TILT LAW & TECHNOLOGY
WORKING PAPER SERIES

Privacy Protection in Czech Criminal Procedure

Draft Version 0.7 (Please do not quote without authors' permission)

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February 2017

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1. Introduction

The law of criminal procedure serves two main functions: it provides the public authorities the legal basis to intrude upon individual rights for the purposes of investigating and prosecuting criminal activity, and at the same time limits the power of these authorities by establishing clear boundaries of such power. From the perspective of privacy, it is therefore highly interesting to examine, where the law of criminal procedure, especially in the investigation stages, establishes the boundaries of police action interfering with the right to privacy. In this report, with an aim of gaining a better understanding of privacy, different types of privacy and how their protection is conceptualized by the legislators (and judiciary) in the Czech Republic will be described. The focus will especially lie on the protection of home and things inside private home, the body (including things carried by the person) and mind of persons and personal communications. Special focus is given to those areas where recent technological advances challenge the traditional protections and provide the law enforcement authorities with a more focused lens into the private life of individuals. As a full and comprehensive description of all privacy related aspects of the criminal procedure would be enormous in scope, certain areas will only be briefly sketched and the report is rather selective in the array of topics which are given more focus.

2. Privacy and the contours of criminal procedure

2.1 A brief overview of criminal procedure

The key legal instrument of criminal procedural law in the Czech Republic is the Code of Criminal Procedure. The purpose of the Code is defined in § 1, as the regulation of the activities of the law enforcement authorities in such a way that the criminal offences are detected and their perpetrator's justly punished. At the same time, the proceedings must serve the strengthening of the rule of law, the prevention of criminal activity, forming citizens in the spirit of respect for the law and public order. It is a right and a duty of all citizens to help achieve these goals. Criminal procedure, therefore, serves to provide effective enforcement of the criminal substantive law, which sometimes defined as a system of legal norms regulating the creation, modification and termination of criminal law relations.[1] However, that is not entirely correct, since such relations are established when a crime is committed, which is not the case, if the criminal law fulfills its preventive function.[2] The main aim of the criminal procedure is the resolution of criminal offences including the identification of its perpetrator, while respecting legality in the actions leading to this resolution, which is ensured by precise definition of the law enforcement powers[3], the so-called fair trial principles.[4]

Fair trial is mainly ensured by the principle of equality of arms, meaning that each party in the process has equal opportunity to defend their interests. It also includes the right to publicness of the hearing and judgment, the right to a speedy trial, the right to a just proceeding, presence at the trial, justification of the decision, and also the right to know the nature and the reasons of

[1] Kratochvíl, V. (eds.) *Trestní právo hmotné, Obecná část*, Brno : Masarykova univerzita (2003), s. 10.
[2] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 3.
[3] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 7.
[4] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 4.

indictment, the right to defense, the right to hear witnesses and to call witnesses, and right to an interpreter, where needed.[5]

An important task of the courts is the interpretation of the Code of Criminal Procedure. While the interpretation is generally binding only in specific cases, especially the Supreme Courts decisions play in important role in the legal system. The public prosecution office can also interpret the legal provisions, but only in their relation to the police authorities.[6] Interpretation by the Constitutional Court must be followed by other law enforcement authorities.[7]

2.2 Constitutional Law and Privacy

The Czech Charter of Fundamental Rights and Freedoms, which is an equivalent of the sections on rights and liberties typically found in constitutions, and has the same legal force as the Constitution, contains a number of provisions protecting privacy, or relating to the protection of private life. Because of the changing notion of privacy in time and of its multilayered character relating to a multitude of spheres of private life, Czech authors sometimes explicitly shy away from articulating a definition of privacy and comprehensively listing its different aspects. They see privacy as a subjective, differently perceived and plastic term, which allows it to better accommodate to the changes in society,[8] and some even call efforts to define it dangerous.[9] The lack of clarity is somewhat reflected in the somewhat unsystematic structure of the privacy provisions in the Charter. The general privacy protection is protected in Art. 10 of the Charter:

Art. 10 Right to privacy in a wider sense

(1) Everyone has a right to the respect for her human dignity, personal honour, good reputation and protection of the name.
(2) Everyone has a right to be protected from unauthorized interference with private and family life
(3) Everyone has the right to be protected from unauthorized collection, publishing and other abuse of the data about their person

Right to privacy is seen as an important part of the constitutional order since it creates conditions in which the individual has the status of a person and can realize their freedom that is respected and protected by the state.[10] Article 10 serves as a subsidiary provision, together with the autonomy of will derived from Art. 2(3), to the more specific provisions of Article 12 protecting the home, Art. 13 protecting documents and correspondence, and Art. 7 protecting personal integrity and

[5] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 5.
[6] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 8.
[7] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 8.
[8] Kokeš, Marian, 'Několik poznatků k problematice konkretních konfliktů mezi právem na informační sebeurčení a ochranou národní bezpečnosti v tzv. době internetové' in Šimíček, V. (eds), *Právo na Soukromí*, Brno: Mezinárodní politologický ústav Masarykovy university (2011), p. 122.
[9] Matejka, Jan, *Internet jako objekt práva: hledání rovnováhy autonomie a soukromí*, Praha: CZ.NIC (2013), p. 52.
[10] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 279.

personal privacy.[11] The fragmentation reflects different forms of privacy intrusions. It defines the right to privacy in its various forms and manifestations. However, the different dimensions of right to privacy in the constitution should not be understood as a closed and exhaustive list of what should be subsumed under protection of privacy and private life. It needs to be read while keeping in mind the general goal of securing the autonomy of the person and her freedom, which should be understood in its time-dependent integrality.[12]

The function of right to privacy is to secure a space for the development and realization of individual autonomy of personality and to secure the space of her freedom. Wagnerová, based on the constitutional structure of the right to privacy talks about four areas of the right to private life:

- Personal private sphere
- Family life and the right to enter marriage and found a family
- Spatial dimension of privacy, particularly the dwelling
- Secrecy of correspondence[13]

The personal private sphere is understood as negative right that is a freedom from interference. The private sphere here is mostly understood as personality rights (dignity, personal honour, good reputation, good name).[14] The main interest in privacy is by some understood as "not losing face".[15] There are two general areas of the personal private sphere: autonomous decisions about own physical and psychological integrity, and the right to protection from surveillance, guarding and following, including in public spaces, which, of course, is not altogether excluded.[16] Considering the amount of data that the state has collected before 1989 and still has, Wagnerová is surprised that no case has yet been dealt with by the Constitutional Court.[17] The standard is applied inconsistently and there is a weak protection of informational self-determination of individuals and a strong understanding for the needs of state power.[18]

The spatial dimension of privacy serves the purpose of not to being intruded upon in a (spatial) private sphere. It includes protection from unauthorized making of pictures or audio records from closed private space,[19] although the text of the provision itself seems narrower. The constitutional protection of dwelling is interpreted extensively as a spatially understood sphere of life which the

[11] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 280.
[12] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 281.
[13] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 282.
[14] I. US 453/03 – IV. US. 23/05.
[15] Sobek, Tomáš, 'Svoboda a soukromí' in Šimíček, V. (eds), *Právo na Soukromí*, Brno: Mezinárodní politologický ústav Masarykovy university (2011), p. 40.
[16] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 285.
[17] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 285.
[18] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 286.
[19] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 331.

person procured and excluded from public access, even if temporarily[20], and includes work spaces, business premises and to some extent even to open spaces.[21]

Secrecy of correspondence extends to communications and is flexible as to the technical means of mediation. It reflects the decision of the lawmaker to guarantee unitary right to protect private mediated communications.[22] It is explicitly considered to be part of the right to privacy.[23] Protection includes content and traffic data[24], and also privately kept documents, so it extend beyond protection of communication, although the commentaries strangely do not reflect this last point.

Article 7 of the Charter protects inviolability of the person, in the sense of physical inviolability, protecting from unlawful interferences with the body and mind of the person. The additional protection of privacy in general in the text of the Article is criticized as unsystematic, considering the existing protection of private life in Article 10.[25]

3. The Protection of Places

The regulations of the Code of Criminal Procedure protecting private places, especially the home reflect the requirements of Art. 12 of the Charter protecting the inviolability of the home, especially the principle of legality, by giving legal basis to the law enforcement authorities to interfere with the spatial protection of privacy. These include especially the search of homes or other premises under § 82 CPC, entry into residence under § 83c of the CPC or § 40 of the Police Act, and the surveillance of persons and items under § 158d of the CPC.

3.1 The Home

The law does not use the home, but the term dwelling. The dwelling is understood as a flat, other premises used as a residence and premises attached to them.[26] It is a broad notion emphasizing the factual situation of the premises being used for housing, regardless of the legal title of such use, e.g. ownership, lease, or sublease, residence based on family relations, a court decision placing the person in an institutional care facility, etc.[27] The actual use of space is relevant, even if a house is not divided into separate and individual apartments according to the land register, it can contain multiple "residences" of multiple persons from the criminal law point of view.[28] It includes not

[20] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 332.
[21] Pl. US 3/09.
[22] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) , p. 342.
[23] I. US. 3038/07.
[24] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) ,p. 342.
[25] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012) ,pp. 186-187.
[26] §82(1) CPC.
[27] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1112-13.
[28] IV. ÚS 2227/12.

only residential houses and apartments, but also residential cottages or cabins, hotels, hostels and lodging houses, including rooms rented temporarily for short periods of time, e.g. for recreational purposes[29], college dormitories, retirement homes, gardening cabins used for temporary residence, car trailers used for housing, houseboats etc.[30]

The most common forms, such as a house or an apartment are defined in Civil Law acts. Thus a house is an aboveground building connected solidly to the ground, used for housing people, however, unoccupied or abandoned houses do not fall into the scope.[31] The associated premises of a house may typically be e.g. an attic, a basement, an enclosed courtyard or a fenced garden adjacent to the house – but not other premises such as sheds, barns or summerhouses.[32] An apartment is understood as a room or a set of rooms located inside a building, which is designated for permanent housing by decision of a public authority. The associated premises of an apartment may include a lockable cellar[33], a pantry or an attic.[34] Generally, attached premises include spaces which the authorised person is entitled to use based on the same legal basis as for the residence itself.[35]

3.1.1 Search of Home

One of the ways in which the law enforcement authorities can interfere with the spatial privacy of the home is by conducting a house search based on § 82 and the following. The house search can be conducted, if there is a reasonable suspicion that "a person or property important for criminal proceedings" is present in the premises.

The property important for criminal proceedings are understood as items or documents which can serve as physical evidence according to § 112, items which can be objects of the penalty of forfeiture according to § 70 of the Criminal Code or confiscation under § 101 of the Criminal Code, but also computers, other electronic devices and data storage media, which can also be seized during a house search.[36]

Persons important for criminal proceedings are primarily suspects in investigation of criminal offences, or accused persons, however, if a person is subject to a detention order, warrant for arrest or order for delivery for the enforcement of prison sentence or for the enforcement of a protective measure associated with denial of personal freedom, or if a person must be presented for the purpose of criminal proceedings or must be detained, this fact does not justify a house search, but for entry into residence under § 83c of the CPC.[37] Such persons can also be witnesses or experts,

[29] cf. 5 Tz 37/88.
[30] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1112-13.
[31] cf. § 498/1 Civil Code
[32] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1112-13.
[33] cf. 6 To 49/92.
[34] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1113.
[35] 219/2010 Coll.
[36] IV. ÚS 2/02.
[37] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp.. 1113-14

but not solely for the purposes of delivering the summons to a witness or an expert known to be in the premises.[38]

The main *ex ante* condition of the house search is the reasonable suspicion that "a person or property important for criminal proceedings" is present in the premises. Thus, a house search may be conducted not only in the residence of a suspect or of an accused person, but also in the residence of a third person; however, this only applies provided that there are sufficiently justified circumstances that the searched property or person is located in the respective premises, which must be sufficiently specified in the search warrant.[39]

The house is subjected to a warrant requirement. The warrant must be issued by the presiding judge and in written form including a justification. It must contain an explicit order to perform the search, exact description of the place so that it cannot be mistaken with another object, determination of the scope of the search and the purpose of the search, and a reference to the duty of the owner or user to tolerate the search, advice regarding the duty to release property relevant from criminal proceedings.[40] Since the principle of proportionality applies, it is necessary to consider the particular circumstances of the situation in relation to the proportionality of the interference and the desired purpose. The criteria include e.g. the seriousness of the crime in question, circumstances which influenced the decision to issue the warrant, the availability of other evidence, the contents and the scope of the warrant, the character of the searched premises and the extent of the implications of the search for the reputation of the person in question.[41] The house search should be restricted to exceptional situations and the conditions in the legislation require restrictive interpretation.[42]

The house search must be limited to the residence of the person specified in the warrant. Conducting a house search in the residence of another person, albeit located in the same house as the residence of the specified person, is a breach of the inviolability of that person's residence.[43] On the other hand, the law enforcement authorities cannot be expected to specify precisely all the property important to criminal proceedings before the house search takes place since their existence and significance often becomes apparent only during the performance of the search.[44] Therefore, it suffices, if this property is exactly described and concretized in the subsequent report on the house search, whereas in the warrant for the house search it is sufficient to specify only certain categories of property or evidence. Similarly, it is impossible to determine with certainty if the property, which is found, is actually linked to the investigated crime, therefore, it is sufficient if there is a probability that the property will be important for the criminal proceedings.[45]

The justification requirement in the warrant cannot be fulfilled by formal references to the statutory provisions, but must include the factual circumstances, on which the grounds for the house search are based and specify why the relevant statutory provisions are fulfilled. It must also balance the

[38] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1113-14.
[39] IV. ÚS 2227/12.
[40] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1122.
[41] IV. ÚS 2227/12.
[42] I. ÚS 201/01.
[43] IV. ÚS 2227/12; I. ÚS 424/2000.
[44] cf. III. ÚS 1033/2007 and III. ÚS 1578/2007.
[45] III. ÚS 2097/12.

seriousness of the investigated criminal offence against the protected value which is the spatial dimension of privacy.[46] However, such flaws of the warrant are merely formal and do not result in the unlawfulness of the search and the inadmissibility of the evidence obtained, and may be remedied in further proceedings, e.g. by interrogating the persons, who took part in the house search or who conducted it, as witnesses, if it is then established that the material conditions were fulfilled.[47]

The actual execution of the house search is only permitted after the person whose residence is to be searched did not voluntarily release the sought property, except if the matter cannot be delayed[48] due to danger of destruction of the evidence[49] and interrogation cannot be conducted immediately.[50] The house search also cannot be performed, if the reasons for it have been eliminated, e.g. by finding that the sought property has been destroyed or is located somewhere else, or that the person important for criminal proceedings is hiding somewhere else, or has died etc.[51] If the person who was subject to a house search claims that the house search was conducted unlawfully it is a duty of the court to deal with the person's argumentation sufficiently, a mere general statement, that the court did not find any unlawful aspects in the house search, cannot be considered as sufficient. If the court concludes that the search was conducted unlawfully, it must subsequently also deal with the question of the admissibility of evidence obtained during the search.[52] However, a person subject to a house search is obligated to tolerate it[53] without creating obstacles[54] and the authorities carrying it out are permitted to overcome their resistance, if necessary. The overcoming of resistance can take form of a disciplinary fine, but also more intensive means such as holds and grips, a baton, handcuffs, or use of lockpicks, cutting padlocks, breaking bars, etc. It is always important to follow the principle of proportionality by using the mildest possible ways and measures which are sufficient to overcome the resistance.[55]

The search is performed by a police authority, upon the order of a judge. This does not preclude the judge to also personally attend the search. In preliminary proceedings, the public prosecutor can also perform the search.[56] During the search, the warrant shall be served to the person whose residence it concerns, and if this is not possible, it must be done no later than 24 hours after it has become possible.[57] The person who is the user of the residence or any adult member of the household, including next of kin who does not live in the dwelling, must be allowed to be present during the search.[58] At the same time, a person not involved in the matter shall be taken along for the house search. This person cannot be the victim or a person having a relation to one of the law

[46] II. ÚS 3073/10.
[47] 15 Tdo 510/2013.
[48] § 84 CPC.
[49] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1143.
[50] § 84 CPC.
[51] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1142.
[52] III. ÚS 183/03.
[53] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1149.
[54] A created obstacle is understood as everything put in place with the purpose of preventing the entrance into the residence, especially locks, bars, fences, electronic security devices, watchdogs etc.; in practice, also guarding conducted by a private security service is considered a created obstacle.
[55] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1150.
[56] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1123.
[57] § 83/1 CPC.
[58] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1146.

enforcement bodies involved in the matter, however, according to the opinion of the Supreme Public Prosecutor's office, it can be a police, or other, authority which is not taking part in the ongoing proceedings.[59] This interpretation is seen as very problematic in literature and doubts are raised whether a police officer can be a neutral witness in a dispute involving their colleagues.[60]

Following the house search, the authority performing it must write a written report containing the list of found property, and may include photographs or video documenting the search. However, the video cannot replace a written report, only supplement it.[61] If it was necessary to overcome resistance or an obstacle, this must also be mentioned in the transcript.[62] Flaws in the report, however, do not render the house search unlawful and the evidence obtained is admissible, as long as it is apparent from other evidence that the search was taken lawfully.[63] The person whose property was searched shall also immediately, or at the latest within 24 hours, receive a written confirmation of the results of the search and items that were seized or released.[64]

3.1.2 Other Physical Intrusions in the Home

The police authorities can enter into private residences for purposes other than execution of a search according to § 83c of the CPC. Such entry into a residence must follow a purpose different from a house search[65], specifically the elimination of immediate danger, or the presence of a person subject to a detention order, warrant for arrest, or for enforcement of protective measures associated with deprivation of liberty, or to secure a person whose presence is required for the purposes of criminal proceedings.[66]

Immediate danger, which is one of the permissible goal of entering into residences must be a matter non-amendable to delay, and making the entry necessary for the protection of human life or health, or to protect other rights and freedoms, or to avert a serious threat to public safety and public order, for example risks of explosions, fire, danger to hostages, etc.[67]

When entering for these purposes, the police may not perform any other actions other than those necessary. Particularly, the entry shall not be used to bypass the strict conditions set out for house searches and the possibilities regarding discovery and seizure of evidence are very limited during such entries. Evidence may be discovered and seized only if it is obtained in immediate relation to or connection with the actions taken in order to eliminate the immediate danger and only if it is obtained before the immediate danger is eliminated (e.g. when searching for an explosive hidden inside an apartment, the police proceeds the same way as during a house search or a crime scene examination, and can thus seize the evidence they discover, but after the explosive is found, the

[59] Explanatory opinion No. 4/1998 Coll. of Explanatory Opinions of the Supreme Public Prosecutor's Office.
[60] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1146.
[61] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1147.
[62] § 85a/2 CPC.
[63] Supreme Court Decision 5 Tz 32/2000 from 29 March 2000.
[64] § 85/4 CPC.
[65] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1139.
[66] § 83c(3) CPC.
[67] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1139.

police can continue searching for and seizing evidence only after fulfilling the conditions for a house search.[68]

The *ex ante* conditions for entry into residence are much less strict than those for a house search, most notably neither a warrant nor prior authorisation are required, nor any prior interrogation of the person using the residence to allow voluntary cooperation.[69] The only condition is the existence for one of the grounds for entry. Similarly to a house search, the person is obliged to tolerate the entry, otherwise the authorities can use measures to overcome the resistance.

The entitlement to entry into residence is given to a police authority. The requirement for the presence of the person using the residence and a person not involved in the matter applies to the entry into residence in the same way as it does during house search.[70] This does not apply, if the entry could endanger their life or health.[71]

The *ex post* requirements for the entry into residence are equivalent to the house search. This means, a report must be written and written confirmation given to the person using the residence.

Entry into residence is also permitted under the Police Act, under very similar conditions. However, in this case the entering is not an act of criminal proceedings, so in cases where the police is revealing, examining and investigating crimes, they should use § 83c of the CPC as legal basis for entering.[72] The provision of the Police Act does not cover situations where the entry into residence is necessary in order to "protect other rights and freedoms" and is confined to situations where the entry is necessary to protect human life or health, or to avert a serious threat to public order and safety.[73]

The law enforcement authorities are also permitted to carry out evidence in the residence under § 104a and foll. namely reconstruction, recognition, on-site verification and experiments, if the nature of the evidentiary measure makes it impossible to carry it out in another place. This is for example the case of a reconstruction of a murder scene, of recognition of a stolen art piece.[74] Carrying out evidence in a residence is subject to the same conditions as a house search.

3.1.3 Surveillance of Home

Surveillance of persons and items is one of three types of the means of intelligence (§ 158b CPC) which may be used in criminal proceedings and is regulated in § 158d of the CPC. The only purpose for such measures allowed by law is the obtaining of facts relevant to the criminal proceedings.[75] This should be understood as information which leads to the discovery of crimes, discovery of their perpetrators and preventing crimes. The character of this information is usually as implied by § 89/1, which defines what must be proved by evidence in criminal proceedings, but

[68] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1141.
[69] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1139.
[70] § 85/5 CPC.
[71] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1148.
[72] Commentary (ZP), p. 156.
[73] Commentary (ZP), p. 155.
[74] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1164.
[75] § 158b/2 of the CPC.

it may also consist of information about the location or existence of physical evidence, about the location of the hideout of the perpetrator, etc.[76] Only such records from the means of intelligence that were obtained lawfully may be used as evidence in further proceedings.[77]

The use of means of intelligence generally consists of continuous obtaining, collecting, examining, or analyzing operational information, aimed at the protection of interests protected by the legislation.[78] The relevant fact are obtained by using technical or other means (§ 158d/1). Technical means include all means which enable the obtaining of information remotely (e.g. binoculars, devices using infrared rays or X-rays, devices enabling night vision etc.), spatial information interceptions, microphones and cameras placed inside a residence, devices used for viewing the contents of correspondence without opening the envelope, etc.[79] Other means usually denote physical surveillance or observation of the persons (their movement or communication) or items (their movement) and how they are manipulated by persons.[80]

Obviously, surveillance of persons and items does not necessarily have to take place in a person's residence and therefore interfere with the inviolability of the residence – in principle, there are three kinds of surveillance distinguished by the CPC:[81] general surveillance where records are not made (§ 158d/1), surveillance with making of records (§ 158d/2) and surveillance which involves interference with constitutionally protected rights and freedom, including the inviolability of the home (§ 158d/3). For the purposes of this section, only the third type will be discussed.

The provision of § 158d/9 explicitly sets out that operators of telecommunications, their employees, and other persons who participate in the operation of telecommunications activity, as well as the post office or the person performing the transport of the consignments, are obligated to provide the police authority performing the surveillance with the necessary assistance free of charge and in accordance with their instructions. They may not claim the obligation of professional confidentiality imposed by special Acts. The provision of § 158d/10 explicitly deals with the possibility of using the records obtained during the surveillance of person or items in another criminal matter (i.e. in proceedings concerned with a different crime). This is possible only in cases where either the new criminal matter consists of an intentional criminal offence, or where the person, whose rights and freedoms were interfered with by the surveillance, gives express consent with it.

The surveillance of the home under § 158d/3 may only be conducted by a police authority, which is authorised to do so by the Police President or the competent minister. Only certain police departments are authorised to use this power.[82] This type of surveillance may only be conducted with prior written authorisation of a judge. In practice, the petition for the authorisation is usually made by the public prosecutor, but it is possible for the police authority to make the petition directly to the judge.[83] The petition must be in written form and must contain information about

[76] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1992.
[77] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1993-94.
[78] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1985-86.
[79] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[80] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.
[81] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[82] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1988.
[83] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 2006-08.

the suspicion of criminal activity[84], which must be concrete and specific, i.e. describe the suspicion that the person who should be observed has a concrete link to a concrete criminal activity, and the reasons why the surveillance is necessary. It is not sufficient to merely state that there is a suspicion of an intentional criminal offence.[85] The law requires proper justification of why it is necessary to make audio, video, or other records, and why it is necessary to interfere with a person's residence, correspondence, or other documents. The petition must also include the necessary information about the persons or items which should be observed.[86]

The authorisation must contain information about the duration of the surveillance, which must not be longer than 6 months, but may be later extended for another period of 6 months, even repeatedly.[87] However, the extensions are only possible where the initial suspicion is strengthening or becoming increasingly confirmed, or at least lasting.[88]

Authorisation cannot be obtained *ex post* even in urgent circumstances. The only exception is a situation where the person whose rights and freedoms are to be interfered with gives express consent to the surveillance.[89] The person, whose rights and freedoms are to be interfered with by the surveillance" is understood as the person who should be observed or the person who lawfully owns or possesses the item which should be observed. Typically, this concerns situations where a person is blackmailed and gives express consent with being observed, or with his or her items being observed (e.g. the ransom money) so that the perpetrators can be discovered.[90] The consent can be withdrawn at any time and the surveillance must stop immediately.

Surveillance can only be conducted in proceedings on an intentional criminal offence. An intentional criminal offence is an offence where intent is required by TZ, therefore it cannot be committed out of negligence.[91] Principle of subsidiarity must also be followed, that is, the means of intelligence may only be used if the desired purpose cannot be achieved in any other way or if its achievement would otherwise be significantly more difficult. Therefore, when permitting the use of means of intelligence, as well as while conducting them, there must not only be a reasonable suspicion of an intentional criminal offence, but it must also always be considered whether such suspicion may not be examined using different means of evidence provided by the law.[92] The surveillance is also bound by the principles of expeditiousness,. economy, and the efficiency of the criminal proceedings.[93]

Given that means of intelligence are used secretly, are conducted by specialized police departments and in a specific way, their use always constitutes a substantial intervention with the fundamental rights and freedoms of the persons who are subject to them. Therefore, they may only be used to the necessary extent and their intensity must be kept as low as possible.[94] If the police finds that

[84] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 2006-08.
[85] II. ÚS 2806/08.
[86] § 158d/4 CPC.
[87] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 2006-08.
[88] II. ÚS 2806/08; IV. ÚS 1235/09.
[89] § 158d/6 CPC.
[90] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2009.
[91] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1990.
[92] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1992-93.
[93] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1992-93.
[94] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1993.

the suspect is communicating with their defence council, surveillance must immediately stop and all records must be destroyed.

The provisions of § 158d/3 also allows entry into residence for the purposes of planting technical equipment, however, no actions other than those required for planting equipment can be performed, so the legal requirements of other institutes are not bypassed.[95]

If the records of surveillance are to be used as evidence, a transcript must be made and include information about the duration of the surveillance, the places or premises where the surveillance was conducted, the character of the record (audio, video, or other) and a description of the activities of the observed person (or of the position of the observed item) at the time when the record was made.[96] If no fact relevant for the criminal proceedings are found during surveillance, all records must be destroyed and the manner in which they are destroyed must be documented.[97]

The information obtained during surveillance shall not be used by anyone for any purpose other than the criminal proceedings.[98]

3.2 Other non-residential (semi-) closed places

Other premises and land are also protected from arbitrary interferences of the state authorities. Other premises are defined as non-residential premises which are not publicly accessible. This notion includes e.g. work spaces, offices, warehouses, commercial facilities, detached garages which are not parts of houses or apartments, vehicles (with the exception of trailers used for housing), boats and ships (with the exception of houseboats).[99] Land is defined as land which is not publicly accessible. Only land which has no buildings is covered here, since land with buildings on is covered by either the dwelling or other premises.[100] The Constitutional Court has established, the constitutional protection (mainly Art. 12 of the Charter) is provided to other premises and land as well, but only if the borders of the premises or land, as well as the identity of the person who is their lawful user, are recognizable for other persons, and only if the freedom to use the premises or land is exercised lawfully.[101]

The provisions on search, entry into residences, carrying out evidence and surveillance discussed in the previous sections on home, apply equally to other premises and land. Prior to 2012, the ex ante conditions for the search of other premises and land were very different from the ex ante conditions for the house search, which was the result of a narrower concept of the term "residence", meaning that there was a relatively sharp distinction between the residence (as the place where people's personal life takes place) and other places and premises. The degree of protection given to the residence was significantly higher. however, the Constitutional Court concluded that the aforementioned approach was wrong and the provision of § 83a was unconstitutional since in

[95] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2007.
[96] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 2009-10.
[97] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2010.
[98] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 161-62.
[99] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1114-15
[100] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1114/
[101] IV. ÚS 2228/09.

today's age, it is nearly impossible to distinguish exactly between places where a person's personal life takes place and where his or her professional life takes place, therefore, it is against the very purpose of the human right to private life to differentiate strictly between the residence and other premises and land.[102]

Nowadays, the only exception is the provision of § 40/2/c of the Police Act, which includes one extra reason for entry into other premises and land, which does not apply to entry into residence, specifically a reasonable suspicion that there is an abused animal. This indicates that the lawmakers did not consider animal abuse to be serious enough in all cases to serve as a reason for entry into a person's residence. However, if the animal in question is abused in a particularly cruel or painful manner, or in a cruel or painful manner that is publicly or locally accessible to the public (cf. § 302 Criminal Code), or if the necessary care for an animal is neglected, causing them permanent consequences to health or death (cf. § 303 Criminal Code), the behaviour gives rise to criminal liability, thus making it possible for the policeman to enter into a residence (§ 40/1 Police Act) as committing a crime must be considered a serious threat to public order.

3.2.1 Public Places

The term publicly accessible places is only used in the Police Act, but it is not defined there. The literature merely states that the relevant provision shall not apply to places which are not public and are thus private.[103] Under § 62 of the Police Act, the police may, if it is necessary for the performance of its tasks, make audio, video, or other records of people and items located in publicly accessible places, and audio, video, or other records of the performance of an operation. This provision will typically be used when making records in publicly accessible places in order to prevent threats to public order and safety (e.g. fixed cameras), in order to obtain findings and materials important for the initiation of criminal proceedings, or even evidence, in order to discover safety threats in certain places or areas, in order to maintain the safety of persons and objects, in order to document the use of means of intelligence, or in order to record police operations or interventions conducted in public (e.g. roadside checks).[104]

The police is allowed to make records under the provision of § 62 without any prior authorization or consent, and it must be strictly distinguished from the surveillance of persons or items under the CPC. However, since even non-targeting monitoring can capture concrete criminal offences, the use of such recordings in criminal proceedings cannot be precluded.[105] However, if there are sufficient grounds to start criminal proceedings, the police must first draw up the record on the commencement of the criminal proceedings, and then make the records under the regime of § 158d of the CPC.[106]

It is of no relevance whether the records are made visibly or secretly. Police can make records in publicly accessible places where no person is present without any legal restrictions.[107] They can

[102] II. ÚS 1414/07.
[103] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), pp. 253-54.
[104] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), p. 254.
[105] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), p. 256-57.
[106] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), pp. 256-57
[107] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), pp. 255-56

also make records related to a person without their consent, as long as these records are used for administrative purposes in accordance with the law.[108] In general the provisions regarding must be respected, therefore, the factors which must be considered are mainly the extent of the interference with the rights of the persons involved in the records, and the importance of the police task for whose performance the records are used, the making of the records must be necessary for the performance of the concrete police task.[109] If there are permanent automatic technical systems installed for the purpose of making records (as described above), the police shall publish the information about their installation.[110] Furthermore, all records must be secured against unauthorized access, changes, destruction, loss, theft, misuse, or other unauthorized processing.[111]

3.3 Computers and cell phones

Computers, other electronic devices and data storage media may be considered property important for criminal proceedings and may be seized during a house search. This also applies in cases where such devices contain not only information relevant for the criminal proceedings, but also other unrelated information, even if this other unrelated information is subject to a duty of confidentiality (e.g. the confidentiality of the attorney).[112] This also applies to such items that are carried on, or with, a person as tangible property.

The relevant provisions of the Act on Criminal Procedure contain no specific rules or requirements which would apply to smartphones, laptops or other electronic devices. Therefore, these items are treated the same way as any other items, particularly, they can be seized by the respective authorities provided that they are „property important to criminal proceedings", which obviously applies not only physically to the device itself (e.g. a smartphone which contains fingerprints) but also to the data stored in that device.

An explanatory opinion issues by the Supreme Prosecutor's Office in 2014 deals in detail with the searches of the contents of seized electronic devices, and also clearly confirms that these items can be not only seized during a personal search, but also searched afterwards.[113]

Having said that, it should be noted that according to some Czech case-law, the searches of seized electronic devices should always be done by professionals, i.e. experts in the field of criminalistics, with computer expertise. The Constitutional Court of the Czech Republic stated that in case such devices were searched by a person lacking the necessary knowledge and skills, a substantial risk would arise that the data stored on that device might be modified, damaged or lost. Therefore, during the (personal) search, the authorities should only seize the device, and leave the subsequent examination of the data stored in it to computer experts.[114]

[108] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), pp. 253-54.
[109] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), p. 256.
[110] Vangeli, Benedikt, *Zákon o policii České republiky. Komentář*, 2nd edition, C.H. Beck (2014), p. 258.
[111] § 60/2 Police Act.
[112] IV. ÚS 2/02.
[113] Explanatory Opinion No. 1 SL 760/2014 of the Supreme Public Prosecutor's Office, p. 4.
[114] Decision No. IV. ÚS 2/02 of 28 March 2002.

As for the extent to which the seized devices can be searched, there are, similarly to the extent of the personal search itself, no precise or exact rules set out by the legislation, literature or case-law. Therefore, we come to the conclusion that the authorities are in principle allowed to search all the contents of the device seized during a personal search, given that conditions similar to the ones for the personal search (as mentioned above) are met, i.e. mainly that there is a reasonable suspicion that the device contains property (information) important to criminal proceedings. However, this does not give the authorities fully free access, since the principles of proportionality and subsidiarity must be followed and the interference into the private life of the person whose information is contained in the device must be proportionate to the gravity of the offence and the desired purpose cannot be achieved in a less intrusive way.

Further limitations exist to this rule. As already mentioned, the Supreme Public Prosecutor's Office issued the Explanatory Opinion No. 1 SL 760/2014 (hereinafter referred to as „Explanatory Opinion"), which responds to the lack of case-law and other sources of authoritative interpretation regarding the extent and scope of the searches of seized electronic devices. The Explanatory Opinion mainly focuses on the distinction and differences in the approach regarding, on one side, the data which is already stored in the device at the moment it is seized by the authorities, and, on the other side, the data which is delivered to the device (e.g. via SMS or MMS messages or, nowadays more typically, via various applications connected to the internet) after it has been seized. The elementary idea presented by the Supreme Public Prosecutor's Office is that all data which is stored in the seized device at the moment of its seizure, i.e. not only files of any kind, but also all the SMS messages, e-mails, WhatsApp messages and so on – can be searched, read and analysed by the authorities, without the need for any special order or permission issued by the (presiding) judge. This approach is based on the assumption that the person, whose device was seized, was able to access all this data and all these messages himself or herself before the device was seized, and was thus able to decide which of them he or she wants to keep on the device and which he or she wants to delete. Therefore, the contents of the device at the moment of its seizure depend on the will of the person in question.[115] This is perhaps one presumption too far, since people do not usually consider the risk of their devices falling into the hands of the authorities when considering what data they keep stored on the device.

However, in practice, after a device is seized by the authorities, it often happens that new data or new messages are afterwards delivered to that device. This situation is very different from the one described in the previous paragraph and it cannot be assumed that the person in question was able to access this data or these messages, and therefore these contents of the device no longer depend on his or her will. This leads to different requirements binding the authorities who wish to search and analyse the contents of this data and these messages. They can no longer do so without further authorisation. Instead, they have to obtain a prior injunction from the (presiding) judge for the „intercepting and recording of communications" according to the Section 88 of the Act on Criminal Procedure, i.e. to use the same procedure as if the authorities wanted to intercept and record, for instance, telephone calls of the person in question.[116]

With regards to the contents of the Explanatory Opinion, though, it must of course be noted that, although it certainly enjoys a large degree of authority, it is formally not binding on the courts or

[115] Explanatory Opinion No. 1 SL 760/2014 of the Supreme Public Prosecutor's Office, p. 7
[116] Explanatory Opinion No. 1 SL 760/2014 of the Supreme Public Prosecutor's Office, p. 8

any other public authorities. The Supreme Public Prosecutor himself states in the text of the Explanatory Opinion that it is, given the current lack of case-law, impossible to predict how the courts will deal with the relevant questions. Therefore, the answers provided above should not be taken as definitive.

Lastly, the issue of remote covert searches, by means of so-called police hacking, has recently been unearthed in the Czech societal debate. Although the CPC does not provide any clear legal basis for such measures, the Czech police's Unit of Special Activities, which technically supports various surveillance measures of the police, has been named in the leaked documents from the Hacking Team company as one of the clients of the company. Based on these documents, it seems that the Czech police has purchased software for remote access to computer systems.[117] Reports by Czech scholars indicate that the legal basis the Czech police uses for these purposes is the general provision of surveillance of persons and items under § 158d/3, which they provision seems highly inadequate to provide legal basis for such a potentially intrusive measure.[118] While it must be ordered by a judge, it can be ordered for any intentional criminal offence and a very long time period. Furthermore, use of such measures requires legal framework on the technical guarantees ensuring that the security of computer systems that are accessed by the police is not compromised and made vulnerable to attacks by malicious actors.

3.4 Cloud Repositories

Searches of cloud repositories of data potentially allow the law enforcement to avoid stricter requirements that may be in place for covert interceptions of data transfers, or searches of home. The data, which in the past would be saved on the computer protected by the dwelling might now be stored in cloud repositories, thus giving the police a new gateway to access it by going directly to the repository, avoiding the need for a house search. While this is a relatively new development and largely untested in courts, the Constitutional Court has decided on a similar issue related to the question of spatial protection extending to data stored in the cloud.

The case did not concern the protection of the home, but the protection of premises in which an attorney conducts their activities. While different, the provision concerns spatial protection and thus might offer interesting insights. In Czech law, the premises of an attorney cannot be searched, except for a very restricted set of circumstances. In the case at hand, the police avoided the strict limitations by accessing the data it sought from the cloud repository where they were stored, avoiding the need to search the physical premises of the attorney. Thus, the police created a double standard for the same data, both covered by the confidentiality of the attorney, on the basis of their physical occurrence or absence in the protected space.[119] The Constitutional Court disagreed with such conduct. The provision protecting the premises of an attorney aim to protect the duty of confidentiality bound to the profession and to protect the rights of their clients. Therefore, the protection cannot be limited to the physical spaces, but also to other places in which the attorney

[117] See e.g. http://www.cybersec.sk/spravy/politika/kontroverzny-sledovaci-softver-nakupovalo-aj-cesko-sefa-utvaru-si-predvolala-parlamentna-komisia/.

[118] Polčák, Radim et al., 'Czech Republic. Slovakia' in Sieber, Ulrich, Nicolas von zur Mühlen (eds.), *Access to Telecommunication Data in Criminal Justice: A Comparative Analysis of European Legal Orders*, Berlin: Duncher&Humblot (2016), p. 396-397.

[119] I. ÚS 2878/14, 25.

stores, processes and uses information about the clients. This can include electronic data storage facilities, whether they are in the premises of the attorney or elsewhere, including hosting or cloud services.[120] Double standard of treatment of the same information has been labelled as illogical by the Court.[121] In interpretation and application of statutes, the purpose and meaning of constitutionally protected rights and freedoms must always be guiding.[122]

It is not clear whether the same reasoning could apply to the protection of data relating to private life in the home that is physically stored outside of home. Arguably, the purpose and meaning of the constitutionally protected inviolability of the home should extend the protection afforded to the home also to data in cloud repositories, if it relates to private life in the home. To some extent, the issue is less relevant, since other premises are afforded equivalent protection to residences. However, the status of the person whose data is at stake changes significantly depending on where the police accesses the data. If they do not access it during a house search, that person does not have the right to be present or to receive a written report of the search, thus being deprived of the procedural rights they would enjoy, if the data was confined in their home.

[120] I. ÚS 2878/14, 25.
[121] I. ÚS 2878/14, 27.
[122] I. ÚS 2878/14, 28.

4. The protection of persons

4.1 Personal Searches

Personal searches are regulated in § 82[123], 83b[124], 84[125], 85[126] and 85a[127] of the CPC. Personal search can serve two purposes. Either it is conducted with the aim of potential discovery and seizure of „property important to criminal proceedings", or it is justified by the protection of life and health by permitting searches aimed at discovering and seizing „a weapon or other property that could endanger their own or someone else's life or health". Due to its higher relevance to

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[123] ***Section 82***
Reasons for House and Personal Searches and Search of Other Premises and Land
(…)
(3) Personal searches may be performed if there is a reasonable suspicion that someone is carrying property important to criminal proceedings.
(4) A detained person and a person who was arrested or taken into custody may even be inspected if there is a suspicion that they are in possession of a weapon or other property that could endanger their own or someone else's life or health.

[124] ***Section 83b***
Personal Search Warrant
(1) The presiding judge, and in the preliminary hearing, the public prosecutor, or with their approval, the police authority, are entitled to warrant a personal search.
(2) If the search is not performed by an authority that warranted it, it is carried out, on their order, by the police authority.
(3) Personal searches are always conducted by a person of the same sex.
(4) The police authority performs a personal search without the warrant or approval referred to in Subsection 1 only if the warrant or approval cannot be achieved in advance and the matter cannot be delayed, or if the person in question is caught in the act, or it is a person for whom a warrant for arrest was issued. The personal search may also be conducted without a warrant or approval in the cases referred to in Section 82 Subsection 4.

[125] ***Section 84***
Prior Interrogation
The execution of house or personal searches, or a search of other premises and land, is permitted only after the prior interrogation of those that are to be subjected to such actions and only if the interrogation did not achieve a voluntary release of the sought property or the elimination of its reasons that led to this action. Prior interrogation is not necessary if the matter cannot be delayed and interrogation cannot be conducted immediately.

[126] ***Section 85***
(…)
(2) A person that is not involved in the matter shall be taken along for the house and personal search. The authority performing the search must prove its authority.
(3) The transcript on the search should also include whether compliance with the provisions of the prior interrogation was fulfilled or an indication of the reasons for their non-compliance. If the release or seizure of property occurred during the search, information referred to in Section 79 Subsection 5 shall be included in the transcript.
(4) The authority that carried out the action shall immediately, and if that is not possible, within 24 hours, issue the person who was subject to the search a written confirmation of the results of the action, as well as on the acquisition of the property that was released or removed, or a copy of the transcript.

[127] ***Section 85a***
(1) A person who is subject to a house search, search of other premises and land, or a personal search, or an entry into their residence, is obligated to tolerate such an action.
(2) If a person who is subject to the action referred to in Subsection 1 does not permit the performance of such action, the authorities carrying out the action are entitled to overcome the resistance of such person or the obstacles they create after previous futile attempts. This fact shall be recorded in the transcript (Section 85 Subsection 3).

privacy protection, only the first type will be discussed further in this report. The term 'property important to criminal proceedings' includes items and documents which can serve as evidence, and items which are subject to forfeiture, confiscation, including electronic devices such as smartphones or laptops.[128]

Before the search can take place, the existence of reasonable suspicion that the person is carrying items described above must be established. There is lack of clarity in interpreting the reasonable suspicion standard. There is some doubt expressed in literature whether it is necessary for the police authority to have a concrete and exact idea of the items they are searching for, or whether a more vague idea is sufficient.[129]

Generally, the personal search is also conditioned by an existence of a search warrant issued by the presiding judge during trial, or by the public prosecutor in the preliminary proceedings. In the investigation stage and with the prosecutor's approval, the warrant can also be issued by a police authority. The warrant must contain the order for the competent authority to conduct the search, the exact specification of the searched person, the purpose of the search and must emphasize the duty of the searched person to release property important to criminal proceedings with a notice that the property will otherwise be seized. The formal requirements of such warrant are not set out by the Act, however, it is considered highly preferable to issue it in writing, which is also done in practice in the vast majority of cases.[130] There are a number of exceptions from the warrant requirement. One exception applies to situations when warrant cannot be obtained in advance due to the risk of that the property may be damaged or destroyed. The impossibility of obtaining a warrant means not only the impossibility of a written warrant, but it must also be impossible to obtain it by phone. [131] The warrant is also not required *ex ante*, if the person was caught in the act or there is a warrant issued for the person.

Prior to the search, the person must be interrogated in order to achieve voluntary release of the property. Only, if the property is not voluntarily released, can the search take place. The search should be avoided, if possible, since it is a substantial limitation of the personal integrity of the person protected by Art. 7 of the Charter and the person should be given the opportunity to cooperate voluntarily. [132] In some cases, however, prior interrogation is not necessary, e.g. if the person is under influence of drugs and non-responsive.

For ethical, psychological and health reasons, the search shall always be conducted by a person of the same gender. Neither the law, nor the available literature, do not mention exceptions from the requirement, suggesting it is absolute.[133] This might prove difficult in practice, especially in urgent cases. The same is true for the requirement that the authority must always take a person not involved in the matter along to be present at the search to provide an unbiased witness.

[128] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1015.
[129] Tomáš Sokol, „Problematika domovní prohlídky advokáta", Česká advokátní komora, accessed November 10, 2015, http://www.cak.cz/scripts/detail.php?id=13329
[130] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1136.
[131] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1137.
[132] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1144.
[133] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1137.

The conduct of the search must be documented in writing and the searched person must receive a written confirmation of the results of the search within 24 hours of the search.

What remains somewhat unclear cased on available sources is the extent of the search that is permissible, in particular, what can be searched and how thoroughly. The law does not define personal searches and only provides the conditions and requirements of searches. The leading commentary also does not provide further guidance. Based on criminalistics handbooks, the search includes primarily the search of clothes, and subsequently of the body, as well as the found items and belongings. [134]

4.2 Protection from interference with the mind

4.2.1 Protection from interference with personal choices

4.2.1.1 The right to counsel

The right of the accused person to counsel in criminal proceedings is one of the aspects of the broader right to defence, and is thus guaranteed by the Charter of Fundamental Rights and Freedoms in Art. 40. According to § 2/13 of the CPC, the person against whom criminal proceedings have been initiated must be instructed in every stage of the proceedings in an appropriate and comprehensible manner as to their rights granting them the full use of defence and that they may choose their defence counsel. The right to defence also belongs to a suspect against whom criminal proceeding may be initiated.[135]

The right to defence consists of four aspects: the right to personal defence, right to choose a defence counsel, necessary defence and the principle that law enforcement authorities must be mindful of accused person's right to defence.[136] It is a duty of the law enforcement authorities to inform and instruct the person about their right to defence, and thus enable them to exercise the right to defence effectively.

The accused person has the right to choose the defence counsel and to confer with them during actions undertaken by law enforcement authorities. Through the participation of the defence counsel in the criminal proceedings, the position of the accused person is strengthened and improved, as it compensates the disadvantage that a typical accused person is usually not aware of their rights, or is not able to use them effectively.[137] However, they may not consult with their defence counsel on how to respond to a question once it has been asked.[138] At the same time, the accused person can never be forced to answer a question.[139]

The accused person can request the presence of their counsel during interrogations and the defence counsel can participate in other actions during preliminary proceedings.[140] If the accused proves that they do not have sufficient funds to pay the cost of the defence counsel, the judge shall decide

[134] Jan Chmelík (eds.), *Rukověť kriminalistiky*, Plzeň: Aleš Čeněk (2005), p. 134.
[135] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 54.
[136] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 54-55.
[137] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. p. 434.
[138] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 410.
[139] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 410.
[140] § 165 CPC.

whether they are entitled to the defence free of charge or at a reduced rate. The judge can decide this even without application by the accused. [141] In a number of cases, the accused person must be represented by a defence counsel.[142]

§ 165/3 specifies the duty of the police authority related to the notification of the defence counsel about the investigative actions. As a general rule, if the defence counsel notifies the police authority that they want to participate in the act of investigation referred to in § 165/2, or if the action involves the interrogation of a witness who has the right to refuse to testify, the police authority is obliged to notify the defence counsel on the kind of action, time, and place of the performance without undue delay, except where the performance of the action cannot be deferred and the notification of the defence counsel cannot be achieved.

Another important attribute of the right to counsel is the confidentiality of the communication between the accused person and his or her defence counsel. § 88/1 explicitly states that if the police authority finds during the interception and recording of telecommunications that the accused person has communicated with their defence counsel, they are obliged to immediately destroy the records and not to use the information they learned in this context in any way. The interception and recording of communications conducted on the communication device of the defence counsel in relation to the accused person for whom he or she performs the defence, is impermissible in any case, and may therefore not be ordered.[143] If the interception and recording of communications takes place on the communication device of the accused person, but the police authority discovers that they communicated with his or her defence counsel, they are obliged to destroy the records immediately, and may not use the obtained information in any way.[144]

Similarly, § 158d/1 provides that if the police authority finds during the surveillance of persons that the accused person communicates with his or her defence counsel, they are required to immediately destroy the records with the content of the communication, and the information that they learned in this context they are not allowed to use in any way. The notion entails any type of communication between the accused person and his or her defence counsel, i.e. not only a face-to-face conversation, but also a telephone call from which only the replies of one person are heard, or written communication delivered by a messenger.[145] The information in this context is understood to include the context, e.g. the place where the accused person and the attorney met, the way they communicated, the concealment of the communication.[146]

For these purposes, the police authority must be immediately informed who is the defence counsel of the accused person.[147]

As an exception from the general confidentiality, it is possible to conduct surveillance of an attorney who is accused of a crime committed against the person to whom they provided legal

[141] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 413.
[142] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 443.
[143] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1206.
[144] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1206.
[145] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.
[146] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.
[147] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.

services as a defence counsel before. In such cases, the attorney is not subject to surveillance as the defence counsel of such person, but as a person who is accused of a crime themselves.[148]

Special requirements also exist for house searches and searches of premises of an attorney where they perform the practice of law and if there may be documents that contain facts which are subject to the confidentiality of the attorney. Documents include electronic files stored in various ways.[149] However, this cannot be interpreted to provide space for abuse to commit criminal offences in such premises.[150] The search is permissible, however, the authority conducting the search must seek the cooperation of the Czech Bar Association and is entitled to peruse the contents of these documents only in the presence and with the consent of the Chamber representative, who is appointed from among its employees, or among attorneys by the President of the Chamber. If the Chamber representative refuses to grant the consent, the documents must be secured so that their contents cannot be perused by anyone or destroyed or damaged. The consent of the Chamber representative may be replaced, upon a petition of the authority that ordered the house search (i.e. the judge who issued the warrant), by the decision of a judge of the court that is the closest higher court in relation to the court whose judge is entitled to issue a house search warrant.[151] The judge must individually examine each document carefully and consider whether it contains information which is subject to the confidentiality of the attorney or whether they can be given to the authorities involved in the criminal proceedings and potentially used as evidence in further proceedings.[152]

4.2.1.2 The right against self-incrimination

The constitutional basis of the right against self-incrimination can be derived from the provisions of Art. 37 and Art. 40 of the Charter. In the CPC, the elements of this right can be seen in the provisions of § 33/1 (the right of the accused person to remain silent), § 100/2,3 (the right of the witness to refuse to testify), and § 158/8 (the right to refuse to provide an explanation). § 33/1 states in the first sentence that the accused person is not obliged to testify on the facts which he or she is accused of, and the evidence related to them. § 100/2 states that a witness is entitled to refuse to testify if the testimony would thereby cause the possibility of their own criminal prosecution, or that of their direct relative, their siblings, adoptive parents, adopted child, spouse or partner or other persons in the family or similar relationship, whose detriment would rightly be felt as their own. This is not confined to cases where there would be a threat that criminal prosecution against such person could be initiated, but also applies to cases where the testimony could have a negative impact on such person's position within already initiated criminal proceedings or help to convict such person.[153] However, regarding a number of serious offences specified in the Criminal Code, testimony cannot be refused even on these grounds.

Since the legislation is, as was shown above, not very detailed, the actual extent of the right against self-incrimination and the way it is applied in practice is largely laid down by the case-law of the Constitutional Court. The right against self-incrimination must be understood in such a way that it

[148] 8 Tdo 1332/2009.
[149] II. ÚS 889/10.
[150] III. ÚS 1675/12.
[151] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1157.
[152] II. ÚS 889/10.
[153] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1476.

is not confined just to the accused person's right to remain silent (i.e. to refuse to testify). On the contrary, the right is currently understood to entail the principle that no one may be compelled or forced to provide any evidence against themselves to the law enforcement authorities.[154] However, it is not considered to be a violation of the constitutionally guaranteed right against self-incrimination if the law enforcement authorities secure evidence by themselves, even against the will of the suspected or accused person. There is a difference between the law enforcement authorities compelling or forcing the suspected or accused person to provide them with evidence against himself or herself, and the legal entitlement of the law enforcement authorities to secure evidence even by seizing it against the will of the suspected or accused person.[155]

Much of the available case law deals with situations where a suspected or accused person was prompted to release (submit) property which could potentially be used as evidence in criminal proceedings, and was issued a disciplinary fine upon refusal to do so. The Constitutional Court has repeatedly and consistently ruled that it is constitutionally unacceptable if the suspected or accused person is compelled to submit such property to the law enforcement authorities by being punished with a disciplinary fine as that is in fact forcing him or her to conduct a volitional activity leading to their self-incrimination.[156] In such cases, the authorities must seize the relevant property themselves while the person is only obliged to passively tolerate their actions.[157]

In cases where the suspected or accused person was subjected to an action under § 114 the obtaining of a scent trace, the obtaining of a hair sample, or a buccal smear, the Constitutional Court established that these actions, whose purpose is to obtain evidence which exists objectively, regardless of the person's will, do not require any volitional activity by the suspected or accused person and that the person is only obliged to tolerate them. Therefore, these actions may be conducted by the law enforcement authorities, and if the person refuses to undergo them, he or she may be compelled to do tolerate them.[158] Same applies to the institute of recognition, which the suspect must tolerate, but it is to be considered an unacceptable violation of the right against self-incrimination if the law enforcement authorities, during the recognition, prompt the person to say something aloud in order to enable the witness to recognize his or her voice, and once he or she refuses, compel him or her to do so.[159]

If a transcript containing the accused person's testimony from the proceedings before a different public body is to be used as documentary evidence against him or her within criminal proceedings, it must always be examined first whether that testimony was not made under the threat of a sanction and whether it does or does not have a self-incriminating nature for the accused person.[160]

Regarding the witness' right to refuse to testify, the case-law states that it must not be understood as an absolute right. In other words, the witness is not entitled to completely refuse to testify. They

[154] II. ÚS 552/05.
[155] Pl. ÚS 29/2000.
[156] III. ÚS 644/05; II. ÚS 255/05; I. ÚS 402/05; II. ÚS 118/01; III. ÚS 561/04; I. ÚS 636/05; II. ÚS 79/07; etc.
[157] III. ÚS 644/05.
[158] Pl. ÚS-st. 30/10; II. ÚS 2461/1.
[159] III. ÚS 528/06; I. ÚS 1641/07-2; III. ÚS 849/08; II. ÚS 120/07.
[160] III. ÚS 451/04; I. ÚS 677/03.

are still obliged to coherently testify about what they know about the matter, but he or she may avoid mentioning any information which might potentially incriminate them.[161]

4.2.2 Other protections for intellectual activity and thought

Certain extremely intrusive forms of forcing the accused to testify are penalized as criminal offences in § 149 of the Criminal Code. Whoever tortures another or subjects another to otherwise inhuman treatment in the exercise of public power shall be held criminally liable under this provision.

4.3 Protections of behavioral privacy

4.3.1 Tracking of Activities in Physical Space

Czech constitutional protection of private life (Art. 10 Charter) and its aspect of informational self-determination includes the right to protection from surveillance, guarding and following in public spaces, especially by public authorities, although such powers of the state are not altogether excluded.[162] On the statutory level, the CCP grants the law enforcement the power to track the future (and real time) movement of people in public spaces in the general provision on surveillance for the purposes of criminal investigation:

> ***§ 158d***
>
> *Observation of persons and objects*
>
> *(1) Observation of persons and objects (further only "observation") is understood as obtaining knowledge about persons and object performed in a covert manner using technical or other means. If the police organ finds out during the observation that the accused is communicating with his defense council, he is obliged to delete the record containing such communication and to not use in any way the knowledge thus obtained.*
>
> *(2) Observation during which audio, visual or other records are created can be performed only on the basis of a written permission of the state prosecutor.*
>
> *(3) If the observation is to interfere with the inviolability of the home, secrecy of correspondence or to reveal by technical means the content of other writings and privately kept records, it can only be performed on the basis of a prior judicial authorization. During entry to the dwelling, no acts can be performed other than those that are needed for placing*

[161] III. ÚS 149/97; I. ÚS 3102/11-2; II. ÚS 3101/11; II. ÚS 89/04; II. ÚS 642/04.
[162] Wagnerová,, E., Pospíšil, I., Langášek, T., Šimíček, V, *Listina základních práv a svobod, Komentář*, Wolters Kluwer (2012), p. 285.

the technical means.

(...)

There are three types of surveillance that can be ordered: observation during which no records are made, observation with records being made and observation interfering with constitutionally protected rights. The latter type will not be relevant for location tracking in public space. All three types of surveillance that can be ordered only to obtain knowledge important for the criminal proceeding relating to an intentional criminal offence[163] when the objectives of the criminal investigation cannot be secured by other means or it would be otherwise significantly harder to achieve them. The rights and freedoms of the observed person can be limited only to the extent that is unavoidably necessary.[164]

The provision distinguishes observation by technical means (everything that permits observation of persons and objects from a distance)[165] and observation by other means (especially classical physical observation by the police officer)[166], but there is legally no difference between the two forms, as long as the technical means are only used to observe and not to record. Such observation without recording generally serves operative purposes and can only be used in later stages as evidence in the form of witness statement by the police officer.[167]

Observation during which visual, audio or other records are made (this does not include writing up of a report after the observation is concluded, only the records made during observation by technical means)[168] are subject to the written approval of the state prosecutor. In the context of location tracking, visual recording of the person's movements in public space[169] or digital maps of the person's movement created e.g. by GPS tracking[170] can only be created with prosecutor's approval. Such approval needs to have a written form and is only issued on the basis of a written application which must contain the information about a concrete suspicion of criminal activity, sufficient justification of the necessity to create visual, audio or other records and a description of the persons or object to be observed.[171] The permit is issued for the duration no longer than 6 months (can be potentially extended indefinitely every 6 months, but only if the reasons for it are still there).[172]

There are three exceptions from the prior written approval requirement: (1) in cases not amendable to delay, observation and recording can be performed without prior approval, but the application shall be sent as soon as possible and if approval is not obtained within 48 hours, the observation must stop immediately and all records must be destroyed and information obtained cannot be

[163] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[164] §158b CCP.
[165] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[166] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.
[167] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2005.
[168] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[169] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1993.
[170] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1993.
[171] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2008.
[172] § 158d(4) CCP.

used;[173] (2) a police officer performing his tasks as an agent under §158e CCP does not need approval of the prosecutor to create records during observations; (3) the person to be observed explicitly agrees with the observation.[174]

If the observation did not reveal information relevant for the criminal proceedings, all records must be destroyed.[175]

4.3.2 Types of tracking

4.3.2.1 Human observation

Human observation falls under the general provision of §158d(1) CCP see above. Police do not need *approval for this and there are no limitations other than the purpose of the measure: it can only be done* to obtain knowledge important for the criminal proceeding relating to an intentional criminal offences[176] when the objectives of the criminal investigation cannot be secured by other means or it would be otherwise significantly harder to achieve them.[177] It makes no difference whether technical devices (such as binoculars) are used or not. If visual recordings are made, written approval of the prosecutor is needed (see above).

4.3.2.2 GPS tracking

The police can perform GPS tracking under §158d(1) CCP. Same rules as for human observation apply here. Since the provision covers persons and objects, there is no material difference between placing trackers on cars, persons or objects (assuming a car counts as an object). Mareková questions the compatibility of the Czech legal framework for GPS tracking by the police with the established case law of the ECtHR (*Uzun*). She points out that there are no limitations for the police to track with GPS, if they don't create records. If they use it real time for operative purposes they do not need any form of judicial approval. Additionally, even when they obtain prosecutor's approval, there are very limited requirements for the prosecutor's order (it does not even need to be justified) and there are limited possibilities for subsequent judicial evaluation.[178] She finds the procedural safeguards unsatisfactory.[179]

4.3.2.3 Cell-phone tracking

The constitutional protection of communications in Art. 13 of the Charter also extends to metadata to the extent that they can reveal information related to a personal sphere of people, especially

[173] § 158d(5) CCP.
[174] § 158d(6) CCP.
[175] § 158d(8) CCP.
[176] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2004.
[177] §158b CCP.
[178] Mareková, M., 'Zásah do práva na súkromie sledovaním pomocou GPS' in Šimíček, V. (eds), *Právo na Soukromí*, Brno: Mezinárodní politologický ústav Masarykovy university (2011), pp. 198-199.
[179] Mareková, M., 'Zásah do práva na súkromie sledovaním pomocou GPS' in Šimíček, V. (eds), *Právo na Soukromí*, Brno: Mezinárodní politologický ústav Masarykovy university (2011), p. 200.

their personal data, intimate, societal and economic life.[180] The protection of the secrecy of content sent through a phone extends also to the data created during the connection.[181]

The law enforcement authorities can obtain metadata about telecommunications that have already taken place on the basis of § 88a(1):

> *"If, for the purposes of criminal proceedings conducted for an intentional criminal offence for which the law sets out a prison sentence with an upper penalty limit of at least three years, for the criminal offence of violating the confidentiality of messages (§ 182 TZ), fraud (§ 209 TZ), unauthorised access to computer systems and information media (§ 230 TZ), procuring and possessing access devices and computer system passwords and other such data (§ 231 TZ), dangerous threats (§ 353 TZ), dangerous persecution (§ 354 TZ), spreading alarming news (§ 357 TZ), encouraging a criminal offence (§ 364 TZ approving a criminal offence (§ 365 TZ) or for an intentional criminal offence for which prosecution is stipulated in a declared international treaty binding on the Czech Republic, it is necessary to ascertain data on the telecommunications service which are the subject of the confidentiality of telecommunications or which are subject to the protection of personal and intermediation data, and if there is no other way to achieve such purpose or if its achievement would be otherwise significantly more difficult, the release of such data to the public prosecutor or to the police authority shall be ordered by the presiding judge in proceedings before the court and by the judge upon the petition of the public prosecutor in the preliminary proceedings. The order for the ascertaining of data related to telecommunications must be issued in writing and must be justified; if the criminal proceedings are carried out for an intentional criminal offence, the prosecution of which is governed by the applicable international treaty, the order must include a specific reference to the applicable international treaty. If the request applies to a particular user, his or her identity must be specified in the order, if it is known."*

The data related to telecommunications, which are subject to the protection of the provision of § 88a is defined in § 88 et seq. of the Act No. 127/2005 Coll., on electronic communications (hereinafter referred to as "ZEK").[182]

§ 88/1 ZEK provides that the entrepreneur providing a publicly available electronic communications service is obligated to ensure, using technical and organisational means, the security of the provided service with regards to the protection of the personal data of individuals (in accordance with special legislation), the protection of operational and location data, and the confidentiality of the communications of individuals and legal persons, while providing this service (…). The individual or legal person providing a public communications network or a publicly available electronic communications service shall retain, for a period of 6 months, the operational and location data which are generated or processed during the provision of the public communications networks or the publicly available electronic communications service. The operational and location data related to unsuccessful call attempts (missed calls) shall be retained only if these data are generated or processed and stored or recorded.

[180] Constitutional Court decision, ÚS 27/2004-u.
[181] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1225.
[182] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1230-31.

The operational and location data shall be understood as mainly the data which lead to the tracing and identification of the source and the recipient of the communications, as well as the data which lead to the ascertaining of the date, time, manner, and duration of the communications.[183] Location data are defined in § 91/1 ZEK as "any data processed in a network of electronic communications or by an electronic communications service, which determine the geographical position of the end telecommunication device of the user of a publicly available electronic communications service".[184]

The production order of the data related to telecommunications under § 88a(1) must contain an obligation to provide concrete and specific data about (already realized) telecommunications service – including a reference to a particular provision of ZEK, mainly § 97/3,4 – as well as the determination of the period, for which the data shall be provided, the identification of the person who is the user of the relevant publicly accessible electronic communications service, the purpose of the ascertaining of the respective data – mainly with regards to the criminal offence for which the proceedings are carried out or for which criminal prosecution has been initiated; the order shall also contain specification of the manner in which the requested data shall be provided to the court (or the public prosecutor in the preliminary proceedings) – e.g. in writing in a documentary form, or in a way allowing continuous remote access to information from a database of participants of a publicly accessible electronic communications service as well as the provision of data related to the provision of an electronic communications service, etc. The order must be justified, the mere existence of a criminal complaint is not sufficient unless the reasonable suspicion that the person committed a criminal offence is supported by concrete facts.[185]

§ 88a(2) CCP states that after the legally effective conclusion of the criminal proceedings, the user shall be informed that the communication data was provided to the law enforcement and can petition the Supreme Court to review the legality of the measure. According to the explanatory report of the Act No. 273/2012 Coll. which introduced the provision in the CCP, the aforementioned possibility should serve as a guarantee that the fundamental rights to the respect of the private and family life (Art. 8 ECHR, Art. 13 LZPS) are interfered with only if it is necessary and only as far as it is necessary; it should also serve a preventive purpose as it should lead the law enforcement authorities to be as careful as possible when using the powers under § 88 or 88a and to respect the principles of legality and reservedness.

Reports can be found that the Czech police is also using IMSI catchers (they call them "Agáta"), but this is not reflected in the legal literature. Presumably, they are using §158d(1-2) CCP (observation) as a legal basis.

[183] § 97(4) Electronic Communications Act.
[184] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1230-31.
[185] Constitutional Court decision, II. ÚS 789/06.

4.3.2.4 Other means

Based on police laws, in relation to missing or searched persons, the police can also request data about time and place of using electronic payment methods from banks or data about place and time of provision of health services from health insurance companies and healthcare providers.[186]

4.3.3 Tracking of Online Behavior

With the emergence of internet and social media, the digital space has become an ever more important space for observation of human (online) behavior. Whereas no specific legal basis for open source intelligence in the digital spaces exists in the CPC, it can be assumed that the general provision on surveillance of § 158d, defined as is understood as obtaining knowledge about persons and object performed in a covert manner using technical or other means, would sufficiently cover such investigations. However, unlike the physical world, where the boundaries of public and privately space are more clearly visible, in the digital world it might sometimes be harder to distinguished which content is public and can be freely accessed by the authorities and which content or behavior is protected by constitutional guarantees such as the protection of communications, and can only be accessed with judicial approval. The Constitutional Court has dealt with this issue to some extent in a case related to police access to a Facebook profile of the accused. In the case at hand, the lower court argued that a Facebook is a public communication platform that has more than one billion users worldwide, and therefore, does not enjoy the protection of secrecy of communications.

The Constitutional Court disagreed with such simplification. The Court emphasized that it must be clearly established what is the character of communication done on social networks such as Facebook.[187] Facebook is a multi-functional social network, serving the creation and preservation of inter-personal relations online and the spreading of information. In particular, it allows the creation of a network of social contacts, communication of its users, sharing of various multimedia contents, organization of events and presentation of the users, as well as a number of other functions. The user has the possibility to find and choose friends with whom they establish closer contact. At the same time, the user can individually manage the extent of sharing of the information they share and who can see the content of their page. In other words, the profile can be open, or closed in various degrees.[188] The communication itself can take form of private chat, messages, or on the profile of the user where the user themselves or the users allowed by them can post content. The user can make this content accessible to anyone, or only to friends, or groups of friends, or individually selected persons.[189]

Considering the complexity, the Constitutional Court declared that the nature of Facebook communication as such can't be defined as private or public, since this will depend on individual users and how they set up their profile. It is up to the user to choose which content will be considered public and which private, depending on the settings they put in place.[190] Content that is private can only be accessed by the same means as other forms of mediated communications.

[186] § 68 Police Act.
[187] III. ÚS 3844/13, 34.
[188] III. ÚS 3844/13, 35-36.
[189] III. ÚS 3844/13, 37.
[190] III. ÚS 3844/13, 39.

However, an interesting question arises when the content is semi-private, that is not open to everyone, but to a selected group of people. The present case law does not reflect the option that the police uses deceit and tries to befriend the suspect to gain access to their content. The Constitutional Court, however, indirectly suggested that obtaining access to the content by getting access from a person who already has such access (for example a Facebook friend of the suspect shows the screen of their phone to the police officer) would be permissible.[191]

4.4 Protection for personal communications

4.4.1 Content-based investigations

4.4.1.1 Mail

Provisions related to the protection of personal communications in the form of mail can be found mostly in Subdivision 6 of CPC labelled "Seizure and Opening of Consignments, their Replacement and Monitoring", namely in § 86-87c. There are essentially four different legal institutes, seizure of consignments (§ 86), opening of consignments (§ 87), replacement of consignments (§ 87a), and monitored delivery (§ 87b). All of these actions constitute an interference with the constitutionally guaranteed secrecy of correspondence protected in Art. 13 of the Charter. However, their use is acceptable in situations laid down in legislation.[192] While the content of correspondence is always protected, the circumstances of it are only protected, if they reveal, even indirectly, information related to the personal sphere of individuals, mainly their personal data, intimate, social and economic life.[193]

A consignment, the term used in the CPC, is understood as any item, transported in any manner, including postal services, other transport services including covert deliveries, which can be discovered only through a thorough search.[194]

§ 86/1 states that if it is necessary, for the clarification of facts relevant to criminal proceedings in a specific case, to determine the contents of undelivered mail, other shipments and telegrams, the presiding judge and in the preliminary hearing, the public prosecutor, will order the post office or a person performing their transportation (hereinafter referred to as "post office") to hand such items over to them, or to the police authority in the preliminary proceedings. In such event, the post does not deliver the consignment to the recipient, but instead hands it over to the authorities.[195] This legal institute may only be applied in situations where the consignment has not been delivered to the recipient yet, otherwise it would be covered by different provisions. The need to clarify facts relevant to criminal proceedings refers to questions of whether an act is seen as a criminal offence, whether the act was committed by the accused person, and if so, based on what motives, and the significant factors affecting the assessment of the nature and seriousness of the act; potentially also the significant circumstances allowing the determination of the consequences, the amount of damage and unjust enrichment, caused by the criminal offence.[196]

[191] III. ÚS 3844/13, 46-48.
[192] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1167.
[193] IV. ÚS 554/03.
[194] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1191.
[195] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1168-69.
[196] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1168-69.

§ 86/2 contains a different legal institute, which may be used by the police authority in certain conditions in which the seizure of consignments, as described above, cannot be used. The provision states that without the order referred to in § 86/1, the shipment of a consignment may be delayed upon the order of the police authority provided that it is an urgent matter and the court order cannot be obtained in advance. The police authority is obliged to notify the public prosecutor on the delay of the consignment within 24 hours and if the post office or the person performing the transport of the consignments does not receive an order in accordance with § 86/1 within three days, the shipment of consignments cannot be deferred any longer. Thus, the institute is aimed at securing future possibility to seize the consignment. However, under this provision, the consignment may to be handed over to the relevant authority.

The opening of consignments, under § 87/1, applies to consignments that have been handed over to the law enforcement authorities pursuant to § 86/1. These may be opened only by the presiding judge, and in the preliminary hearing, the public prosecutor or the police authority with the authorisation of a judge. Opening is defined as any disruption of its packaging or of the shipping container or another transport area in which the content of the consignment is stored and must be performed without delay after handing over of the consignment. The act must be recorded in written form.[197] If it is, before opening, established from other evidence that the contents of the consignments will not contribute to the facts relevant to the proceedings, it must be immediately passed on to the recipient or returned to the post office.[198]

Under § 87a/1, consignments may be replaced for investigation purposes. The provision states

Replacement of Consignment that in the interest of identifying persons involved in the handling of a consignment containing narcotic substances, psychotropic substances, precursors, poisons, radioactive materials, counterfeit money and booked securities, firearms or weapons of mass destruction, ammunition and explosives, or other items that require special permissions for their possession, items intended to commit a criminal offence, or items arising from the committed criminal offence, the presiding judge and, in the preliminary hearing, the public prosecutor with the consent of the judge, may order that the contents of such consignment are replaced by different contents, and the altered consignment is then passed over for further transport. This typically applies to consignments which were seized and handed over to law enforcement authorities (§ 86/1), but it may also be conducted covertly, without the consignment being handed over to the authorities and also without the knowledge of the person performing the transport of the consignment.[199] The different contents used by the law enforcement authorities instead of the original contents of the consignment will typically be harmless, but contents less harmful than the original (even though still harmful) may also be used.[200] The altered consignment is usually passed over for further transport to the same person who was performing its transport before it was seized (§ 86/1), but it is also possible for tactical reasons to pass over the consignment to a different person.[201]

[197] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1173.
[198] § 83/3 CPC.
[199] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1176.
[200] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1184.
[201] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1184.

A monitored delivery can be performed under § 87b/1. The institute may be used in preliminary proceedings based on the order of a public prosecutor. It consists of monitoring (surveillance) of a consignment for which there is reason to suspect that it contains items referred to in § 87a, if this is necessary to clarify a criminal offence or identify all the perpetrators, and the determination of these necessary facts by other means would be ineffective or substantially more difficult. This legal institute was added to CPC by the Act No. 265/2001 Coll., based on the requirements of the practice Before that time, such a consignment had to be seized. This however, that was not always the optimal solution, especially in cases where the seizure of the consignment would only lead to the identification of the perpetrators who work at the lowest level of an organized crime scheme, while making it impossible for the law enforcement authorities to discover the identity of the higher-positioned perpetrators who organize the drug dealing.[202]

Given that during the monitoring of a consignment, surveillance of persons who come into contact with the consignment inevitably occurs, there are exact conditions which must be fulfilled for a monitored delivery to be conducted:

- a reasonable suspicion that the consignment contains items referred to in § 87a – the suspicion must be reasonably based on findings gained either within the procedures contained in TŘ (mainly means of intelligence – § 158b-158f) or in other legislation (e.g. § 72-77 ZP)
- it must be necessary in order to clarify a criminal offence or identify all the perpetrators – which will be fulfilled in cases where the release, seizure, or other impoundage of the contents of the consignment (including the replacement of the consignment – § 87a) would make it impossible (or substantially more difficult, or where there would be a threat its purpose would be jeopardized) to clarify a criminal offence or identify all the perpetrators
- the determination of the aforementioned necessary facts by other means would be ineffective or substantially more difficult – this is a reflection of the subsidiarity of the monitored delivery – it may only be used if the clarification of a criminal offence or identification of all the perpetrators using other means would be impossible or would be substantially more difficult (e.g. would incur much higher expenses, or would be ineffective considering the amount of necessary effort on the law enforcement authorities' side.[203]

The monitored delivery must be distinguished, both from a material and formal point of view, from the surveillance of persons and items under § 158d, even if both of these actions may be conducted simultaneously in one criminal matter.[204]

§ 87b/3 then states that the police authority shall terminate the monitoring of the consignment on the order of the public prosecutor, and even without such an order, if it is clear that the handling of the consignment constitutes a serious danger to life or health, substantial damage to property, or if there is a serious risk that it will not be possible to further monitor the consignment. If necessary, simultaneously with the termination of the monitoring of the consignment, they will

[202] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1186, 1187.
[203] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1186-87.
[204] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1187-88.

take further action against the possession of the items that make up the contents of the consignment.[205]

Furthermore, interferences with the constitutionally guaranteed confidentiality of correspondence (which obviously entails mail as well), and of other documents and records kept in private, are explicitly mentioned in the provision of § 158d regarding the legal institute of surveillance of persons and items. § 158d/3 states that if the surveillance of persons and items constitutes an interference with (among others) the confidentiality of correspondence or if it includes finding the contents of other documents and records kept in private by the use of technology, it may only be conducted with the prior authorisation of a judge, therefore, it is not permitted (unlike in cases not listed in § 158d/3) to conduct the surveillance without the prior authorisation of a judge and to obtain the authorisation ex-post. The confidentiality of correspondence and of other documents and records kept in private applies to any closed documents or other papers, which a person possesses lawfully, or which are transported by a post office or another person.[206]

The post office or the person performing the transport of the consignments are obligated to provide the police authority performing the surveillance with the necessary assistance free of charge and in accordance with their instructions. They may not claim the obligation of professional confidentiality imposed by special Acts.[207]

4.4.1.2 Telephony (POTS) and Internet communications

The constitutionally guaranteed right to the confidentiality of correspondence (Art. 13 LZPS) must not be confined to correspondence delivered via mail, but must also be applied to correspondence delivered in other ways, via telephone, telegraph, or another similar device, which, in today's age, undoubtedly includes electronic means of communication.[208] Regarding communications conducted using Facebook and other social media, the Constitutional Court ruled that it must be examined in every individual case whether the relevant communications were private or public, depending on the user's privacy settings.[209]

Therefore, state interference with the aforementioned right is only possible in situations and in ways laid down by the legislation (cf. Art. 13 LZPS), and, Art. 8 of the ECHR, i.e. if it is necessary in the democratic society in the interests of national security, public security, the economic welfare of the country, the protection of order and prevention of crime, the protection of health or of the morality or of the rights and freedoms of other persons.[210]

The most important investigation power given by CPC to the law enforcement authorities in this respect is the interception and recording of telecommunications (§ 88, 88a), which is a constitutionally permissible interference with the aforementioned rights.[211] The purpose of this

[205] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1190.
[206] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 2007.
[207] § 158d/9 CPC.
[208] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1196.
[209] III. ÚS 3844/13.
[210] Commentary, p. 1196.
[211] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1196-97.

legal institute is to secure evidence. Its character is very similar to the character of the means of intelligence (§ 158b et seq.). This institute does not apply to the so-called spatial interception, which is usually conducted under § 158d/3 (as surveillance of persons). The main difference between the interception and recording of telecommunications (§ 88) and the collection of data related to realized telecommunications (§ 88a) is that the former is directed into the future, at communications which will take place, whereas the latter is concerned solely with communications which already have taken place.

Regarding the definition and the scope of the term "telecommunications", it entails communication conducted using a telephone, telefax, mobile telephone, walkie-talkies or radio transmitters, or other communication devices and means such as e-mail and other forms of internet communication. According to the literature, the most frequently intercepted form of communication is communication over mobile telephones, while interception of e-mails or other internet communications is still rather rare.[212] Possibly, such assessment is somewhat outdated.

According to some opinions, an e-mail message which was, after its reception, printed by the recipient using a printer, should be considered a consignment under § 87c (see above), however, Šámal[213] is of the opinion that the character of a printed e-mail message is similar to the character of an already delivered consignment, and the printed e-mail can thus be impounded by the law enforcement authorities using the general provisions of § 78-79 (release or seizure of property), without the need to proceed according to § 86-87b which are only applicable to consignments which are still being transported and have not been delivered yet.[214]

The interception and recording of communications can be divided into three phases[215]:

- the preparation of the interception, the filing of a petition to the judge, the eventual issue of the order, the immediate conduct of the interception by the respective police authority. In this phase, the interception is treated as classified information and it is out of the question that the accused person or his or her defence counsel could be given the opportunity to view the results of the interception
- the conduct of the interception until its termination, including the continuous assessment of its results. In this phase, the contents of the interception may stay classified information. The information that the interception is conducted is always classified. During this phase (investigation), it cannot be strictly ruled out that the accused person or his or her defence counsel are given the opportunity to view a part of the records and asked to express themselves.
- the final analysis and assessment of the results of the interception and the decision regarding their further use. In this phase, the contents of the interception are usually not classified information anymore, and especially if the investigation has already been completed and the examination of the case file (§ 166 CPC) takes place, the accused person and his or her defence counsel has the right to view the results and contents of the interception, which should serve as evidence, and express themselves.

[212] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1197-98.
[213] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1199.
[214] cf. 7 Tz 9/2000.
[215] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1198-99.

According to § 88/1, if criminal proceedings are conducted for a crime for which the law stipulates a prison sentence with the upper penalty limit of at least eight years, for a criminal offence of machinations in insolvency proceedings under § 226 CC, violation of regulations on rules of competition under § 248(1)(e) or § 248(2-4) CC, negotiating advantages during public procurement, tender and auction under § 256 CC, machinations during public procurement and tenders under § 257 CC, machinations at a public auction under § 258 CC, misuse of powers of an official person under § 329 CC, or for any other intentional criminal offence for which prosecution is stipulated in a declared international treaty, an order for the interception and recording of telecommunications may be issued if it may be reasonably assumed that facts relevant to the criminal proceedings will be obtained in this way and if there is no other way to achieve such purpose or if its achievement would be otherwise significantly reduced. The Police of the Czech Republic perform the interception and recording of telecommunications for the needs of all law enforcement authorities. The interception and recording of telecommunications between the defence counsel and the accused person is inadmissible. If the police authority finds during the interception and recording of telecommunications that the accused person has communicated with his or her defence counsel, they are obliged to immediately destroy the interception recording and not to use the information learned in this context in any way. The report on the destruction of the record shall be placed in the case file.

The use of this institute must be strictly limited.[216] Primarily, the use of telecommunication interceptions is limited by the principle of subsidiarity and reservedness.[217] It must always be considered whether the concrete facts relevant and important for the criminal proceedings may not be secured and subsequently proven by different means provided by the CPC, e.g. the interrogation of the accused person (§ 91 et seq.), the interrogation of witnesses (§ 97 et seq.), the impoundage of property (§ 78-79), the house search, personal search, search of other premises and land (§ 82-83c), an expert opinion (§ 105 et seq.), and so on.[218]

The interception and recording of communications is always conducted by the Police of the Czech Republic, following the order of a law enforcement authority within the criminal proceedings.[219] In the preliminary proceeding, it is ordered by a judge upon the petition of the public prosecutor. The order for the interception and recording of communications must be issued in writing and must be justified. The order for the interception and recording of the telecommunications service shall include the specification of the intercepted user address or user device, as well as the user if his or her identity is known, and the period for which the interception and recording of telecommunications traffic will be conducted. The period cannot be longer than four months.[220] The justification of the order must describe the facts on which the reasonable suspicion against a specific person is based. The mere existence of a criminal complaint is not sufficient.[221]

The provision of § 88/3 states that the police authority is obliged to continuously assess whether the reasons which led to the issue of the order for the interception and recording of telecommunications still persist. If the reasons have ceased, the police authority is obligated to

[216] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1199.
[217] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1205.
[218] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1205.
[219] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), p. 1205.
[220] §88/2 CPC.
[221] II. ÚS 615/06.

immediately terminate the interception and recording of telecommunications, even before the end of the period for which the order was issued. The assessment must focus on concrete facts, the discovery of which was the purpose of the interception and recording of telecommunications and which were used to justify the issue of the order for the interception, and whether there still is no other way to achieve the purpose of the interception or whether its achievement would still be significantly reduced if another way was used.

As soon as the police authority discovers the facts relevant for the criminal proceedings, whose discovery was the purpose of the interception, or as soon as the police authority finds out that the initial assumption was disproved, they are obligated to terminate the conduct of the interception and recording of telecommunications immediately, regardless of the period determined in the order.

If based on the assessment, the continuation of the interception and recording of telecommunications is necessary, the judge may extend the monitoring, even repeatedly, but always for a maximum period of four months.[222]

As an exception to the judicial order requirement, the law enforcement authority may, without the order for the interception and recording of telecommunications, order the interception and recording of telecommunications or also conduct it themselves if there is a criminal proceeding for the criminal offence of human trafficking (§ 168 CC), the delegation of custody of a child to someone else (§ 169 CC), restriction of personal freedoms (§ 171 CC), extortion (§ 175 CC), kidnapping of a child and persons suffering from a mental disorder (§ 200 CC), violence against a group of people or an individual (§ 352 CC), dangerous threats (§ 353 CC) or dangerous persecution (§ 354 CC), if the user of the intercepted unit (station) agrees to such measure.[223] Under these circumstances, the other conditions set out in § 88/1 do not have to be met.[224] The consent (agreement) has to be given by the user of the intercepted unit (station).[225]

If it is to be used as evidence, the recording of telecommunications must accompanied by a transcript, which however does not need to transcribe the content of the communications, but only the circumstances of it, e.g. time, telephone numbers, persons communicating.[226] The records made during the conduct of the interception and recording of communications may be used as evidence in another criminal matter, but only in case the conditions set out in § 88/1 are fulfilled in that matter as well.[227]

If the interception and recording of the telecommunications did not find any facts relevant to the criminal proceedings, the police authority, following an approval of the court, and in preliminary hearings, the public prosecutor, must destroy all records after three years from the final and legally effective conclusion of the matter. The period of three years is necessary with regards to the

[222] §88/4 CPC.
[223] § 88/5 CPC.
[224] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1210-11.
[225] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1210-11.
[226] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1212-13.
[227] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1212-13.

possible use of an extraordinary remedy (an extraordinary appeal, a complaint against the violation of the law, or a retrial).[228]

Finally, the case law of the Constitutional Court emphasizes that the rather strict procedure under § 88 TŘ must be respected at all times and it is not permissible to bypass it, for example by using records of interceptions conducted under other laws (typically laws governing intelligence services) for the purposes of criminal proceedings.[229]

The records resulting from the interceptions and recordings of telecommunications conducted abroad are admissible in criminal proceedings in the Czech Republic, as long as the formal requirements set out by Czech legislation regarding the issuing of the order for the interception and recording are met. However, the admissibility of such records must always be considered with due regards to the existence of a sufficiently important interest, the comparability of procedural safeguards.[230]

4.4.2 Metadata-based investigations

For discussion of metadata based investigation see section 4.3.2.3.

4.4.3 Oral interception (face to face communications)

There is no special legal institute within the CPC or the Police Act which explicitly deals with the interception of face-to-face communications. However, in practice the oral interception undoubtedly falls under the regime of the surveillance of persons under § 158d TŘ and is usually referred to as one of the forms of "spatial interception" in the case-law and in the literature. Whereas the institute of surveillance of persons and items has already been extensively discussed in sections 3.1.3. and 4.3., we refer you to those sections for further details.

Some aspect relevant to the spatial interceptions have been dealt with by the Constitutional Court. With regards to place based boundaries, even places which could be considered public or quasi-public (e.g. the premises of the municipal office), the right of the persons to privacy must be respected and protected. It is therefore impossible to argue that "spatial interceptions" which

[228] Šámal, Pavel (eds.), *Trestní řád. Komentář*, 7th Edition, Prague: C. H. Beck (2013), pp. 1213-14.
[229] I. ÚS 3038/07.
[230] Higher Court in Prague, 2 To 144/03.

should be conducted in such places could be ordered and performed without fulfilling the requirements set out by § 158d.[231]

Furthermore, the Constitutional Court has concluded that the consent of the person whose rights and freedoms are to be interfered with by the surveillance must be explicit (i.e. it is not sufficient that such a person merely "is aware" of the surveillance). This also means that if such a person gives his or her consent with the surveillance of a personal meeting between him or her and another person, but in the end the meeting is attended by different persons, the consent shall not be considered as effective.[232]

5. Conclusion

t.b.a.

[231] II. ÚS 2806/08; IV. ÚS 1235/09.
[232] I. ÚS 541/10.