court of Banja Luka no. 71 0 K 151263 12 Kpp of December 5 2012: "Reasons justifying a need for temporary seizure of the assets referred to in paragraph 1 of the operative part hereof lie in the fact that the suspect has, over a comparatively short period of time, fictitiously transferred a title of property in dispute to third parties. That means that at present those third parties are in a position to continue the fictitious abalienation of the said assets in contravention of the principles and aims of the Law on Seizure of Assets Acquired through Crime."

were permanently seized and the ownership of assets was transferred to the Republika Srpska Ministry of the Interior based on a decision rendered by the Republika Srpska Government.[24]

In another criminal case, the competent court rendered a judgement in the first instance proceedings and in addition to imposing a prison sentence, assets that had been subject to temporary security measures were handed over to the Agency for Management of Seized Assets pending final judgment. Namely, in this case as well, the prosecutor who handled the case issued an order for a financial investigation at the same time he issued an order for initiating a criminal investigation. The Financial Investigation Division had simultaneously submitted a report on the criminal offence of money laundering and a financial investigation report (in which a manifest disparity worth several millions was established). In this case as well, the measure of a temporary ban on usage, abalienation and/or administration of stocks, real estate, monetary resources had been ordered pursuant to Article 138 of the Republika SrpsS CPC (the total value of assets amounted to more than 20 million BAM). Pursuant to the Criminal Procedure Code, the Criminal Code, and Law on Seizure of Assets, the Court had, it its first instance judgment, rendered a decision to temporary seize the assets concerned and hand it over to the Agency for management thereof pending a final decision. Seizure of material gain is obligatory in money laundering cases in the operative part of the act and the prosecutor decided not to move for temporary seizure by filing a special motion to that end and instead, he requested it in the indictment, pursuant to the CPC, CC, and the Law on Seizure of Assets.[25] Namely, this refers to the case *Ćopić Zoran et al.* – the first case in the region to be concluded by a final judgment rendered on January 24, 2014 by the Supreme Court of the Republika Srpska in a case against members of the Darko Šarić's organised crime group for the criminal offence of money laundering.

Assets and moneys that have been seized from Zoran Ćopić and third parties associated with Darko Šarić include:

1) Bijeljina Sugar Mill (51 percent of stocks)
2) CESSNA 340A II RAM IB airplane, owned by the company *Avio Rent d.o.o.* /ltd/ Banja Luka,
3) A sum of BAM 2,672,590.58 from the company *Agrokop Banja Luka*.

The total value of assets seized in the *Ćopić et al.* case amounted to 20 million BAM, whereas the total amount of laundered money amounted to 9.5 million BAM.

Aside from the above-mentioned case, the Republika Srpska Ministry of the Interior also conducted proceedings against Duško Šarić, a brother of Darko Šarić and two more individuals for the criminal offence of money laundering, in which case it was found that approximately 4.5 million BAM had been laundered. A criminal report was submitted to the Special Prosecutor's Office in Banja Luka. The case was referred to the competent judicial authorities of the Republic of Serbia since the charged persons were available to the judicial system of that country; financial and criminal investigations were simultaneously conducted in that case as well.

The total amount of laundered money for both of the above-mentioned cases was 14 million BAM.

24 Judgment by the District Court of Banja Luka no. 11 0 K 009464 12 K ps- p of June 26, 1012.
25 Judgment by the District Court of Banja Luka no. 11 0 K 00694911 K of August 2, 2012.

CONCLUSION

The stage of financial investigation is the most important and involves a range of specific investigative measures aimed at discovering illegal material gains or assets acquired through crime. The asset seizure procedure is contingent on the completion of this stage to a great extent. A financial investigation ought to be conducted in parallel with a criminal investigation in order to promptly collect and secure evidence and for the purpose of timely securing (temporarily seizing) the assets in order to allow for their permanent seizure in the future. The aim of any criminal investigation is to resolve and document a criminal offence, while the aim of a simultaneous financial investigation is to temporarily secure or seize the proceeds of crime, as well as to investigate money laundering operations in parallel. It is important that a financial investigation should begin at an early phase of the criminal investigation since the results of both investigations are joined together for the purpose of achieving both aims. Successful detection and temporary seizure of assets preclude their concealing and usage and allow permanent seizure at the end of criminal proceedings. Unlike at other legislative levels in BiH, such activities have been made possible in the Republika Srpska by the adoption of the Law on Seizure of Assets Acquired through Crime and the information presented herein through statistical indicators and jurisprudence support such an assertion. For making financial investigations and investigations into money laundering even more efficient, it is necessary to harmonise some of the provisions of the Law on Seizure of Assets Acquired through Crime with international standards in the filed and allow seizure of replacement property in cases when illegal assets have been "spent"; also, the seizure of assets and initiating proceedings for the crime of money laundering should be allowed without a prior judgement of conviction for a predicate criminal offence or in other words, money laundering should follow from criminal activities – subjective and factual circumstances. Such regulations would allow the gross principle to be applied in financial investigations as opposed to the current use of the net principle, which would certainly meet the requirements of fairness and facilitate even greater recovery of illegal assets and material gain as well as prosecution of criminal offences of money laundering.

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Prosecutorial Model of Investigation and Juvenile Offenders
(law and practice in the Republika Srpska)

1. Introductory remarks

It is an undeniable fact that in all the modern countries in the world judicial authorities have considerably broad powers when dealing with juvenile offenders, firstly when it comes to initiating criminal proceedings, then in respect of their course and, finally, the very completion of a particular criminal proceeding.[2] They have numerous powers in respect of that issue; firstly, juvenile prosecutors and juvenile judges have a discretionary right to stay criminal proceedings against juvenile offenders notwithstanding the seriousness of their criminal offences on one particular condition – if they deem it useful from the perspective of education and reformation of juvenile offenders. In such a manner, the principle of usefulness is given precedence over the principle of fairness in such proceedings. In addition, other powers of juvenile prosecutors are also important (and they will be elaborated on in this paper), as well as the powers vested in the court, which, among other things, encompass not only a vast range of resources and measures, but also the possibility of the court to substitute already imposed alternative measures and criminal sanctions with other more suitable measures or criminal sanctions if thus required by a specific situation.[3]

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2 Lj. Mitrović: *Alternativne krivične sankcije u krivičnom zakonodavstvu BiH i iskustva u njihovoj primjeni*, Proceedings of the XLVI Regular Annual International Conference of the Serbian Association for Criminal Law Theory and Practice, *Pojednostavljene forme postupanja u krivičnim stvarima i alternativne krivične sankcije*, Zlatibor, 2009.

3 H. Sijerčić Čolić, *Maloljetničko krivično pravosuđe i maloljetnička delinkvencija u Bosni i Hercegovini*, Godišnjak Pravnog fakulteta u Sarajevu, Sarajevo, 2002.

Pursuant to a provision contained in Article 1 of the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings in the Republika Srpska,[4] the following authorities usually conduct proceedings involving children in conflict with the law,[5] young adults and children who have been victims or witnesses of a criminal offence:

1) Courts,
2) Prosecutor's offices,
3) Police authorities, in the first place the Ministry of the Interior of the Republika Srpska, and
4) Guardianship authorities or competent social care centres as a rule.

Considering in the first place the specific status of this category of criminal offenders, *i.e.* being mindful of their mental and physical state as well as of their overall development, the role of the family, school, and other institutions at all the levels in society, as well as of the other participants in criminal or any other type of proceedings involving minors in conflict with the law should certainly not be neglected.

The Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings in the Republika Srpska (hereinafter: Law on Juveniles in Criminal Proceedings) has defined, as a *lex specialis*, the concept of juvenile justice and so this term is used to denote a judicial system of the Republika Srpska established for children for whom there are grounds for suspicion that they have committed a criminal offence; in addition, the protection and promotion of children's rights to fair treatment are laid down in general terms (Article 12, paragraph 1, item a) of the Law on Juveniles in Criminal Proceedings.

Two more extremely important powers of authorities that participate in juvenile criminal proceedings should certainly be mentioned here (the powers of judicial authorities, *i.e.* of the court and prosecutor's offices). Namely, the said authorities which take part in proceedings against juveniles, as well as all the other authorities and institutions from which certain information, reports, and opinions relevant to each specific proceedings are sought, are obligated to act as promptly as possible pursuant to an express provision from the Law so that proceedings against juveniles could be concluded as soon as possible (duty to act promptly is provided for in Article 85 of the Law on Juveniles in Criminal Proceedings). Naturally, the competent authorities should ensure that expeditiousness does not turn into precipitancy, particularly considering the fact that over time juveniles move to another age group or that lengthy, slow and protracted criminal proceedings against juveniles lose their effects from the aspect of criminal pedagogy.[6]

On the other hand, the Law on Juveniles in Criminal Proceedings provides for a special duty of juvenile prosecutors and juvenile judges according to which they shall, as a rule and in accordance with the principles and rules laid down by the law and secondary legislation, withhold from conducting formal criminal proceedings; instead, they shall resolve cases involving juvenile

4 Also, the District of Brčko adopted in 2011 their own Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings, published in the *Official Gazette of the Brčko District* of BiH, no. 44/2011.

5 The term "a child in conflict with the law" indicates that the child is in contact with the system of criminal justice because he is suspected of committing a criminal offence, charged therewith or has been convicted of a crime; the alternative term "youth in conflict with the law" may also encompass young adults since the word "youth" is not limited in terms of certain age.

6 M. Simović: *Krivično procesno pravo II (Krivično procesno pravo – posebni dio),* Comesgrafika, Banja Luka, 2006.

offenders by applying diversion recommendations (the principle of redirecting or diverting from regular proceedings can be found in Article 8 of the Law). This is perhaps the most important innovation in the juvenile criminal justice that pertains to the legislation of the so-called alternative or diversionary measures which result in the diversion of criminal proceedings to other branches of law (eg. family law or social care law).[7]

2. The Prosecution

Article 12 of the Law on Juveniles in Criminal Proceedings, which contains an authentic interpretation of terms related to the system of juvenile justice and judiciary and used in the Law, defines in its paragraph 1, item đ) the notion of a juvenile prosecutor (prosecutor for juveniles). Thus, the juvenile prosecutor is deemed to be "a prosecutor who has an inclination towards working with children and specialised knowledge about the rights of children and juvenile delinquency, as well as other types of knowledge and skills that make him competent to work on juvenile delinquency cases". Given the above provision, juvenile prosecutors or prosecutors who prosecute juvenile offenders must have an unquestionable disposition towards the education or needs and interests of the youth, as well as specialised knowledge in the field of the rights of children and juvenile delinquency (Article 18 of the Law on Juveniles in Criminal Proceedings). The main criteria for appointing prosecutors in general as well as to the position of juvenile prosecutors are thus defined. In addition to the above, juvenile prosecutors are obligated to attend the so-called special training programmes and have certificates or credentials giving evidence of their professional competence for working in the field of juvenile delinquency and their protection within the system of criminal justice.[8]

Juvenile prosecutors are appointed for a term of five years by collegiums of prosecutors and they may be reappointed to the same function even after the expiration of the five-year period following the same appointment procedure.

Juvenile divisions are part of all the district prosecutor's offices in the Republika Srpska and they have on staff one or more juvenile prosecutors and one or more expert advisors.[9] Thus, the

7 M. Simović et al.: *Commentary to the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings*, Banja Luka, 2010.

8 Specialisation of juvenile prosecutors is formal in nature, which means that it is confirmed in a relevant and official manner, that a specific prosecutor satisfies the requirements for conducting proceedings in the capacity as juvenile prosecutor. Naturally, the above implies that juvenile prosecutors can only be persons who have acquired specialised knowledge in the field of the rights of children and juvenile delinquency. The providing of specialised knowledge and continuous professional training and development to juvenile prosecutors in the filed of children's rights, juvenile delinquency, and their protection within the system of criminal justice is under the purview of the Centre for Training of Judges and Prosecutors of the Republika Srpska that functions under the supervision of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Article 197 of the Law on Juveniles in Criminal Proceedings). The specialisation of juvenile prosecutors is officially proven by certificates or credentials of professional competence for working in the filed of juvenile delinquency and their protection within the system of criminal justice issued by the Centre for Training of Judges and Prosecutors of the Republika Srpska.

9 Both prosecutor's offices and courts should have expert advisors on their staff, namely social educators: special-education teachers, special educators, social workers and psychologists. Expert advisors for prosecutor's offices have an active role in juvenile delinquency cases since they provide expert opinions; collect necessary information; maintain various types of records; and perform other tasks by order of juvenile prosecutors. In the course of preparatory proceedings, expert advisors with prosecutor's offices may collect information about juvenile's personality; collect information and provide opinions to the prosecutor about a decision whether or not it is opportune to initiate proceedings; collect information regarding the application of diversion notices; provide opinions as to the necessity the measure of placing juveniles into reception centres and other measures to ensure their presence in the course of proceedings; visit juveniles placed in detention and submit reports to juvenile prosecutors and when necessary, propose that necessary measures be applied; provide opinions as to the justifiability of application of specific diversion notices, educational measures and security measures or their replacement by other measures or stay of proceedings; maintain records and collect statistical and other data and opinions pursuant to the orders and at the request of the juvenile prosecutor.

above-mentioned legislative solution has introduced into prosecutor's offices, or more precisely into their juvenile divisions, a new category of employees with specialist knowledge – the so-called expert advisors.

The Law on Juveniles in Criminal Proceedings in the Republika Srpska grants a number of important powers to juvenile prosecutors. One of the most important powers is certainly the one provided for in Article 89 of the Law. Namely, paragraph 1 of the provision specifies conditions or prerequisites for applying the principle of discretionary prosecution (principle of opportunity) which is within the competences of juvenile prosecutors.[10] Formally speaking, this discretionary possibility that is within the competences of juvenile prosecutors exists in cases of criminal offences committed by juveniles and punishable under the law with a term of imprisonment of up to five years or with a fine (considering that a punishment laid down by the law for a certain criminal offence is only one of those conditions related to the abstract seriousness of criminal offences; in addition, evidence needs to exist that a juvenile has committed an offence and as the final condition, it is required that a juvenile prosecutor deems that proceedings would be appropriate). Therefore, the principle of discretionary prosecution with regard to juvenile offenders has been specified by the provision of Article 89 of the Law on Juveniles in Criminal Proceedings whereby a juvenile prosecutor may decide against bringing criminal proceedings even though there is evidence in support of reasonable suspicion that a juvenile has committed a crime if he finds it inappropriate to conduct proceedings against him (the assessment of this condition is within the sole jurisdiction of juvenile prosecutors), given the nature of the crime and its circumstances on the one hand, and juvenile's previous life and personal characteristics on the other. All of the above grounds must exist together and be such as to justify the making of a decision not to bring prosecution against the juvenile.[11] Juvenile prosecutors may take the same action even in cases of criminal offences that are punishable under the law with a term of imprisonment exceeding five years if such actions are in accordance with the principle of proportionality (commensurateness) from Article 9 of the Law on Juveniles in Criminal Proceedings. With a view to clarifying as much as possible the above-mentioned circumstances (conditions), a juvenile prosecutor may request information from juvenile's parents or guardian, other persons and institutions, and if necessary, he may summon those persons and the juvenile in order to provide information directly. And finally, the juvenile prosecutor is also entitled to request an opinion from the guardianship authority on whether or not it is appropriate to institute criminal proceedings against the juvenile. When there is such a service in a prosecutor's office, a juvenile prosecutor may task an expert associate or advisor (such as social worker, psychologist, educator, etc.) with the collection of relevant information. Certainly, the principle of promptness must be adhered to in the process of obtaining such information.

10 The principle of prosecutorial discretion is also provided for in Article 58 of the Law on Juvenile Offenders and Criminal Protection of Juveniles of Serbia (*Official Gazette of the Republic of Serbia*, no.85/2005). This provision sets out that in cases of criminal offences punishable by a term of imprisonment of up to five years or a fine, the juvenile public prosecutor may decide not to press charges although evidence exists giving rise to reasonable suspicion that the juvenile has committed a criminal offence, if in his opinion it would not be appropriate to prosecute the juvenile due to the nature of the criminal offence and circumstances under which it was committed, his previous living circumstances and personal characteristics. For the purpose of establishing those circumstances, the juvenile public prosecutor may request information from juvenile's parents, adoptive parent or guardian, other persons or institutions and, when necessary, he may summon these persons and the juvenile to directly give information. He may request an opinion from the guardianship authority on whether or not it would be opportune to bring prosecution against the juvenile, and may delegate the task of collecting such information to a professional (social worker, psychologist, educator, special educator, etc.), provided there is any with the public prosecutor's office.

11 M. Simović i drugi: *Maloljetničko krivično pravo*, Pravni fakultet u Istočnom Sarajevu, Istočno Sarajevo, 2013.

Aside from the above-mentioned, juvenile prosecutors have at their disposal some other possibilities before they make a decision (not) to institute criminal proceedings. Namely, they may propose to the court that a juvenile be sent to an adequate children and youth reception centre or to a specific educational institution, certainly in situations when it is necessary to examine directly juvenile's personal characteristics in order to reach a decision not to initiate criminal proceedings against him. Something like that will happen in more delicate cases, when juvenile's personal characteristics need to be examined and that can be done only in specialised institutions.[12] When a juvenile is sent to any of the above-mentioned institutions, he may stay there no longer than 30 days. A provision on prosecutorial discretion contained in Article 89, paragraph 3 is particularly interesting since it is applied to instances when juveniles who are serving their sentence in a juvenile prison or against whom an educational measure implemented in an institution is imposed commit a new criminal offence or when another offence which was not known at the time of the trial is learnt about. Discretion of such kind is especially opportune in situations when it is at first glance completely clear that new criminal proceedings against that juvenile would not change anything whereas their institution would create a number of adverse consequences for that particular juvenile. However, such a possibility is not associated with criminal offences of any particular degree of seriousness; instead, prosecutorial discretion may be applied to any criminal offence in accordance with provisions contained in the law.[13] The only condition for applying this type of prosecutorial discretion is that the juvenile is serving a term of imprisonment at a juvenile prison or that the application of an educational measure against him is underway.

In cases when juvenile prosecutors find that initiating criminal proceedings would not be appropriate, they are undoubtedly obligated to inform accordingly certain persons and give arguments in favour of their decision. In addition to the juvenile and the injured party, they are obligated to inform about their decision juvenile's parent or guardian or their adoptive parent, as well as the guardianship authority within eight days from the date of rendering such a decision.

Furthermore, juvenile prosecutors play a rather prominent role in the procedure for imposing a special alternative measure of the so-called police caution. It is a specific cautionary measure[14] or a more formal admonition imposed by the police[15] on juveniles who have committed a crime punishable with a fine or a term of imprisonment of up to three years (offences that are usually referred to as offences of minor significance). Similar to the purpose of issuing diversion recommendations, the purpose of imposing such an alternative measure is twofold; namely, it is *a*) to avoid criminal prosecution of a juvenile for a criminal offence he committed or to stay proceedings that have already been initiated and *b*) to influence juvenile's proper development and strengthen his sense of personal responsibility so that his relapse into crime would be prevented in the future by giving him a police caution. Under the Law on Juveniles in Criminal Proceedings, the issuing of a police caution is provided for by a special statutory instrument, namely by the Rulebook on Application of Measure of Police Caution which was adopted by the Minister of Interior of the Republika Srpska in 2010. Pursuant to this regulation, a police officer has a duty to question a juvenile, collect all the necessary evidence, obtain a report on his social history and information about his previous life

12 M. Simović et al.: *Commentary to the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings*, Banja Luka, 2010.
13 *Ibid*.
14 Lj. Mitrović: *Krivične sankcije prema maloljetnicima u Zakonu o zaštiti i postupanju s djecom i maloljetnicima u krivičnom postupku Republike Srpske*, "Revija za kriminologiju i krivično pravo", Beograd, broj 2/2009.
15 Ž. Pru: *Kanadski Zakon o krivičnom gonjenju maloletnika*, Proceedings of the Conference "Krivičnopravna pitanja maloletničke delinkvencije", Međunarodni naučni skup, Beograd, 2008.

within the period of 24 hours and together with an official report submit to a juvenile prosecutor a recommendation supported by a statement of reasons that the juvenile should receive only a caution for the criminal offence he committed. Should the juvenile prosecutor find, after considering the recommendation for imposing the measure of a police caution, that there is evidence that the juvenile has committed the offence and that, given the nature of the offence and circumstances in which it was perpetrated, as well as juvenile's previous life and personal characteristics, it would not be opportune to institute proceedings against him, he will grant the requested approval and refer the case to a police officer with the law enforcement authority so that he would issue a police caution. On the other hand, if the prosecutor does not approve the issuing of a police caution, he will inform the police officer accordingly and prior to initiating preparatory proceedings, he will consider whether or not it is possible and justifiable to issue a diversion recommendation or he will issue an order for initiating preparatory proceedings.

The diversion from regular criminal proceedings implies that juvenile prosecutors have a duty in accordance with the principles and rules established by the law and secondary legislation not to resort to formal criminal proceedings but to resolve cases involving juvenile offenders by applying diversion recommendations. Therefore, pursuant to Article 90, paragraph 1 of the Law on Juveniles in Criminal Proceedings, a juvenile prosecutor shall have a duty to consider the possibility and justifiability of applying one of diversion recommendations provided for by the Law prior to issuing an order for initiating preparatory proceedings against a juvenile.[16] Thus, the possibility of diverting criminal proceedings has been introduced into proceedings conducted against juvenile offenders (the diversion model of procedure). In any event, the juvenile prosecutor shall issue an order (by virtue of prosecutor's discretionary power) for applying a diversion recommendation on condition that the juvenile agrees to fulfil the obligation he has undertaken pursuant to the diversion recommendation (prior to issuing the order, the prosecutor is obligated to inform the juvenile, his parents or his guardian or adoptive parent about his intention to resolve that particular case in the above manner and possibility thereof as well as about the nature, subject matter, duration, and consequences of a diversion recommendation and the consequences of refusal to cooperate and of the enforcement and compliance with the recommendation). As long as the diversion recommendation is being implemented, the guardianship authority (which monitors the enforcement of such notices) shall submit to the juvenile prosecutor a report on its application. In situations when a juvenile prosecutor decides against applying a diversion recommendation, he has a duty to cite reasons for making such a decision.

When the juvenile has completed the obligation undertaken pursuant to the applied diversion recommendation, the juvenile prosecutor shall issue an order that no preparatory proceedings are to be initiated against the juvenile; when necessary, he shall inform thereof not only the injured party (and advise them that they may bring their restitution claim in civil proceedings), but also the person who filed criminal charges. A similar possibility exists when a juvenile has only partially complied with the obligation pursuant to a diversion recommendation or when no full compensation has been obtained through the application of the diversion recommendation.

The legislator has provided for two more situations that may arise in connection with the fulfilment of the obligation undertaken pursuant to a diversion recommendation in Article 90, paragraph 6 of

16 Article 62 of the Serbia's Law on Juvenile Offenders and Criminal Protection of Juveniles governs the application of the so-called diversion orders.

the Law on Juveniles in Criminal Proceedings. Namely, if a juvenile prosecutor should find, based on a report from the guardianship authority, that a juvenile refuses without any justifiable reason to fulfil the obligation undertaken pursuant to a diversion recommendation or that he does not fulfil the obligation in due manner, he shall issue an order for initiating preparatory proceedings. Also, the juvenile prosecutor has discretionary power with regard to the assessment of whether or not a juvenile refuses to fulfil his obligation undertaken pursuant to a diversion recommendation or if the undertaken obligation is being discharged in undue manner or not.[17]

Nevertheless, the greatest power conferred on juvenile prosecutors by the *lex specialis* is their jurisdiction over preparatory proceedings (which represent not only the first, but also obligatory phase in proceedings against juveniles). Namely, pursuant to an express provision contained in the Law on Juveniles in Criminal Proceedings, a juvenile prosecutor shall issue an order for initiating preparatory proceedings[18] and inform the guardianship authority thereof. Therefore, if there are grounds for suspicion that a juvenile has committed a criminal offence and if after due consideration pursuant to Article 90, paragraph 1 of the Law a juvenile prosecutor finds that it is neither possible nor justifiable to apply a diversion recommendation or if the juvenile unjustifiably refuses or in undue manner complies with the diversion recommendation, the prosecutor shall issue an order for initiating preparatory proceedings of which he shall inform the guardianship authority. The prosecutor has a duty to conclude preparatory proceedings within 90 days as of the date of issuing the order, whereas if they are not completed within the said time limit, a provision contained in Article 224 (pertains to the discontinuation of investigations) or 224 (pertains to the conclusion of investigations) of the Criminal Procedure Code of the Republika Srpska shall be applied subsidiarily.[19] Over the course of preparatory proceedings, juvenile prosecutors shall obtain facts pertaining to the criminal offence as well as information about juvenile's personality and behaviour, the environment and circumstances in which he lives; certainly, the amount of collected information shall in the first place depend upon the relevance of delinquent behaviour exhibited by the juvenile and first-hand impression formed by the juvenile prosecutor in direct contact with the juvenile and his parents.[20] It is also implied that the prosecutor has a duty to obtain reports about all of the above circumstances and to question persons who can provide him with necessary information, with the exception of persons referred to in Article 78, paragraph 2 of the Law on Juveniles in Criminal Proceedings.[21] Naturally, the prosecutor shall also obtain an opinion from the guardianship authority about the above-mentioned circumstances and if an educational measure has been imposed against the juvenile, he shall also obtain a report on the enforcement of the said measure. Finally, if a measure of remand in an institution has been ordered against the juvenile, the prosecutor shall obtain a report on the enforcement of said educational measure from the relevant institution or facility. As a rule, information about juvenile's personality is collected by a juvenile prosecutor, granting that the task may also be delegated to an expert advisor with a prosecutor's office. When a juvenile needs to be examined by expert witnesses so that his state of health, degree of maturity and other aspects of his personality could be

17 M. Simović et al.: *Commentary to the Law on Protection and Treatment of Children and Juveniles in Criminal Proceedings*, Banja Luka, 2010.

18 Pursuant to a provision contained in Article 63 of Serbia's Law on Juvenile Offenders and Criminal Protection of Juveniles, a juvenile public prosecutor shall file a motion for initiating preparatory proceedings with a juvenile judge at the competent court. If the juvenile judge does not approve the motion, he shall apply for a decision from the juvenile panel of a higher court.

19 *Official Gazette of the Republika Srpska*, number 53/2012.

20 J. Žuženić, *Maloljetnik kao izvor saznanja o svojoj ličnosti u krivičnom postupku*, Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, 1/1972.

21 These persons are exempted from the duty to testify: parents, guardians, adoptive parents, religious officials or confessors, and defence counsels.

established, medical practitioners, psychologists or educators are appointed to perform such an examination. Such examinations may be carried out in a health institution or in some other institution. In any event, the purpose of collecting all of the above-cited information, *i.e.* reports, opinions, and notifications is to define, already at this stage in the proceeding against the juvenile, the manner in which he will be treated in the system of criminal justice in the future; or, to decide, based on a compiled and analysed report on juvenile's social history whether or not the principle of prosecutorial discretion will be applied in each particular case, or if the proceedings will be discontinued, or if a proceeding for applying a diversion recommendation will commence or if preparatory proceedings will be initiated.[22]

Criminal proceedings conducted against juveniles are specific because juvenile prosecutors – given the provision contained in the Law on Juveniles in Criminal Proceedings – are free to determine the way in which they will take certain procedural actions, in which process they only need to ensure that juveniles' rights to defence are safeguarded and that injured party's rights are protected; also, they need to ensure that evidence relevant to making a decision is gathered (Article 93, paragraph 1 of the Law). Another rule can be derived from the above provision and according to it, the juvenile and his defence attorney will be present during actions taken in preparatory proceedings (except if there are reasons referred to in Article 111, paragraph 4 of the Law). In its Article 93, paragraph 2, the Law grants a special authority to juvenile prosecutors: whenever necessary, questioning shall be conducted with assistance from professionals acting in capacity as prosecution's assistants – educator or another professional.

A juvenile prosecutor may allow a representative of the guardianship authority and juvenile's parent or guardian to be present during actions taken in preparatory proceedings. If the above-mentioned persons are present during the said actions, they have the right to put forward proposals and pose questions to the person who is conducting the questioning or interrogation. In addition, the juvenile prosecutor may refuse to allow juvenile's parents or guardian or adoptive parent to be present thereat if such decision is in the interest of the juvenile; in such situations, the prosecutor will undertake those actions in the presence of the representative of the guardianship authority or of the residential institution for the placement of juveniles.

The importance of the role of juvenile prosecutors becomes prominent also in respect of the measures of temporary placement in the course of preparatory proceedings. Namely, these measures governed by Article 94 of the Law on Juveniles in Criminal Proceedings and imposed by juvenile judges at the motion of juvenile prosecutors over the course of preparatory proceedings are aimed at placing juveniles in reception centres or similar institutions for the placement of juveniles when such course of action is necessary to separate them from their current living environment or to provide them with assistance, protection, or accommodation, in particular if necessary to avoid the risk of their relapse into crime.

Also, the legislator has very precisely provided for the manner in which juvenile prosecutors are to proceed after the conclusion of preparatory proceedings. Namely, they have a duty (and therefore, they are obligated) to submit to a juvenile judge a motion to impose an educational measure or a juvenile prison sentence within eight days after the date of conclusion of preparatory proceedings, after they have examined all the circumstances in connection with the perpetration

22 M. Simović i drugi: *Maloljetničko krivično pravo*, Pravni fakultet u Istočnom Sarajevu, Istočno Sarajevo, 2013.

of the criminal offence, juvenile's maturity and other facts pertaining to his personality and living circumstances.[23] Nevertheless, in case that after the conclusion of preparatory proceedings a prosecutor should find that there is no evidence that a juvenile has committed a crime, he shall issue an order for discontinuation of criminal proceedings (Article 104, paragraph 1 of the Law).

Prosecutor's motion to impose an educational measure or juvenile prison sentence is formal in nature and contains five types of information: a) information about the juvenile – his name, surname and age; b) information about the criminal offence – statement of facts and legal classification of the offence; c) evidence which supports the conclusion that the juvenile has indeed committed the offence; d) a statement of reasons which must include an assessment of juvenile's maturity and characteristics of his personality; as well as e) a motion to impose an appropriate criminal sanction on the juvenile or reasons that justify the application of proposed educational measure or juvenile prison sentence rather than the application of the diversion recommendation under Article 90, paragraphs 1, 4, and 5 of the Law on Juveniles in Criminal Proceedings. The contents of information collected under Article 92 of the Law and pertaining to the personality of the juvenile shall be presented in such a manner as to have the least possible adverse effect on his education. When submitting his motion for imposing an educational measure or juvenile incarceration, the prosecutor shall also submit evidence in support of the allegations made in the motion.

In the event that the juvenile prosecutor fails to provide reasons for not acting pursuant to Article 89, paragraph 3[24] or Article 90, paragraphs 1 and 2[25] of the Law, a juvenile judge may express his disagreement with the prosecutor's motion for imposing a criminal sanction and apply to the panel referred to in Article 17, paragraph 3 for a decision thereon within a period of three days. The panel shall render their decision after having heard from the juvenile prosecutor. The panel may rule either to return the case to the prosecutor so that he would act in accordance with Article 89 or 90 of the Law or that the judge shall act in accordance with Article 106,[26] or if conditions for applying Article 106 have not been satisfied, to act in accordance with prosecutor's motion for the imposition of a criminal sanction.

The graduality of imposing criminal sanctions implies that in the process of imposing such sanctions, judicial authorities always have a duty to give precedence to the measures of caution and guidance, then to the measures of increased supervision, followed by a measure of remand/

23 Prosecutor's motion to impose an educational measure or juvenile prison sentence is the only charging document in criminal proceedings against juveniles that is drawn up and filed in writing by the prosecutor. The motion is also served on a juvenile and his defence counsel. Within three days from the date of the service of the motion, the juvenile and his defence counsel are allowed to file a preliminary objection under Article 241, paragraph 1 of the Republika Srpska Criminal Procedure Code and their objection shall be decided on by a panel. The time limit for filing preliminary objections may be extended at the proposal of the juvenile's defence counsel, but it may not exceed 15 days after the service of the motion. After a decision on preliminary objections has been rendered, the judge shall submit evidence under Article 104, paragraph 4 of the Law on Juveniles in Criminal Proceedings to the juvenile prosecutor and the case file shall be referred to the juvenile judge so that he could schedule a session or the main hearing (Article 107, paragraph 2 of the Law). In that context, the judge who decided on the objections as a member of the panel may not participate in the trial. The ruling of the panel may not be appealed.

24 Article 89, paragraph 3 of the Law governs specific situations involving juveniles serving their sentence in a juvenile prison or against whom an educational measure of remand in an institution is being applied. Namely, when the enforcement of a sentence or educational measure of remand in an institution is in progress and a juvenile has committed another criminal offence, the juvenile prosecutor may decide not to move for the institution of criminal proceedings for the other criminal offence.

25 A provision contained in Article 90, paragraph 1 pertains to prosecutor's duty to consider the possibility and justifiability of applying a diversion recommendation prior to issuing an order for initiating preparatory proceedings against a juvenile in connection with criminal offences referred to in Article 89, paragraph 1 of the Law on Juveniles in Criminal Proceedings and pursuant to that Law. Situations in which prosecutors do not apply diversion recommendations to criminal offences referred to in Article 89, paragraph 1 of the Law are governed by Article 90, paragraph 2 of the Law: in such circumstances, they are obligated to provide reasons for their decision.

26 A provision contained in Article 106 of the Law on Juveniles in Criminal Proceedings pertains to the deliberation on the possibility and justifiability of applying a diversion recommendation.

committal in an institution, over finally, the most serious one, the criminal sanction of juvenile incarceration (provided that neither the principle of prosecutorial discretion/opportunity has been applied nor alternative measures such as police caution or diversion recommendations).

A duty to obtain a report on juvenile's social history[27] in each individual case as early as possible represents an important task for juvenile prosecutors; that task is mandatory to be carried out after the institution of proceedings against a juvenile offender. Namely, pursuant to an express statutory provision contained in Article 87 of the Law, prior to initiating preparatory proceedings in connection with the offence with which a juvenile is charged, the prosecutor shall obtain from the competent guardianship authority the so-called report on juvenile's social history, *i.e.* information about the age, maturity, and other personal characteristics of the juvenile, as well as information about the environment and circumstances in which he lives for the purpose of rendering one of the following decisions: a) to apply prosecutorial discretion in that particular case; b) to stay proceedings conducted against the juvenile; c) to initiate procedure for the application of a diversion recommendation, or d) to issue an order for initiating preparatory proceedings. In any event, juvenile prosecutors have a duty to request a report on juvenile's social history except in cases in which the principle of prosecutorial discretion and diversion recommendations can be applied without it.

Juvenile prosecutors keep under their direct supervision and control the process of enforcement of educational measures. Competent guardianship authorities are obligated to submit a report on the enforcement of individual educational measures to prosecutor's offices every six months; at the same time, the administrations of institutions in which sentences of juvenile incarceration or educational measures of remand in an institution are being enforced are obligated to submit such a report every two months.

Juvenile prosecutors also initiate proceedings against adult perpetrators of criminal offences under Article 184 of the Law on Juveniles in Criminal Proceedings if a child or a juvenile is an injured party in criminal proceedings or other criminal offences stipulated by the criminal code if they deem it necessary for the purpose of affording special protection to the personality of children and juveniles that participate as victims in criminal proceedings.

27 The report on juvenile's social history is one of the most important documents written by social workers. It gives an account of juvenile's life history from his birth until the moment when a social worker enters into his life. The aim of writing a report on juvenile's social history is to establish which circumstances impacted his development and behaviour as well as to provide him with guidelines that might help him choose behaviours and possibilities to assist his personal development and improve the circumstances in which he lives. A report on juvenile's social history includes: a) general information about the juvenile: name and surname, date and place of birth, address, telephone number, parent's name and mother's maiden name; information about his childhood, education, educational qualifications, additional professional or vocational training, skills and knowledge that might help him achieve a better quality of life, employment, marital status, persons who live or are in close contact with the juvenile and have an impact on his life, and finally information about how the juvenile relates to himself, his family, job, the way in which his life is organised, his activities, the manner of spending free time, interests and affinities; b) information about juvenile's family: his parents, siblings and other relatives who play an important role in his life, general information about them (age, education, state of health, employment, social status, address), juvenile's relation to them, how they are connected and the degree in which they are ready to provide help and support, and if applicable, other persons that play a relevant role in juvenile's life; c) information about juvenile's state of health: previous and current state, and probable prognosis; if the juvenile has a medical condition, the source of medical information needs to be established: statement by the juvenile, his next of kin, medical documentation; d) information about juvenile's financial situation: his regular and additional income, lost opportunities for earnings, possibilities currently not taken advantage of (right to receive support from the next of kin, assistance for care givers and the like), needs that the juvenile cannot satisfy given his current income; e) information about juvenile's living conditions: whether or not they currently conform to his needs given the number of family members, prognosis and possibility for more favourable solutions, to which extent is the juvenile capable of solving his accommodation problems on his own, is there anyone in the family who could help him or who is willing to help him, whose assistance outside of the family it would be realistic to expect and ask for, has anything been done in that regard; f) social worker's opinion and g) social worker's recommendation regarding actions to be taken; for more details on this topic, see: Lj. Mitrović: *Uloga organa staratelјstva u postupku prema maloljetnicima*, Proceedings of the International Scientific Conference "Krivično zakonodavstvo i prevencija kriminala", Brčko, 2011.

Bruno Vekarić, MA[1] and Tomo Zorić[2]

Prosecution and the Media in Relation to the New Serbian CPC: a Practical Guide[3]

1. The Media and Prosecutorial Investigation: a Delicate Relationship Between the Principles Underlying Criminal Proceedings and the Public Interest

The new Criminal Procedure Code of the Republic of Serbia,[4] which came into force on January 15, 2012 in respect of prosecutor's offices and courts with special jurisdiction (prosecutorial investigation began to be generally applied on October 1, 2013), has acknowledged the common interest shared by all the participants in the process of attaining justice: asserting the fundamental right of every citizen to information - to be provided with true, correct, and timely information at every place and any time.

Principle of publicity and citizen's right to information (sometimes referred to as the "right to know"). The principle of publicity that underpins the work of judicial authorities presupposes the acceptance of responsibility towards the public, which has been set as a standard to be achieved by judicial institutions. As a result of the promotion of the rule of law and creation of an atmosphere that ensures non-selective access to justice to all citizens, the quality of justice is thus achieved as the essential standard of the judiciary's work. That involves taking some complex and demanding steps towards building the public's trust in and respect for country's legal institutions. Publicity is

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3 Parts of this article have been taken from the authors' book *Priručnik za praktičnu primenu strategije komunikacije u krivičnom postupku /Guide to Practical Application of Communication Strategy to Criminal Proceedings/*, published by the OSCE Mission to Serbia, Belgrade, 2013, and adapted for publication in this book.
4 *Official Gazette of the Republic of Serbia (RS), no. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.*

not only an important aspect of attaining that goal, it is essential to it. In order to ensure access to justice for citizens, the transparency of court trials needs to be enhanced.

Ten years of implementation of the Law on Free Access to Information of Public Importance,[5] which came into force on November 13, 2004, have shown that one of the most important mechanisms of access to justice is the fundamental right of citizens to be informed. The availability of information of public importance relevant to citizens, as well as the openness of institutions and publicity of their work have become not only an indicator of how democratic a society is taken as a whole, but also of access to justice for citizens.

Silence fuels doubts, but timely and continuous reactions to phenomena and events dispel them, at the same time building a trustful relationship between the prosecution and the public. For the judiciary to become one of the pillars of democratic society open to changes and progress, it must fulfil one prerequisite – it has to be the judiciary that communicates with citizens in the correct manner through the media, from the local to the national level, in particular in sensitive proceedings such as war crime trials or organised crime and corruption trials.

2. Limitations of the Right to Information

The first limitation of the public's right to access information is provided for by the law, *i.e.* governed by provisions of other laws. Pursuant to the Law on Free Access to Information of Public Importance, the prosecutor shall deny access to information if its publication could be prejudicial to the pre-investigation procedure or to an investigation or in general, could undermine the credibility of evidence found in the case file. In such cases, a person in charge of procedure for granting access to information of public importance shall by means of a decision reject disclosure of certain information. It is very important to explain to the media that have requested the denied information why they have been denied that right at that specific moment as well as to suggest to them that there is a possibility that the information will be made available at the later stages in criminal proceedings, when the competent prosecutor deems that damage would not be caused to that specific case in that manner. Journalists will understand the situation and realize that the limitation is temporary. Without providing such an explanation, a possibility or room would be left for free interpretation and conclusions by journalists that can fairly often be wrong.

The media use the so-called "unnamed sources" rather often. It is very important to avoid falling into this "trap". Information coming from an unnamed source must never be confirmed. If the information is correct, the criminal offence of revealing of official secret could be committed indirectly. In their efforts to obtain information that would be of particular interest to the public, journalists may often, either on purpose or unintentionally, ask for the confirmation of information from an investigation received from an unnamed source. Any confirmation of such information would constitute the criminal offence of revealing of official secret. If the information received from an anonymous source is not correct, it must not be denied since in that manner one would step into the territory of indirect disclosure of official secret. Only after the confirmation and entry into force of an indictment does the main hearing become public and the contents of a case file become available to the public. However, journalists are usually interested

5 *Official Gazette of the RS, no. 120/2004, 54/2007, 104/2009 and 36/2010.*

in its contents during the phase of an investigation, particularly in preliminary investigation because it is when information is exclusive and members of the press will do everything they can possibly do to obtain such information. Thus, prosecutors must be mindful not only of that aspect, but also of the interest of pre-investigation proceedings and investigation and find balance by communicating information that will satisfy the needs of the public and safeguard the interests of criminal proceedings.

A good relationship with the media implies that public prosecutors provide information even at the stage of pre-investigation proceedings, but in a manner that will not compromise the course of proceedings under any circumstances. At the stage of pre-investigation proceedings, prosecutors evaluate which information to communicate to the public and how much relevance it has for the public. It needs to be stressed: never to the prejudice of criminal proceedings! This is precisely the point at which a delicate relationship between the principles underlying criminal procedure and the public interest reveals itself.

The second limitation of the public's right to access information is associated with the obligation not to compromise judicial proceedings. It is useful that the media are informed about the actions and activities of the prosecutor (or the police, courts and other state authorities), but media coverage must not be premature and reports in the media must not be published before the prosecutor's office has made the information public since that may compromise the success of an "operation". One of numerous examples of such reporting by the media typically occurring in a last few years has been the publication of information from pre-investigation proceedings, most frequently in one and the same daily newspaper, which has announced that "the police and prosecution have completed investigations" and that "major arrests are about to happen". In addition to a factual error, because there have been no investigative proceedings in that case, but pre-investigation proceedings instead, such announcements that operations will be carried out by state authorities are virtually warnings to suspects.

In his Annual Report submitted to the Serbian Parliament on March 18, 2014, Saša Janković, the Protector of Citizens (Ombudsman) of the Republic of Serbia, has found that there have been serious violations of citizens' right to correct and complete information about issues of public importance. According to Janković, reasons behind this include not only "the pressure placed on the media /or/ information leakage into selected media groups", but also ratings and circulation battles. Janković has highlighted that two associated phenomena have been a cause of serious concern: pressure exerted on the media (control of the media), as well as the leakage of confidential information and the transferring of institutional proceedings into "privileged tabloids" (the so-called tabloidization of the state).

Examples aimed at drawing attention to the reasons behind the oversights of the media and thus of the prosecution which resulted from the lack of knowledge of or non-adherence to the principles underlining criminal proceedings can be found, among other things, in the *Guide to Practical Application of Communication Strategy to Criminal Proceedings*.[6] We would like to cite four of those examples.

6 Mr Bruno Vekarić, Tomo Zorić, Marijana Trifunović, *Priručnik za praktičnu primenu strategije komunikacije u krivičnom postupku/Guide to Practical Application of Communication Strategy to Criminal Proceedings/* OSCE Mission to Serbia, Belgrade, 2013.

Example 1 *– Journalists may not be informed that a search warrant is going to be executed at certain premises or that a warrant for the arrest of a certain individual is going to be issued. The actual activities of search and arrest would undoubtedly be compromised if such information was made public because a suspect could remove certain evidence or simply flee in order to avoid the arrest.*

Example 2 *– In the "Scorpions" case, a video recording of the Trnovo war crime was shown at a courtroom of the ICTY in 2005. That same evening, the video had been broadcast by the national TV stations just before suspects were arrested. Approximately 20 hours had elapsed between the time of the broadcast and the arrest, which was sufficient time for one of the suspects to leave the country. He was arrested in France two years later.*

For the same reason, details of a criminal offence known to its perpetrator should not be disclosed to the media on account of the fact that their reports about such details would jeopardize the very proceedings. The responsible media should refrain from making such information public if they were to obtain it in any manner.

Example 3 *– A crime of murder had been committed. A victim was killed with a knife. The police were looking for the knife and found it in a park, lying next to a bench some 100 meters away from the crime scene. Several days later, a suspect was questioned and he confessed to the crime. In order for his confession to be valid and have the strength of credible evidence that could be used in a court of law, it is important that the suspect gives an account providing as many details as possible. If the suspect stated, "I don't know where I left the knife" that would be less convincing than the statement, "I threw the knife next to a bench in a park, 100 meters away from it," certainly, providing that the statement is consistent with other evidence. In the majority of cases, only a perpetrator can know where he left the knife after committing a crime and precisely such details constitute evidence in support of the confession. That would not be possible if such a detail was made public by the media because the suspect himself could have seen it on television or read it in the newspapers.*[7]

Example 4 *– Supposing the defendant made a following confession, "I threw the knife next to a bench, 100 meters away from it." If it was not known to the general public that the knife had been found by a park bench at the time the first statement was made during the investigation, the trial judge could respond to his retraction of the confession by asking him, "If your confession does not stand and you were not involved in the crime, how could you have known where the knife had been found?" Now we arrive at the point at which the defendant could say, "I read it in the paper."*

The third limitation of the public's right to access information is related to the protection of rights of other persons. In this context, a spokesperson can refuse to provide information even because it can affect the right of a third party, a defendant or witness, for instance, their right to privacy. Spokespersons have to create a balance between the interests of the prosecution, the media, as well as the rights of persons involved in the proceedings. Certainly, in this case there is a conflict of interests that need to be balanced namely, to reconcile the media's right to information and the right to privacy. A good spokesperson should have a keen sense and should be able to find such balance.

7 A similar problem occurs when at the main hearing a defendant retracts his confession made during an investigation.

3. Right to Privacy

The purpose of this limitation is to protect the rights of suspects and/or defendants. A spokesperson will refuse to provide information to the press if such information could interfere with the right to privacy of a third party (participants in criminal proceedings, in most cases). This is a field in which the media most frequently find sensationalist news that causes their readership and viewer ratings to go up. This is a sphere in which a certain degree of a conflict of interests can occur and a balance must be found between those interests. Such balance reflects as maintaining the equilibrium between the media's right to information and the right to privacy of persons involved in the proceedings. As a rule, the media will want to obtain such information and it will undoubtedly be published in most cases. At this point, we need to distinguish between absolute and relative public figures as well as those persons who are not public figures.

Absolute public figures are persons whose life, office, or opinions generate interest among many people, irrespective of any specific event, such as the President of the country, the Prime Minister, famous athletes, actors, singers, etc.

Relative public figures are persons involved in specific events which attract a widespread interest of the public and consequently makes them persons of general interest; for instance, a person involved in a spectacular criminal offence that attracts public attention even though that very individual is not a public figure.

Persons who are not public figures. This classification is important in respect of persons who are not public figures because the publication of their names and surnames may be denied. When it comes to absolute and relative public figures, something like that is virtually impossible and in most cases journalists manage to learn the names of such persons from various sources. Such matters are difficult to hide, for instance, this holds true for any trial related to organised crime. When informing the media about any criminal proceeding or trial, one must keep in mind the presumption of innocence at all times and emphasise that there is a reasonable suspicion that a certain person has committed a criminal offence.

A statement made to the media that there is an investigation being conducted against a certain individual brings shame to that individual and may have damaging consequences not only for them, but for their family as well. It may turn out that that individual is not guilty and that there is no evidence to convict him of any specific criminal offence. Even though in each case it is presumed that a person is not guilty, third parties will remember that the person was suspected of a crime, regardless of the outcome of a trial (for example, if they are to respond to a vacancy announcement). In a majority of cases, suspect's full name and surname should not be made public because of such damaging consequences to which news reports may lead.

Notwithstanding the above, the full name and surname, as well as other details about a suspect are customarily made public in the following cases:

- when a person has committed a serious crime;
- when a perpetrated crime is related to the general interest to a considerable degree;
- when there is a "strong" suspicion.

In cases of criminal offences of organised crime and war crimes, all of the above requirements are usually met and therefore the publicizing of names and surnames is a customary course of action. However, in situations involving general jurisdiction cases, it should always be carefully assessed if those requirements have been fulfilled.

Considerable attention should be devoted to *particularly vulnerable groups* such as minors, crime victims, etc.

Names could also be publicized if an absolute public figure is under investigation, as well as when the suspect's name has already been widely known due to reports in the media.

When members of the media request certain information about a specific case, they, as a rule, do not know many details about the case itself, which is the very reason why they ask such questions. Sometimes, they have knowledge of certain details from an investigation, maybe even the suspect's name. In such cases, disclosing the suspect's name can help individualise the proceedings which are the subject of journalists' interest. In such situations, the spokesperson will confirm the person's name since it is already known to the journalists. For instance, *a reporter may ask if a certain individual a "Marko Markovic" (Joe Public - translator's note) is under investigation in connection with a burglary committed on October 16, 2006. It may be confirmed to the journalist that the prosecutor's office has been conducting those proceedings against "Marko Markovic" given the fact that his name is already known to the media.* However, it is a completely different situation if a reporter does not require a confirmation and information about a certain investigation but instead, he only seeks general information about an investigation into a specific individual that is underway.

In the above context, several spheres of privacy should be distinguished and that distinction ought not to be lost sight of when providing information. They include:

- *the intimate sphere, i.e.* facts known only to certain individuals, such as intimate relationships, diaries, etc.
- *the private sphere* or more specifically, facts known to other people aside from the individual involved in a case, which nevertheless have not generally been presented to the public; for instance, events that occurred during the leisure time of the given individual, previous convictions, statements not made in public, etc.
- *the public sphere*, individual's public contacts, statements and speeches covered by the media.

When providing information, one should always keep in mind the sphere of privacy from which the information comes. Spokespersons should never disclose information that invades the intimate or private sphere, even if by any chance such information is known to them. They have to be professional and speak solely based on objective criteria.

The Criminal Procedure Code defines specific institutes that require additional caution when it comes to reporting about the actions of the court or prosecutor's offices. Individually speaking, they include:

Particularly vulnerable witnesses (Article 103 of the CPC). At the request of the parties or witness himself, the authority conducting proceedings may *ex officio* grant the status of a particularly

vulnerable witness to a witness who is particularly vulnerable given his age, experience, lifestyle, gender, state of health, the nature, manner or the consequences of the criminal offence. A decision on granting the status of a particularly vulnerable witness is issued by a public prosecutor, the presiding judge or a single judge.

The authority conducting proceedings may issue a decision on appointing an attorney-in-fact for the witness if they deem it necessary for the purpose of protecting the interests of a particularly vulnerable witness, whereas the public prosecutor or court president shall appoint an attorney-in-fact from the roster of attorneys submitted to the Court by the bar association competent for designating *ex officio* defence counsels (Article 76 of the CPC). No special appeal is allowed against a decision granting or denying the request.

Article 104 of the CPC governs the manner is which particularly vulnerable witnesses are to be examined, which will have a considerable impact on the media coverage of their testimonies. Pursuant to that provision, a particularly vulnerable witness may be asked questions only through the authority conducting a proceeding, which shall address such a witness with special care, trying to avoid any harmful effects of criminal proceedings on his personality and physical and mental state. Examinations may be conducted with the assistance from a psychologist, social worker, or some other professional, as determined by the authority conducting the proceedings. If the authority which conducts the proceedings decides that the particularly vulnerable witness shall be examined using technical equipment for transferring image and sound, the examination shall be conducted in the absence of the parties and other participants in the proceedings in the room where the witness is located. Furthermore, particularly vulnerable witnesses may be examined either in their place of residence or on other premises or at an authorised institution which is qualified for examining especially vulnerable persons. In such cases, the authority which conducts proceedings may order that measures referred to in Article 104, paragraph 2 of the Code shall be applied. A particularly vulnerable witness may not be confronted with a defendant unless the defendant himself requests a confrontation and the authority conducting the proceedings allows it, being mindful of the degree of witness's vulnerability and defence's rights.

Protected witnesses (Article 105 of the CPC). Under the Serbian Criminal Procedure Code, if there are circumstances that indicate that the life and limb, freedom or any considerable property of a witness or persons close to him could be put at risk as a result of that witness's testimony or answers to certain questions, the court may authorise one or more measures of special protection by a ruling on granting him the status of a protected witness.

Special protection measures include the questioning of the protected witnesses under the conditions and in the manner which ensure that his identity is not disclosed to the general public and in exceptional circumstances not even to the defendant and his defence counsels, in accordance with the Code.

Excluding the public (Article 363 of the CPC). From the opening of a session until the conclusion of the main hearing, the panel may either *ex officio* or at the motion of a party or defence counsel, but always after they have stated their positions, close the entire main hearing or part thereof to the public if such action is necessary for the purpose of protecting:

- the interests of national security;
- public order and morality;
- interests of minors;
- the private lives of participants in the proceedings;
- other justified interests of a democratic society.

Public prosecutors have the right to decide not to bring prosecution or to defer prosecution as well as to make decisions about whether or not plea agreements and agreements on testifying by defendants and convicted persons will be concluded. It cannot be disputed that the application of the above institutes will result in more expeditious, efficient and economical criminal proceedings and a disburdened judicial system, which is beneficial not only to public prosecutors, but also to defendants without being prejudicial to the injured parties. When applying the principle of prosecutorial discretion or concluding plea agreements and agreements on testifying, they must be justified from the point of view of public interest. The courts have to be mindful of these new institutes and the changed role of public prosecutors who not only conduct investigations, but use their powers to decide in favour of or against performing their function of instituting prosecution at their discretion.

The media are in a position to make a significant contribution to the administration of justice in respect of both the victims and offenders if they approach reporting in a responsible manner and in full awareness and knowledge that the system of criminal law is a system of legal provisions aimed at safeguarding the human rights of real and potential victims of criminal offences, *i.e.* that it is an integrated system of protection against crime.

The system of criminal procedure law is a system of legal provisions whereby human rights of offenders (suspects, defendants or convicted persons) are protected against arbitrariness, authoritarianism or excessive repression by the state and its bodies. Practice has shown that media criticism in that regard is directed precisely towards the work of the public prosecution service and the police. The provisions of criminal procedure law have the purpose to define in a clear manner the position and rights of defendants, their right to defence and the presumption of innocence occupies an important place in that context.

Adhering to the presumption of innocence. The Code requires adherence to the presumption of innocence by ordering in its Article 3, paragraph 2, that public and other authorities and organisations, the media, associations and public figures shall abide by the rules on presumption of innocence and may not violate defendant's rights by giving public statements about the defendant, criminal offence or proceedings. However, even though the legislator has made this provision, this principle has been left without virtually any protection under the criminal law. The reality of our situation is that the presumption of innocence is violated rather often precisely by the media and even politicians whose statements and interpretations of relevant information from criminal proceedings discredit the proclaimed autonomy and independence of the judiciary. Violations of the presumption of innocence directly violate the principle of court's independence. Adherence to the above principles is an achievement of civilisation and points to the level of democracy in a society with regard to the implementation of the rule of law and it is certainly indicative of the cultural level achieved by any nation. In that context, European standards imply adherence to the presumption of innocence. This applies even to criminal offences that are horrifying in public's view. In democratic countries, the mass media always use expressions that explain cases at the

level of a certain degree of suspicion. That constitutes an important element of legal culture. It is not difficult to observe the presumption of innocence. Similar to a lawyer who defends a person and not a criminal offence, a journalist should morally condemn the criminal offence instead of a person who has just been charged."[8]

The Independent Association of Journalists of Serbia (NUNS) has appealed to the media to adhere to the presumption of innocence when reporting about criminal offences and not to declare suspects guilty before the court renders its final decision in each case. "Recently, there have been frequent violations of the presumption of innocence in the media, accompanied by full disclosures of identity of apprehended persons against whom only an investigation is underway."[9] In that context, the NUNS has reminded that the Criminal Procedure Code (Article 3) requires that public authorities, the media, associations of citizens, public figures and other persons observe the presumption of innocence and "not violate other rules of procedure, the rights of defendants and injured parties or the independence, authority and impartiality of the court by giving public statements about ongoing criminal proceedings." Furthermore, it has been added that Article 37 of the Law on Public Information[10] lays down that no "media outlet may qualify anyone as the perpetrator of a punishable offence, or proclaim a person guilty of or responsible for an offence prior to a final ruling passed by a court or another competent body".[11]

The Code of Serbian Journalists imposes a duty on journalists to "observe the rule of presumption of innocence" and "that no person may be declared guilty before the court has delivered its judgement." In that context, the NUNS has announced that "the media are obligated to show respect for the right to the presumption of innocence as well as to protect the privacy and identity of a suspect. Even if competent state authorities disclosed information about a suspect that belongs to his private sphere, the media would not be not allowed to report it."

The public is predominantly interested in criminal offences of organised crime and in war crimes as well as in "public figures" as perpetrators of crimes. This projects a picture of crime in our country that is nowhere near as realistic and the strenuous efforts and great responsibility of public prosecutors and the police to uncover perpetrators and criminal offences of "general criminality" are not appraised in the correct manner. Namely, in its Article 162 (former Article 504a), the CPC cites criminal offences in respect of which special evidentiary actions are taken. Special evidentiary actions include as follows: covert interception of communications, covert surveillance and video and audio recording, simulated business services, computer search of data, controlled delivery, and undercover investigators. Information about motions for special evidentiary actions, decisions thereon and their undertaking represents confidential information. Other persons that learn about such information in whatever capacity are required to keep them secret (Ar. 165, para. 2 and 3 of the CPC – Confidential Information).

The legislator mentions confidential information and exclusion of the public in several places with regard to different phases of the proceedings, which is relevant to providing information in

8 Prof. dr Milan Škulić "Medijski linč ili linčovanje medija"/ Media Lynching or Lynching of the Media",, Politika, 29 December.2009, http://www.politika.rs/rubrike/ostali-komentari/Medijski-linch-ili-linchovanje-medija.lt.html.

9 NUNS poziva medije da poštuju pretpostavku nevinosti /The NUNS Appeals to the Media to Observe the Presumption of Innocence/ Beta News Agency, 19 June 2013..

10 Official Gazette of the Republic of Serbia, no. 43/2003,61/2005,71/2009, 89/2010.

11 In this context, a decision by the RS Constitutional Court, no 42/2011.

onnection with a particular case. For instance, Article 304 of the CPC regulates the maintaining of confidentiality in an all-inclusive manner by providing that "if it is necessary in order to protect the interests of national security, public order and morality, interests of minors, privacy of participants in the proceedings or other justified interests in a democratic society," the authority conducting the proceedings which undertakes a certain evidentiary action shall order persons it interrogates or questions or who attend evidentiary actions or examine case files about an investigation to maintain confidentiality of certain facts or information they learnt on that occasion and warn them that disclosure of a secret constitutes a criminal offence.

The above-mentioned Article mentions each and every person that may learn "a piece of confidential information" in various procedural situations and afterwards make it public or disclose it to another person without authorisation. An order by which certain individuals are directed to maintain the confidentiality of information and details from an investigation is entered into records of evidentiary action or recorded in examined files, having the warned person sign them in order to prevent the possibility of invoking the error of law.

A provision contained in Article 250 of the CPC lays down that examination of files may be denied or made conditional on a ban on using the names of participants in the proceeding in public if the main hearing has been closed to the public or if there could be a substantial violation of the right to privacy, whereas Article 363 of the CPC sets down reasons for excluding the public from the main hearing. The significance of those provisions is manifested in the fact that persons who act in contravention thereof are held criminally liable. In that regard, Article 337 of the Criminal Code provides that the criminal offence of "Violation of Confidentiality of Proceedings" shall be punishable with a fine or imprisonment from one to eight years. Disclosure of information learnt in court, misdemeanour, administrative or other proceedings when the law or a court order or decision by some other competent authority declares such information secret is punishable under paragraph 1 of the said Article; moreover, disclosing the course of criminal proceedings that are closed to the public or information about minors (court decisions or information about minors themselves) is punishable under paragraph 2; unauthorised disclosure of information about the identity of a person protected in criminal proceedings or regarding a special protection programme is punishable under paragraph 3; and finally, if the offence referred to in the previous paragraph results in serious consequences, the perpetrator shall be punished in accordance with paragraph 4.

In order to implement many of the provisions whose nature has been presented above, adequate technical equipment has to be available, staff has to be professionally competent and other prerequisites need to be met since the Criminal Procedure Code has changed the procedural position not only of public prosecutors, but also of the police who have been stripped of some of their former powers. Practice and challenges in respect of the implementation of the Code, as well as insufficiently precise wording of some of the provisions contained therein have already shown that it is necessary to amend some of its current solutions. "Rapist Caught", "Murderer Must Be Punished", "Monster on Trial", etc. Such headlines come as true "bombshells" and are bound to have a strong effect on the public. Judges who are the only persons who can finally establish whether or not a crime has been proven and if it was committed by the person accused of it also read newspapers and watch television.

Does making public comments about a case being resolved in criminal proceedings whose final outcome is generally uncertain constitute pressure exerted on the court? In principle, the court should be immune to any and every influence, even when it is coming from the media. Judges ought to be competent and honourable professionals who make decisions based on presented evidence. However, judges are also human beings who do not live in an ivory tower. People are often strongly influenced, sometimes even subconsciously, by suggestion and auto-suggestion. Not many things are as powerful as the mass media in terms of their suggestive effects.

The above-mentioned presumption of innocence whereby the Criminal Procedure Code lays down that each person shall be considered innocent until found guilty by a final decision of the court at the same time literally means that the accused has the *right* to be considered innocent. This has also been enshrined in the Serbian Constitution as well as in relevant international instruments, such as the European Convention on Human Rights and Fundamental Freedoms. The Criminal Procedure Code of Serbia also lays down that the presumption of innocence may not be violated by public statements made about ongoing criminal proceedings. This provision is not always observed in practice and unfortunately there have been instances of orchestrated campaigns aimed at prejudging the outcome of some criminal proceedings.

In his effort to protect defendants from the so-called media lynching as well as to safeguard the court from suggestive influences, the legislator has recently provided for the criminal offence of making unauthorised public comments on court proceedings. This criminal offence will not be committed if standard comments regarding criminal proceedings are made by writing about a person accused of a criminal offence with a certain degree of necessary "reserve" until the final adjudication of a criminal case. This is easiest to achieve by using expressions such as a "suspect", "defendant" or "the accused", while avoiding terms such as a "perpetrator" or more specific ones like "a murderer", "robber", "thief", etc. Even if someone who has no legal education or simply gets caught up in the atmosphere makes a comment that formally speaking could not be regarded as appropriate, such a person would not commit this criminal offence if the comment has not been made with the explicit intention of thereby violating the presumption of innocence or court's independence. This offence may not be committed by negligence; instead, there has to exist premeditation, which means that a perpetrator has to be aware that his public statements violate the presumption of innocence and to want that or at least consent to that. Not even all that will suffice because in such cases there has to be intent as perpetrator's subjective attitude towards his act that is expressed in a particular manner whereby he emphatically makes certain targeted and tendentious statements just in order to violate the presumption of innocence and judicial independence, which is certainly not easy to prove in every instance. For example, if a close relative of a murder victim pleaded in public that the "murderer" must receive the appropriate punishment or if a journalist during a programme devoted to serial rapists took a position that it was necessary that the "rapist" be severely punished, as a rule, their actions would not constitute a violation of the presumption of innocence since in both cases it is implicitly understood that they demand justice in respect of a specific case. In that regard, the emotional state of the injured party should be taken into account, as well as the right of any journalist to support a certain policy on criminal prosecution. In contrast to this, if a specific case was being portrayed in a certain incriminatory manner for days or weeks and the person who has just been suspected or accused of a crime was being constantly referred to as the perpetrator, such actions could constitute a criminal offence which involves a violation of presumption of innocence.

4. Prosecution and the Public

As an autonomous state authority that prosecutes the perpetrators of criminal offences and other punishable acts by seeking legal recourse, the public prosecution service protects constitutionality and legality and takes other actions as authorised under the law. As the Law on Public Prosecution sets forth, the public prosecution service is subject solely to the Constitution and the law.

The media act as an intermediary between judicial institutions, in this case the prosecution service, and the public. The final participant is the public or people who use information about the activities of the prosecution reported by the media.

The public, as a group of individuals who share a common interest, form opinions about the work of state authorities and judges it based on information and personal experiences of their interaction with those authorities. A common interest of all the participants in the process is to assert the fundamental right of each citizen to receive true, correct, and timely information whereby the foundations of a state adhering to the rule of law and best practices of the judiciary are strengthened. What the media and the prosecution have in common (depending on a legal system) is that they are mostly independent in their profession. The higher the level of independence and autonomy (in relation to the executive branch above all), the more favourable the atmosphere in which the media and the prosecution function and the more manifest the process of transition to a more democratic society.

Media's attitude to key topics such as preventing society from sinking into crime, fight against organised crime, other types of crime, or war crimes certainly plays a relevant role in shaping the public opinion on prosecutor's offices and their work. Therefore, the training of journalist is a prerequisite for informing the public in a competent and objective manner about the course of criminal proceedings in respect of the new CPC, which represents a qualitative change on a road to attaining justice. To achieve that goal, it is equally important to provide simultaneous training to the representatives of the prosecution service and the police.