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Crown/Material witness in Central Europe: Slovak Republic, Czech Republic and Austria. Part 2.¹

The authors provide in the present second part of scientific research a detailed analysis of legislation of the crown witness in Slovak Republic, Czech Republic and the Republic of Austria. They focus on topics such as obligations of the crown witness or the ways how the information obtained from the cooperating person can be used as evidence. From analysis of the findings, authors recommend what factors the legislator should consider in legal regulation of the crown witness.

SUMMARY: 1. Introduction. - 2. Benefits provided to the crown witness. - 3. Information obtained by the examination of the cooperating person as evidence. - 4. Conclusion

1. Introduction

As discussed in the first part of the research, the main aim of the crown witness is to effectively clarify serious crime, in particular organized crime, committed by sophisticated methods, with a higher level of conspiracy and to raise distrust among organized crime members and raise concerns that someone can always betray them by cooperating with the police. To fulfill this purpose, the Slovak, Czech and Austrian legal regulations impose obligations on the cooperating accused in criminal proceedings against another person. However, the cooperating accused must also be positively motivated. Thus, the second part of the research deals with the issue of the positive motivation of the cooperating accused and the subsequent possibility of using his statement as evidence.

2. Benefits provided to the crown witness

The benefits provided to the crown witness form the legal consideration for fulfilling the duties, in particular providing information. These benefits are an instrument of positive motivation to cooperate with state authorities, unlike the situation of "ordinary" witnesses, who are obliged to testify about all the facts they know about the crime, i.e. unlike the situation of other persons,

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who may be penalized with criminal offenses in the event of failure to report selected criminal offenses.

The benefits provided to a crown witness may be more (termination of criminal prosecution or waiver of punishment) or less (award of a sentence below the lower limit of criminal penalty) pronounced and significant in the proceedings regarding the person's own criminal activity. The fact that the crown witness himself or herself is the perpetrator of a criminal offense, which requires the reaction of the society in the form of a sanction, i.e. the non-prosecution of the perpetrator of a criminal offence as a reward for information, constitutes a moral problem, does not speak in favour of providing significant benefits. In addition, the potential of a considerable reward – non-prosecution – may be a significant motivation to unlawfully testify about the criminal activity of a third party². On the other hand, the necessity to persuade a person to cooperate in cases of insufficient evidence, in particular in cases of organized and criminal groups, to persuade a person to betray his or her accomplices³, speak in favour of providing significant benefits. In addition to the benefits presented, the enforcement of the witness protection legislation will normally be a significant advantage for the crown witness.

According to the legislation of the Slovak Republic and the Czech Republic, the primary possibility of "different treatment" of the cooperating person is the temporary suspension of the allegation under Section 205 of the Czech Code of Criminal Procedure, or the temporary suspension of criminal prosecution under Section 159b of the Code of Criminal Procedure. The imperative expressed in the purpose of the criminal codes (Section 1 of the CPC or Section 1 (1) the Czech CPC) – proper detection of criminal offenses and the fair and lawful punishment of their perpetrators) is implemented by the law enforcement authorities by applying the principles of legality and officiality; at the time when the facts found indicate a higher probability that the offense was

² Significant benefits for cooperation may refer to both false testimony of one's own criminal activity and the criminal activity of a third party. See: PFISTER, *Deal und Fehlurteil*, Forensische Psychiatrie, Psychologie, Kriminologie, 2013, No. 4, p. 254.

³ Especially in cases where the cooperating person is aware that the information obtained from him or her constitutes to a great extent a decisive evidence, therefore, to convict the perpetrators *conditio sine qua non*, the person will be more willing to take the risk and not testify, as a result of which all members of the group will be released. In such cases, the motivation for the cooperating person should be as distinctive as possible. See: BUDAYOVÁ, *Četnost využívání institutu spolupracujícího obviněného a návrhy k jejímu zvýšení (Frequency of Using the Cooperating Accused Institution and Suggestions for its Increased Application)*, Advocacy Bulletin, 2018, available at: <http://www.bulletin-advokacie.cz/cetnost-vyuzivani-institutu-spolupracujiciho-obvineneho-a-navrhy-k-jejimu-zvyseni> of 23 January 2018.

committed by a particular person, by prompt criminal charge (that is, by initiating criminal prosecution against a particular person). However, this imperative is in such a situation exceptionally implemented in another way, by not applying the legality and officiality, but by delaying the criminal charge (initiation of criminal prosecution against a particular person), if the criminal charge would exclude the possibility of the cooperating person testifying as a witness, thus obstructing the appropriate detection of criminal activity and the legal and fair punishment of its perpetrators. In this sense, it can be concluded that the suspension of the allegation is an exception to the application of the principle of legality and officiality, which is otherwise implemented by prompt raising of criminal charge (or in the Czech Republic, by the initiation of criminal prosecution).

In the Austrian criminal procedure, there is no adequate legal institution for suspension of the criminal charge. It should be noted here that in the Austrian criminal procedure, unlike the Slovak or Czech legal status, a person does not get accused based on a formal decision, but on a material basis: the existence of a specific suspicion, an interrogation, performing other evidence or investigative tasks⁴. The allegation against a person does not occur by a formal act, so its suspension cannot be ruled out based on the subject matter. The Austrian Code of Criminal Procedure, however, provides⁵ that the application of the provision regarding the crown witness is also possible at the time when the suspect person is not yet accused.

The primary purpose of suspending the allegation (the initiation of criminal prosecution in the Czech Republic) lies in the fact that the suspected person does not become co-accused of a crime that he or she is to clarify, which means that he or she can testify in this case as a witness. Secondly, the non-prosecution of the cooperating person also has a psychological effect - it is a concession towards the person involved, the person is not in the position of the accused, which does not cause the negative effects of leading the prosecution against that person⁶.

In the Slovak criminal procedure, following the application of the temporary suspension of the allegation, further procedure is applied. It should be noted here that the institute of suspended allegation is applied when no allegation

⁴ Definition of the accused under Section 48 (1) point 2 of the StPO.

⁵ Provisions of Section 209a (2) of the StPO.

⁶ Acts cannot be thus performed against a cooperating person that can be performed against an accused person (e.g. imprisonment), i.e. the conduct of criminal prosecution does not have the damaging effect on the cooperating person as it does on the accused, etc.

has yet been made against the suspect who has the potential to become a co-operating person. If such a person has already been accused, consideration is given to the exclusion of the case for separate proceedings and the termination of criminal prosecution against that person (Section 228 (3) of the Slovak CPC) comes into consideration. After receiving a testimony (both in the pre-trial proceedings and in the court proceedings), the second stage of the procedure with the cooperating person follows in the conditions of the Slovak Republic: an allegation is promptly exhibited against this person and separate proceedings is conducted, applying one of the following institutions: termination of criminal prosecution under Section 215 (3) of the Slovak CPC, conditional suspension of criminal prosecution of the cooperating accused under Section 218 and 219 of the Slovak CPC⁷, which can be applied by the prosecutor in the pre-trial proceedings and later by the court, or extraordinary reduction of the punishment below the lower limit of criminal penalty under Section 39(2e) of the Slovak CPCs, which can only be applied by the court. The difference between the termination of criminal prosecution and the conditional suspension of criminal prosecution against the cooperating accused lies mainly in the time aspect of its application: prosecution can be terminated when the cooperating has already fulfilled all his or her duties (provided all information to help clarify the crime and convict the perpetrator, in the status of a witness), while the conditional suspension of criminal prosecution is applied when it is assumed that the cooperating person will continue to perform his or her duties, i.e. to provide information, to testify as a witness, and for that purpose the prosecutor sets a probation period of two to ten years for that person. At the end of the probation period, a testimonial is made on the basis of compliance with the terms of the cooperation. In deciding on the criminal case of the cooperating person, the prosecutor does not have to wait for the prosecution in the criminal case against a third party, or for the testimony of the crown witness in the main proceedings but can conditionally suspend the criminal prosecution and set a probation period.

In the Czech criminal procedure, the benefits provided to the cooperating person include the temporary suspension of criminal prosecution against the cooperating person and consequently, in the court proceedings, the waiver of

⁷ However, the application of conditional suspension of criminal prosecution of the cooperating accused person after the allegation is hardly likely since the probationary period set for this institution serves just to make the crown witness fulfil his or her part of the agreement, i.e. to testify and prove the perpetrators guilty. However, if the role of the cooperating accused as a witness is over, there is no reason to conditionally terminate the criminal prosecution but it is meaningful to terminate the criminal prosecution or to reduce the sentence below the lower limit of criminal penalty.

punishment or the award of a sentence below the lower limit of criminal penalty, which may be proposed by the prosecutor in the prosecution (Section 178a (2) of the Czech CPC). Only the court is thus entitled to make the meritorious decision on the criminal matter of the cooperating person, the prosecutor only proposes the application of benefits. If the criminal case of a person as a potential crown witness is already at the stage of court proceedings and the person did not cooperate with the public prosecutor in the pre-trial proceedings, it is impossible to cooperate with such a person as a crown witness in the court proceedings, as for the cooperation in the court proceedings it is necessary that the public prosecutor designates the person as the cooperating accused already in the pre-trial proceedings, i.e. proposes the application for the waiver of punishment or the award of a sentence below the lower limit of the penalty rate⁸. Extraordinary reduction of the penalty below the lower limit of the penalty rate⁹ is a standard tool for motivating the cooperating person. The waiver of punishment¹⁰ as a motivation of the cooperating person is a special solution characteristic for the Czech legislation. In the case of the waiver of punishment, the court declares the perpetrator to be guilty, but does not award a sentence. The advantage of such a solution is indeed the fact that the punishment is not awarded, but the court may impose a protective measure (e.g. protective treatment, confiscation of things, etc.) Under the Slovak or Austrian legislation, such a procedure in the termination of criminal prosecution is not possible. In addition to the waiver of punishment of the cooperating person, the court in the Czech Republic may also decide on the conditional waiver of punishment¹¹, in which the court determines a probation period during which the crown witness is required to meet his or her duties related to the provision of information. Such a solution means an alternative to the conditional suspension of criminal prosecution in Slovakia, and the termination of criminal prosecution under reservation in Austria. The advantage of this solution is the possibility of imposing a protective measure, but the disadvantage is that the case can solely be decided by the court, which means more time consumption and burden on the court. In the Austrian criminal procedure, the provisions on deviations apply. If the

⁸ This fact is criticized as an obstacle to the wider application of the institution since the accused may potentially decide to cooperate later on. See: REHÁČEK, *Mlčetí zlato aneb spolupráci se státním zástupcem k přísnějšímu trestu (Silence is Gold or a Stricter Punishment for Cooperation with the Public Prosecutor)*, *Trestněprávní revue* 2016, Volume. 15, No. 2, p. 44-46.

⁹ Provisions of Section 58 of the Czech Criminal Code.

¹⁰ Provisions of Section 46 of the Czech Criminal Code.

¹¹ Provisions of Section 48 of the Czech Criminal Code.

cooperating person has requested this, he or she has information that can support the clarification of the criminal offense, i.e. conviction of the perpetrator, confesses to the commitment of his or her own criminal activity, and such a procedure is sufficient for the fulfilment of individual prevention, the prosecutor's office imposes the obligation¹² on such a person to meet the duties according to the provisions on deviation and the obligation of further cooperation with the public prosecutor's office (provision of information, testimony in the procedural status of a witness). After meeting all the obligations imposed, the public prosecutor's office will terminate the criminal prosecution against the cooperating person. If these conditions are not met (in particular, the absence of the presumption of individual prevention, but also others), the public prosecutor's office will, in the course of the next proceedings (in the filing of the indictment), propose to impose a punishment below the lower limit of the penalty rate¹³. Thus, in the Austrian criminal procedure, two advantages are applied towards the crown witness: the termination of criminal prosecution or, if the court decides after the filing of allegation, the award of a sentence below the lower limit of the penalty rate. Such a model of the application of the benefits is similar to the Slovak criminal procedure, which allows the application of the termination of criminal prosecution, or the conditional suspension of criminal prosecution and the award of a sentence below the lower limit of the penalty rate. The specificity of the Austrian model lies in the possibility of continuing with the already suspended criminal prosecution, since the public prosecutor's office suspends the criminal prosecution under reservation. This model of the termination of criminal prosecution thereby comes close to the legislation of the conditional suspension of criminal prosecution of the cooperating accused in Slovakia. After the suspension of criminal prosecution under reservation in the Austrian criminal procedure, it is possible to continue with the criminal prosecution against the cooperating person if the accused violates his or her obligation to cooperate, i.e. the information provided does not make a significant contribution to the clarification of the crime or conviction of the perpetrator, or if it was provided only to cover the person's leading role in a criminal group. The facts which the crown witness does not cause, such as the termination of criminal prosecution against a third party due to insanity, or

¹² Provisions of Section 209 (3) of the Austrian StPO.

¹³ Provisions of Section 41a of the Austrian StGB.

the limitation of criminal prosecution¹⁴, cannot be held against the crown witness. The public prosecutor's office must decide on the continuation of the prosecution within 14 days of the delivery of the decision terminating the criminal prosecution in the criminal case against the third party, which the cooperating person has clarified. Compared to this, in the Slovak Republic, the cooperating person has in the case of a conditionally suspended criminal prosecution a set probation period, during which he or she is obliged to provide information that will significantly contribute to the clarification of the offense, or the conviction of the perpetrator. If the cooperating person meets his or her duties, the prosecutor decides on a testimonial with the *res iudicata* effect; otherwise, it will decide to continue the prosecution.

An important issue in relation to the provision of benefits to the cooperating person in criminal proceedings is the question of the obligation or the volition of the law enforcement authorities or the court to apply these benefits, that is, the question of the obligatory or facultative nature of their application. The historical development of the crown witness institution has noted changes in the Anglo-American legal environment on this issue - while initially after the third party's conviction, the crown witness had the right to the termination of the proceedings against him or her, the newer legislation did not establish such a right: the judge was to consider whether to convict or release the witness¹⁵.

The Slovak legislation is construed as exclusively facultative: the temporary suspension of the allegation, the termination of criminal prosecution against the cooperating accused, the conditional suspension of the criminal prosecution against that person, or the award of a sentence below the lower limit of the penalty rate apply solely on the discretion of the court or law enforcement authority. This stems from the formulation of legal provisions¹⁶.

Compared to this, in the Czech Republic, the application of the provisions on the cooperating accused, the extraordinary reduction of punishment and the

¹⁴ See the document on the institution of crown witness by the Austrian Federal Minister of Justice (Bundesministerium für Justiz): Handbuch zur Kronzeugenregelung. Available at: https://www.justiz.gv.at/web2013/home/buergerservice/publikationen/handbuch_zur_kronzeugenregelung/2c94848a580590360159b1d1286c0414.de.html of 15 January 2018.

¹⁵ FREIBERG, *Der Kronzeuge*, Zeitschrift für die gesamte Strafrechtswissenschaft, Walter de Gruyter, Berlin / New York, 1940, Vol. 59(1), p. 42.

¹⁶ Provisions of Section 205 (1) of the Slovak CPC: "...a policeman may temporarily defer an allegation with the prior consent of the prosecutor...", Provisions of Section 215 (3) of the CPC: "The prosecutor may terminate the criminal prosecution...". Similarly, also Section 218(1) of the Slovak CPC and Section 39 (2e) of the Slovak CPC: "The court may reduce a sentence below the lower limit of the penalty rate ..."

waiver of punishment is mixed: both facultative and obligatory, even following the amendment of this institution in 2012. The designation of a person as the cooperating accused and the proposal for extraordinary reduction of punishment below the lower limit of the penalty rate or the waiver of punishment is carried out on the facultative basis by the public prosecutor, at his or her own discretion concerning the fulfilment of the legal conditions¹⁷. Subsequently, however, in deciding on the waiver of punishment of a person who has been identified as the cooperating accused and for whom the prosecutor has proposed it, in compliance with the statutory conditions, the court obligatory applies¹⁸ the waiver of punishment of the person without having space for its own discretion. The Czech legislator has chosen this model to more strongly motivate the persons¹⁹, who have information about the crime, to ensure them that after they meet the legal conditions and the public prosecutor proposes the waiver of their punishment, the benefits will actually be provided to them, after a strong criticism from the application practice²⁰. The peculiarity of this model is the fact that the public prosecutor has a room to decide at his or her discretion, twice: when deciding on designating a person as the cooperating accused, and then when proposing an extraordinary reduction of the sentence or a waiver of punishment, while such a room for discretion is not provided to the court. Such a model, where there is a room for discretion of the prosecutor's office and subsequently not for the discretion of the court, differs from the general concept of the status of the subjects of criminal proceedings, in which the prosecutor is, in principle, obliged to file an allegation, if the legal conditions for another procedure are not met, and consequently the court has a legal obligation to decide at its own discretion on the guilt and punishment. Narrowing the room of the court for its own discretion when awarding a sentence can raise doubts about the compliance of such a solution with the requirement to award appropriate penalties, as well as the principle of the traditional threefold separation of power, and thus the principles of the rule of

¹⁷ Provisions of Section 178a para. 1 of the Czech CPC: “*In the criminal proceedings, the public prosecutor may designate the accused in the allegation as the cooperating person...*” and para. 2: “*... the public prosecutor may propose the waiver of punishment in the allegation...*”

¹⁸ Provisions of Section 46(2) of the Czech CC: “*The court will waive the punishment of the perpetrator designated as the cooperating accused...*”.

¹⁹ See the explanatory report to Czech Act No. 193/2012 Coll, amending the Czech CPC.

²⁰ The facultative option to award a sentence below the lower limit of the penalty rate has proved as insufficient motivation for cooperation. VANTUCH, *K institutu spolupracujícího obviněného a možnostem jeho uplatňování v praxi (To the institute of cooperating accused and possibilities of its application in practice)*, Trestní právo 2012, Volume. 16, No. 7-8, p. 19-29.

law²¹. The Czech legal situation can be criticized in the sense that when the court is already obliged to apply the proposed institution, the public prosecutor's obligation should also be stipulated (if the legal conditions are met, i.e. the duties of the cooperating person) to select one institution and to propose its application to the court, because the public prosecutor may ultimately decide in the present legal status not to propose any of the benefits to the cooperating person, thus contradicting the original intention of the legislator to strengthen the motivation of crown witnesses to cooperate.

From the point of view of the obligatory and facultative nature of the benefits provided to the cooperating accused, the Austrian legislation may also be considered mixed, albeit in a different way. If the conditions are met, the public prosecutor's office is, in principle, obliged to treat the suspected person (without the status of the accused person) as the crown witness,²² unless it is clear from the beginning that these conditions cannot be met (e.g. the information is not sufficient for the significant clarification of crime). The public prosecutor's office has the possibility to consider the fulfilment of the conditions, even though the legislator restricts the room for consideration (evident facts). If the person is already in the position of the accused, the public prosecutor's office is again obliged to apply the procedure according to the deviations - to impose an obligation on the accused to provide the service, or to provide further information on crime and the perpetrator if the assumptions are met²³. After compliance with the obligations, as stipulated to the cooperating person, the public prosecutor's office is obliged to terminate the prosecution²⁴. However, if the assumptions are not met (e.g. the information is insufficient), the public prosecutor's office continues to prosecute the cooperating person, while obliged to propose to the court an extraordinary reduction of the sentence below the lower limit of the penalty rate according to Section 41a of the Austrian StGB. The court then has the facultative possibility to apply this institution, i.e. it is at the discretion of the court to consider the contribution of the cooperating person to the detection of criminal activity and

²¹ Contrary to the principle of the rule of law (Section 1(1) of the Constitution of the Slovak Republic), the Constitutional Court of the Slovak Republic pronounced the legal regulation of the so-called aspiration principle, i.e. the principle applied in the punishment of the coercion of several offenses, according to which the upper limit of the most severe offense is increased by one third and the court is obliged to impose the punishment in the upper half of thus increased penalty rate. It is this limitation of the court when imposing a punishment that is contrary to the principles of the rule of law. The finding of the Constitutional Court of the Slovak Republic, file No. PL. CC 106/2011 of 28 November 2012.

²² Provisions of Section 209a (2) the first alinea of the Austrian StPO.

²³ Provisions of Section 209a (3) of the Austrian StPO.

²⁴ Provisions of Section 209a (4) the third alinea (in fine) of the Austrian StPO.

the conviction of its perpetrators, and to impose a fair punishment, taking into account the cooperation. The Austrian system of applying institutions conferring an advantage for the cooperating person is mostly obligatory, as far as the activity of the public prosecutor's office is concerned, the exception is only the procedure of the court, which is facultative. If all the conditions are met, this system gives the cooperating person the legal right to receive an advantage, so it guarantees its legal certainty. Compared with the Czech Republic, the system, if initiated towards the cooperating person at the court proceedings, is set up opposite: the prosecutor in the Austrian criminal procedure obligatory proposes and the court facultatively applies, taking into account its own discretion. This model corresponds to the traditional concept of the court as the authority with broadest discretionary power, broader than is the discretionary power of the public prosecutor's office.

7. Information obtained by the examination of the cooperating person as evidence

The question of using the cooperating person's testimony as evidence in proceedings against a third party is identical in all the legislations examined, in particular on the basis of the influence of the decision-making process of the European Court of Human Rights (ECHR). The information obtained by the examination of the cooperating person has no higher probative value (although the "crown" attribute would be likely to lead to such a presumption), but *a priori* it also has no lower probative value than the information obtained from other evidence. However, the evidence obtained by the examination of the cooperating person must be carefully assessed on its own, particularly in terms of consistency between individual testimonies given by the cooperating person, i.e. from the point of view of the credibility of the person himself or herself (e.g. with regard to his or her current or previous criminal activity, for example regarding his or her position in the criminal group, etc.) and, on the other hand, in the context of other evidence obtained, either confirming or negating the content of the cooperating person's testimony. Because of the need to assess this evidence in the context, therefore, the information obtained by the examination of the cooperating person cannot be the sole evidence proving the perpetrators guilty of committing criminal activity²⁵. Several factors may affect the veracity of the cooperating person's testimony. Both the cooperating person and the convicted offender are motivated to achieve the

²⁵ See Ruling of the Supreme Court of the Czech Republic, file No. 7 Tdo 1315/2012 of 12 December 2012, Available at <https://www.nsoud.cz/> : «The given evidence cannot stand alone.»

greatest possible benefit as part of their standing in criminal proceedings. If these persons participated in joint criminal activity, both sides will try to marginalize their own share in committing the crime and highlight the decisive or key role of the other party in committing the crime. In cases, where the cooperating person and the convicted offender have committed a joint criminal offense but also in cases where the cooperating person is (or is to be) accused of other - unrelated crimes, the veracity of his or her testimony may be influenced by another factor: the effort to ingratiate with the law enforcement authorities and the court for the benefits granted, as a result of which the testimony may include fables that have not actually taken place.

The ECHR has repeatedly expressed its opinion on the applicability of the information obtained from the crown witness. The approach of the ECHR to the crown witness institution, which is essentially positive, corresponds to the considerable expansion of this institution in the legal systems of the European countries²⁶, i.e. the fact that it is not just a singular phenomenon of one legal system²⁷.

The question of applicability of the accusative or inquisitional type of the criminal procedure in individual countries, i.e. pointing to the fact that the crown witness was not the original institution used in continental legal systems, is no longer relevant. Essential is only the observation of the rules of fair trial²⁸. The ECHR allows the use of witness testimony of the cooperating person, i.e. its application is not violation of the right to a fair trial *per se* under Art. 6 of the Convention. Similarly, it is generally permissible to base the con-

²⁶ See the Resolution of the Constitutional Court of the Czech Republic, file No. III. CC 859/13 of 13 March 2014: «*In many foreign criminal laws, this institution is currently included and considered to be an extraordinary but nevertheless a legitimate means of combating serious crime. The legal foundation of the institution of the cooperating accused (under such names as Kronzeuge, informant defendant, świadek koronny, pentito, testimone di giustizia, immunity witness, accomplice witness, supergrass apod.) can also be found, e.g. in Slovakia (establishment by an amendment of the Criminal Law and Criminal Procedure Code by Act No. 457/2003 Coll.), in Germany (Section 46b of the StGB), in Poland [Art. 2 ustawy o świadku koronnym z dnia 25. czerwca 1997 r. (Dz. U. z 1997 r. Nr 114, note. 738)], in Italy (La legge 13 febbraio 2001 n. 45) and in a number of other countries. The application of this institution and its incorporation into the legal systems of the Member States are also recommended by the Council of Europe documents [Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice].*»

²⁷ Even in the first half of the 20th century, the crown witness was a singular phenomenon of the Anglo-American legal environment (England, Scotland and North America). See considerations of the transposition into German legal system: FREIBERG, *Der Kronzeuge*, Zeitschrift für die gesamte Strafrechtswissenschaft, Walter de Gruyter, Berlin / New York, 1940, Vol. 59(1), p. 38.

²⁸ See: KRISTKOVÁ, *Komparativní pohled na kontinentální trestní řízení (Comparative View of Continental Criminal Proceedings)*, Trestní právo, 2015, Volume 15, No. 3, p. 1-10.

viction judgment on a single conclusive evidence or a decisive factor (conclusive evidence)²⁹. However, the combination of these factors (witness testimony of the crown witness as conclusive evidence) is a reason for thorough examination of the fairness of the process under Art. 6 of the Convention. The ECHR accepted the possibility of witness testimony of the crown witness as conclusive evidence of significant importance. Proof given by the testimony of a crown witness must be carried out in the adversary procedure in accordance with Art. 6 (3d) Article 3 d) f the Convention. The court concludes that the use of testimonies given by the cooperating persons may jeopardize the fairness of the trial, since the veracity of the testimony may be affected by the intention to obtain personal benefits or revenge against the accused. However, the fairness of the trial is preserved if the law enforcement authorities and the court are aware of these risks and carry out an in-depth and thorough analysis of the veracity and reliability of the testimony of the cooperating person and pay special attention to the objections raised by the third party's defence, the elements of adversary procedure³⁰ are applied, that is if the evidence obtained by the witness statement of the cooperating person is supported by further evidence³¹. Although the information obtained from the cooperating person may be sufficient for the initiation of criminal prosecution or the filing of an allegation, for further proceedings - prolongation of the period of detention, and more so for the prosecution and conviction of the accused - there is a need for further evidence of the accused³².

A particular issue is the admissibility of the use of information obtained by the testimony of the crown witness as a proof in proceedings against the crown witness himself or herself. We take the view that the procedure would be contrary to the principle of *nemo tenetur ipsum accusare*, as different rules apply to the examination of the witness than to the examination of the ac-

²⁹ See, for example, ECHR judgement in the Al-Khawaja and Tahery case, No. 26766/05, 22228/06 of 15 December 2011, para. 147.

³⁰ The ECHR judgment in the case of Vladislav Atanasov against Bulgaria, No. 20309/02 of 3 March 2009, *in fine*; further in the case of Cornelis against the Netherlands, No. 994/03 of 25 May 2004, and Verhoek against the Netherlands, No. 54445/00 of 27 January 2004.

³¹ See the ECHR judgement in the case of Labita against Italy, No. 26772/95 of 6 April 2000, para. 157 et. seq.

³² Same source, Para. 158 a 159: "*statements of pentiti must be corroborated by other evidence. Furthermore, hearsay must be supported by objective evidence. ... That, in the Court's view, is especially true when a decision is being made whether to prolong detention pending trial. While a suspect may validly be detained at the beginning of proceedings on the basis of statements by pentiti, such statements necessarily become less relevant with the passage of time, especially where no further evidence is uncovered during the course of the investigation.*"

cused - the witness is unlike the accused obliged to speak only the truth, not to withhold anything, and only able to refuse to testify in statutory situations. Therefore, if prosecution is subsequently pursued against the witness, it is necessary to hear the information about his or her own criminal offense in the procedural position of the accused.

8. Conclusion

From the comparative examination of the legal provisions in question (benefits provided to the crown witness, possibility of using his statement as evidence) and the identification of their substantial differences, the following questions and subjects for reflections *de lege ferenda* arise.

Firstly, what form of benefits is necessary or permissible to motivate the crown witness to cooperate?

On the one hand, the crown witness is also a perpetrator of a criminal offense and there is a social interest in imposing a sanction for the commitment of the offense (i.e. the non-prosecution of the crown witness as a perpetrator constitutes a moral problem), or the possibility of gaining a significant benefit may motivate to false testimony of the criminal activity of third parties; on the other hand, the benefit provided to the crown witness must be sufficient motivation to cooperate with the prosecutor's office, and to break the criminal alliance. When looking for an ideal model of benefits, it is also necessary to take into account the fact that the advantage in the form of stopping prosecution with the effects *rei iudicatae* must be provided only after the fulfilment of all duties by the crown witness, in Slovakia, in the form of stopping the prosecution after the fulfilment of the duties or the temporary suspension of criminal prosecution with a probation period for the fulfilment of the duties, or in Austria, in the form of stopping the prosecution, subject to its possible continuation. Similarly, in the Czech Republic, the court decides to waive punishment or impose a penalty below the lower limit of the penalty rate until the crown witness has fulfilled its duties. The advantage of the Czech model, in which only the court decides on the criminal case of the crown witness is the fact that, even if the punishment is waived, it is possible to impose another sanction: protective measures, protective treatment. The advantage of the Austrian model lies in the explicit duty of the public prosecutor to decide whether to stop the prosecution or to file a prosecution and to propose a lower sentence, which allows the court to consider the possible need to impose a punishment in order to achieve individual prevention and repression of the crown witness.

Secondly, do benefits need to be applied on an obligatory or only facultative basis?

The facultative provision of benefits to the crown witness allows a greater scope for consideration of the prosecution, the public prosecutor's office or the court on the appropriateness of granting an advantage; on the other hand, the obligatory provision of benefits means a legal right to a reward for cooperation, and thus legal certainty and consequently more motivation for the crown witness. The Slovak model of legislation is based on the facultative provision of benefits to the crown witness. The Czech model is mixed: the prosecutor of the court facultatively proposes to waive from punishment or impose a penalty below the lower limit of the penalty rate, and the court, after compliance with the statutory conditions, decides to impose these benefits on an obligatory basis. The paradox of this model is that an independent and impartial court, which is the only one authorized to decide on the guilt and punishment, is given a narrower room for discretion than the public prosecutor's office. The reason for this limitation of the discretion of the court is precisely the provision of legal certainty to the crown witness. The Austrian model is mixed as well, but vice versa: the prosecutor's office obligatorily stops the prosecution, or obligatory (after failing to comply with all the conditions) proposes the imposition of a penalty below the lower limit of the penalty rate, on which the court then has the facultative option to decide. The court has a mandatory obligation, after compliance with the legal conditions, to decide to stop the prosecution if the crown witness institution is applied only during the main proceedings.

Thirdly, what kind of probative value and what effect on conviction does the information obtained from the crown witness have in the proceedings against a third party?

Using the information obtained from the crown witness as evidence against a third party involves several risks related to truthfulness and credibility: marginalization of one's own share or the leading role in the commitment of crime, fabrication of events and facts that did not actually take place, or false information about third parties as offenders in an attempt to increase one's own status as a witness and to achieve greater benefits for oneself, and so on. The decision-making process of national courts and the European Court of Human Rights addresses this issue by emphasizing a careful and in-depth analysis of the truthfulness and credibility of the testimony given by the crown witness, as well as by emphasizing the need to support this testimony with other evidence. The application of a crown witness does not imply per se vio-

lation of the right to a fair trial under Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. the information obtained from the crown witness does not have a lower probative value than the information obtained from other evidence. Information obtained from the crown witness may represent decisive proof of the third party's guilt, but not the only conclusive evidence. It is questionable whether the testimony of the crown witness without finding any further information (without finding any further evidence) would be enough to raise an allegation or to initiate criminal prosecution against a third party as the accused.

Once these issues have been resolved, it can be assumed that the legislation concerning the crown witness will be balanced and effective in any country.