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Crown/Material witness in Central Europe: Slovak Republic, Czech Republic and Austria. Part 1.¹

The authors provide in the present first 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 context of adopting the legislation, range of offences, subsidiarity and proportionality and obligations of the crown witness. From analysis of the findings, authors recommend what factors the legislator should consider in legal regulation of the crown witness.

SUMMARY: 1. Introduction and historical context. - 2. The context of adopting the legislation in Slovakia, the Czech Republic and Austria. - 3. The range of offences. - 4. Subsidiarity and proportionality. - 5. Obligations of the crown witness. - 6. Benefits provided to the crown witness. - 7. Information obtained by the examination of the cooperating person as evidence. - 8. Conclusion

1. Introduction and historical context

The purpose of the crown witness² institution is to strengthen effective detection of serious criminal activity, especially organized crime committed by criminal groups in a sophisticated and secretive manner, and to strengthen the detection and conviction of the offenders by motivating the suspected or accused persons to testify as witnesses. The basis of this institution is an agreement between the offender and the state (represented by the public prosecutor's office or the prosecuting attorney's office) on the provision of information essential for the investigation of serious crime, i.e. identification and detection of the perpetrator, which the cooperating person benefits from. The concept of providing benefits to the cooperating person is based on the idea of "the negotiated justice"³, when the person provides information to the

¹ This article has been prepared within the APVV (Slovak Research and Development Agency) Project (No. 15-0740) entitled as the Guidelines and tools for effective elimination of unlawful acts in relation with potential insolvency.

² In the text, the terms "crown witness" or "material witness", "cooperating person" and "cooperating accused person" are used as synonyms. The term "cooperating person" is explicitly used in the case that no criminal prosecution is conducted against the person as the accused.

³ The matter of the cooperative accused undoubtedly belongs to this concept, since the opportunity is fully applied here and the principle of legality cease to count, although Prof. Kratochvíl (Czech Republic) does not mention this issue directly, focusing in particular on penetrating the institution of an

law enforcement authorities that they would not otherwise have obtained, or provides testimony that constitutes at least material evidence (the cooperating accused person is therefore also called a material witness⁴ or “pentito”), the absence of which would mean the insufficiency of evidence, i.e. this concept is also included under the concept of extensive, or pragmatic opportunity⁵. The cooperating person benefits from the provision of information by the award of a more lenient punishment or complete impunity for a criminal offense in the form of the termination of criminal prosecution. The nature of this cooperation as the negotiated justice is particularly pronounced in the conditions of the Slovak criminal procedure, which does not require initial initiative nor admission of the actual criminal activity by the cooperating person but only the provision of information and testimony as a witness in the proceedings. In contrast, initial initiative as well as admission of crime is required in the conditions of the Austrian criminal procedure, which can be regarded as an external feature of the abandonment of criminal behavior (a sign of desistance), and the benefits provided to the crown witness can therefore be perceived as the extension of possibilities of individualizing the punishment⁶ - similarly as taking into account the admission as an attenuating circumstance.

The institution of crown witness – the cooperating person or the cooperating

agreement on guilt and punishment into continental legal systems. See in detail: KRATOCHVÍL, *Východiska kodifikační fáze trestněprávní reformy v České republice (Basis of the Codification Phase of the Criminal Law Reform in the Czech Republic)*, Collection of Articles from an International Seminar held under the Tempus Program, Masaryk University, Brno, 1994, p. 109 - 123.

⁴ The attribute “crown” can be understood on one hand as a reference to the decisive importance of witness testimony for criminal proceedings, and on the other hand as a reference to the English original of that legal instrument, namely the phrase “*to give evidence for the Crown*”, as the prosecution is made on behalf of the head of state, who is symbolized by the crown.

⁵ Classic opportunity allows a decision on the non-prosecution of the accused based on the absence of the public interest in criminal prosecution. Extensive opportunity allows the non-prosecution of the accused as a reward for a return service. See: MICHORA, *Expanzivní oportunita v kontextu rekodifikace trestního procesu a spolupracující obviněný (Expansive Opportunity in the Context of Recodification of Criminal Proceedings and the Cooperating Accused)*, Trestněprávní revue (*Criminal Law Revue*), No. 1, 2017, p. 1; KRISTKOVÁ, *K legalitě a oportunitě v českém trestním řízení (On the Legality and Opportunity in Czech Criminal Proceedings)*, Criminal Law, 2014, p. 4-13; WEIGEND, *Das „Opportunitätsprinzip“. Zwischen Einzelfallgerechtigkeit und Systemeffizienz*, Zeitschrift für die Gesamte Strafrechtswissenschaft, 1997, p. 110-118.

⁶ 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.

accused person is currently well established and applied⁷ in the legal systems of the Central European region, i.e. Slovakia, Czech Republic and Austria, although it is not typical for these legal system both from the historical point of view and from the point of view of the nature of the criminal procedure. The legal status of a crown witness originates from the Anglo-American legal environment⁸, where the criminal procedure is constructed strictly in contradictory terms, that is, the process of two opposing parties in which the judge does not interfere. The legal status of a crown witness is therefore a lawful and legitimate instrument in the contradictory process by which the prosecution, as one of the opposing parties, seeks to acquire a probative, and hence argumentative superiority over the other side - the defense, by attracting one of the accused to its side.

The criminal procedure of the continental nature in the Central European region originally had an inquisitorial character, with the dominant position of the judge⁹ and the imperative of seeking material truth¹⁰. Crown witness, on

⁷ Regarding an overview on the application of the crown witness legislation in Slovakia (in particular the conditional suspension of criminal prosecution of the co-operating accused under Section 218 and 219 of the Slovak Criminal Code) see detailed statistical year books on the activities of the General Prosecutors Office of the Slovak Republic, available at <https://www.genpro.gov.sk/statistiky-12c1.html>, of 25 January 2017; in the Czech Republic, see the summary according to: 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; and in Austria the Endbericht Kronzeugenregelung Report. Institut für Rechts- und Kriminalsoziologie, available at: https://www.justiz.gv.at/web2013/file/2c94848b5461ff6e0157dd4d90eb5246.de.0/studie_irks_endbericht_kronzeugenregelung.pdf of 23 January 2018.

⁸ Regarding an overview of the application of crown witness legislation in Slovakia (in particular the conditional suspension of criminal prosecution of the cooperating accused under Section 218 and 219 of the Slovak Criminal Code), see detailed statistical yearbooks on the activities of the General Prosecutors Office of the Slovak Republic, available at <https://www.genpro.gov.sk/statistiky-12c1.html>, of 25 January 2017; in the Czech Republic, see the summary according to: BUDAYOVÁ, *Četnost využívání institutu spolupracujícího obviněného a návrhy k jejímu zvýšení (Frequency of Using the Cooperating Accused Institution and the 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; and in Austria, the Endbericht Kronzeugenregelung Report. Institut für Rechts- und Kriminalsoziologie, available at: https://www.justiz.gv.at/web2013/file/2c94848b5461ff6e0157dd4d90eb5246.de.0/studie_irks_endbericht_kronzeugenregelung.pdf of 23 January 2018.

⁹ Regarding this, see (also with reference to the contrast with the inquisitional process): FREIBERG, *Der Kronzeuge*, Zeitschrift für die gesamte Strafrechtswissenschaft, Walter de Gruyter, Berlin / New York, 1940, Vol. 59(1), p. 36.

¹⁰ See, e.g. the provisions of Section 96 of the Code of Criminal Procedure of 1873 (the so-called Glasser's Code of Criminal Procedure), which was valid in the Austrian part of Austria-Hungary and after the

the other hand, is a rational instrument of a strictly contradictory process that prefers efficiency and effectiveness rather than seeking material truth, i.e. the fair punishment of every offender, that is, even the cooperating one¹¹. Following the inclination of the continental legal systems to the accusatory criminal procedure with contradictory elements, the crown witness instrument also finds its place in here, even though the criminal procedure in these systems does not constitute the process of two opposing parties in the true sense of the word. The crown witness institution can be regarded as one of the symbols of departure from the principle of seeking material truth. In Slovakia and the Czech Republic¹², this principle is no longer applicable, while in Austria it is still part of the criminal procedure¹³.

Unity between multiple legal system can be found at the level of purpose, although individual legal standards differ. In the following text, we will examine how three Central European legal systems have coped with the introduction of the original Anglo-American legal instrument, namely, and in particular with the determination of the extent of criminal offenses to which it applies, with the issue of the duties of and the "benefits" for the cooperating person, as well as with the possibility of using the information obtained as evidence in proceedings against a third party.

2. The context of adopting the legislation in Slovakia, the Czech Republic and Austria

The crown witness legislation is relatively new in all three countries, given the historical and systematic context. Legislators decided to introduce the crown witness legislation after considering the inadequacy of the procedural tools used so far in detection and conviction of offenders, particularly organized crime and other sophisticated crimes. The Slovak Code of Criminal

origin of the Czechoslovak Republic also in the territory of Bohemia, Moravia and Silesia: "*If a preliminary inquiry has been commenced, the examining judge proceeds as per the official duty, not awaiting further proposals from the prosecutor, in order to investigate the facts of the case, to find the perpetrator and the means of conviction or defence of the accused, so far as necessary for the purpose of the preliminary inquiry.*"

¹¹ See e.g. BIRKLBAUER, *Section 17 stop*, in FUCHS, RATZ, *Wiener Kommentar zur StPO*, available at www.rdb.at of 31 October 2017. The author states, inter alia, that the transition from the inquisitorial process to accusative means a retreat from seeking material truth.

¹² E.g. even Pfister categorically excludes the parallel existence of the obligation of seeking material truth in the criminal procedure and the conclusion of agreements between the accused, the public prosecutor's office and the court. See also: PFISTER, *Deal und Fehlurteil*, *Forensische Psychiatrie, Psychologie, Kriminologie*, 2013, No. 4, p. 250-257.

¹³ According to Czech and Slovak legislation, the authorities proceed to see the facts of the for which there are no reasonable grounds for doubts to the extent necessary for the decision.

Procedure (CPC)¹⁴ includes legal instruments related to the application of a crown witness¹⁵ from December 2003, and more specifically from January 2006¹⁶. The reason for introducing such legislation, according to the legislators, was to overcome the insufficiency of evidence, especially in cases of organized crime. Motivating a “criminal offender” to voluntarily cooperate with law enforcement authorities, i.e. to conclude a formal agreement on benefits in return for witness testimony, appears to be a more effective tool for detecting information than conventional procedural tools.

Similarly, in the Czech Republic, the issue of the crown witness was gradually incorporated into the Code of Criminal Procedure (CPC)¹⁷: in 1995 and in 2009, by the amendment related to the adoption of the new Criminal Code (CrC)¹⁸.

The reasons for the adoption of the legal status of a crown witness in Austria are, in principle, the same as in the Slovak and the Czech Republic: the clarification of serious criminal activities committed by criminal groups in particular. In addition, the legislation also pursues the effect of general prevention - the destabilizing effect on organized crime groups¹⁹. Each chain is as strong as its weakest link, and a cooperation agreement with one member

¹⁴ The criminal police, the prosecutor's office and the court seek the truth to clarify all the facts that are necessary for the assessment of the office (Section 3(1) of the Austrian Code of Criminal Procedure - StPO).

¹⁵ Slovak Act No. 301/2005 Coll. Code of Criminal Procedure, as amended.

¹⁶ These are the institutions of temporary deferral of the allegation, facultative suspension of criminal prosecution under Section 215(3) of the CPC, conditional suspension of criminal prosecution of the cooperating accused under Section 218 and 219 of the CPC, facultative discontinuance of criminal prosecution under Section 228(3) of the CPC, from the substantive law, it is the instrument of extraordinary reduction of punishment under Section 39(2e) of the CPC.

¹⁷ Institutions related to the cooperating person became part of the Criminal Codes by an amendment of the old Code of Criminal Procedure (No. 141/1961 Coll.) No. 457/2003 Coll., with effect from 1 December 2003, except for the conditional suspension of criminal prosecution of the cooperating accused, which has been in the application practice only from the effective date of the new Code of Criminal Procedure. Regarding these institutions, see the commentary in more detail: ČENTĚŠ, *Section 205, Section 215(3)*, in ČENTĚŠ et al., *Trestný poriadok - Veľký komentár (Code of Criminal Procedure - Great Commentary)*, Bratislava: Euro Code, 2017, p. 956.

¹⁸ Czech Act No. 141/1961 Coll. Act on Criminal Procedure (Code of Criminal Procedure), as amended.

¹⁹ Amendment of CPC No. 152/1995 Coll. has introduced the possibility of temporary postponement of a criminal prosecution without explicit mention of the cooperating person and Amendment No. 41/2009 Coll. has introduced the legal status of a cooperating accused person, also in connection with the possible reduction of punishment under the new CPC.

²⁰ See the document on the institution of crown witness from 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.

of the group breaks the chain, which in other groups of organized crime leads to mistrust among members, motivating each member to pursue primarily his or her own interests, which hereby leads to the weakening of the groups.

The specificity of the Austrian legislation, which is unknown in the Slovak and Czech criminal procedure, is the temporal limitation of the crown witness legislation to a primary six-year period, followed by a five-year period, after which there will be a room for assessing the effectiveness of this legislation and the reasons for its further existence. The effectiveness of the legal status of a cooperating person under Section 209a of the Austrian Code of Criminal Procedure was thus limited from 1 January 2011 to 31 December 2016, and subsequently by a large amendment extended from 1 January 2017 to 31 December 2021.

3. The range of offences

At the beginning, it should be noted that it is necessary to distinguish, on the one hand, the category of offences clarified by using the crown witness institution, namely offences of third parties and, on the other hand, the category of offenses for which the crown witness or the cooperating accused can be prosecuted. The first category – offences being clarified – are, in principle, not considered common criminal offenses, but crimes of higher social importance, committed by secret, organized criminal groups, with a higher degree of conspiracy. This concerns primarily criminal activity committed by organized crime – drug, arms and human trafficking, corruption, money laundering, but also economic crime. The second category of offenses – offenses of which the crown witness may be accused – can be defined in the same or similar way (along with the related crime) as the first type, if the legislator prefers the concept where the crown witness is to clarify the criminal activity in which he or she participated, or does not have to be defined at all if, according to the concept chosen by the legislator, it does not matter whether the cooperating accused person is accused of the same or related criminal activity or entirely other criminal activity that is not related to the clarified crime. The second, more flexible, concept allows to treat any person who has information about a crime, no matter what crime he or she is accused of, as a crown witness. Of course, in practice, the occurrence of cases is more likely where the crown witness is accused of criminal activity that is identical or related, since the participation in criminal activity is a good prerequisite for obtaining sufficient information about it.

The Slovak Code of Criminal Procedure²⁰ exclusively lists the first category of offenses - crimes that can be clarified by this institution. The crown witness institution can be used to clarify corruption²¹, the crime of establishing, assembling and supporting a criminal group or crime²² committed by an organized group or criminal group²³ or terrorist crimes²⁴. The category of offenses is thus defined by exhaustive enumeration (crimes of corruption, terrorist offenses, establishment, assembly and support of a criminal group) and, secondly, by the general clause that it is any crime committed by an organized or criminal group. The second category of offenses, i.e. the crimes of the cooperating person, is not defined and therefore limited, since the crown witness can be accused of an identical or completely different offense and be consequently rewarded for cooperation by terminated or conditionally suspended criminal prosecution for that offence. Negative enumeration is not defined either, i.e. the exclusion of the application of the institution, if the crown witness is accused of some offences. However, the limitation concerns the way of participation in the criminal activity: as with a crown witness, it is not possible to cooperate with the crown witness, who is the organizer, abettor or client of the crime.

The Czech Code of Criminal Procedure, same as the Slovak legislation, only defines the first category of offenses. Crime is, same as in the Slovak legislation, a deliberate criminal offence, for which the Criminal Code defines criminal penalties with the upper limit exceeding five years.²⁵ Such a definition of the category of offenses in which the crown witness can be applied is clear, but to the detriment of the matter it is not possible to include in this category corruption crimes²⁶ and the misuse of public authority²⁷ in the essential facts of the case²⁸, the commentiment of which is an accompanying phenomenon to the achievement of the objectives of organized crime considering the need of cooperation of the offenders with public authorities. However, the acceptance of a bribe can be clarified through a crown witness if the offender is an offi-

²⁰ Provisions of Section 205(1), 215(3), 218(1) of the Slovak CPC.

²¹ Provisions of Section 328 to 336b of the Slovak Criminal Code.

²² A crime is a deliberate criminal offence, for which the Criminal Code defines a criminal penalty with the upper limit exceeding five years (Section 11(1) of the Slovak Criminal Code).

²³ Provisions of Section 129(2, 4) of the Slovak Criminal Code.

²⁴ Provisions of Section 140b of the Slovak Criminal Code.

²⁵ Provisions of Section 14(3) of the Czech Criminal Code, *a contrario*.

²⁶ Provisions of Section 329 of the Czech Criminal Code.

²⁷ Provisions of Section 331 to Section 334 of the Czech Criminal Code.

²⁸ These criminal offences are crimes already in the qualified facts since the upper limits of criminal penalties in the qualified facts already exceed five years.

cial, since in that case the offender can face a criminal penalty with the upper limit of ten years. The second category of offenses, i.e. the crimes of the cooperating person, is not defined, so same as in Slovak legislation, it is possible to work with a person as a crown witness if he or she is charged with any criminal offense. Contrary to the Slovak and Austrian legislation, Czech legislation explicitly excludes the application of this institution if serious injury or death is intentionally caused by the crime of the cooperating person. Similarly, to the Slovak and Austrian legislation, the application of this institution is excluded if the cooperating person is the client or abettor of a criminal offense. The Austrian Code of Criminal Procedure (StPO) defines a relatively wide range of offenses in which the institution of a cooperating person is applicable. The category of offenses is determined, on the one hand, by the jurisdiction of the courts and the public prosecutor's office (Section 209a (1) point 1 and 2 with reference to Section 31(2) and (3) and Section 20a and 20b and, on the other hand, by the specific enumeration of offenses (point 3). The institution of the cooperating accused, for example, can be applied to all offenses where the upper limit of criminal penalty exceeds five years, which, however, does not represent such a large range of offenses as in the case of the Czech Criminal Code or the Slovak Criminal Code, given the generally lower penalties in the StGB²⁹. However, the enumeration of offenses also includes a number of criminal offenses with lower criminal penalties (property crimes, corruption crimes³⁰, misuse of public authority and many others). Same as according to the Slovak legislation and unlike the Czech legislation, the crimes of corruption can be clarified by applying the crown witness institution.

The specificity of the Austrian legislation is the fact that the range thus defined applies to criminal offenses of third parties being clarified, to detect and convict their offenders, but also for criminal offences committed by the cooperating accused. Thus, unlike the Slovak and Czech legislation, a person can become the cooperating accused only if he or she has committed one of the

²⁹ The author based this statement on his own experience of comparing criminal penalties in the relevant codes of criminal substantive law. However, an exhaustive analysis of this issue goes beyond the scope of this article. As an example (relevant in relation to the application of a crown witness), however, we can mention the criminal offense of establishment of and membership in a criminal group (Section 278 of the StGB), for which the imprisonment rate is set for up to three years. In the Slovak Republic, the criminal penalty for an adequate criminal offense (Section 296 of the Slovak Criminal Code) is between five and ten years and in the Czech Republic (Section 361 of the Czech Criminal Code) at the level of two to ten years.

³⁰ Provisions of Section 20a (1) point 5 of the StPO.

specified criminal offenses or other criminal offense that is related to the organized criminal activity committed (... *oder einer Tat, die mit einer solchen Verabredung, Vereinigung oder Organisation im Zusammenhang steht...*). From the concept of «admitting one's own participation in a criminal offense» (... *Geständnis ... über seinen Tatbeitrag ...*) as well as from the concept of «supporting a broad clarification of any of the offenses referred to in points 1 to 3, which (note. clarification) exceeds one's own participation in a criminal offense» (... *die umfassende Aufklärung einer in den Z 1 bis 3 genannten Straftaten über seinen eigenen Tatbeitrag hinaus zu fördern ...*)³¹, it is clear that the legislator requests the cooperating accused person to be accused (suspect) of the same or related criminal offense that is being clarified. The same legal qualification is thus not sufficient since it must also concern the same offences (committed and clarified by the cooperating person) or the content-relative offences. In addition, as in the Slovak and Czech legislation, there is a restriction on the way of own participation in criminal activity: if the person had a leading role (position) in the commitment of a criminal offense, the application of the crown witness institution to that person is ruled out³². The leading role should be interpreted as the position of the organizer, abettor or the client, or even somewhat broader: the cooperation with the offender as a crown witness can theoretically be ruled out if such a person committed robbery with an accomplice, while the role or status of both in committing the offense was the same. At the same time, the law does not state a negative enumeration that would rule out the application of a crown witness in certain criminal offences.

Compared to the Slovak and Czech legislation, the range of offenses thus defined and the need for a connection between the criminal offense of the crown witness and a third party represent a significant restriction on the applicability of this institution. On the one hand, it is understandable that the cooperating person is able to provide the most comprehensive and highest quality information about the crime he or she participated in. On the other hand, a person accused of his or her own unrelated criminal activity may have significant knowledge of other criminal activity in which he or she did not participate. However, Austrian law does not allow the application of the institution of the cooperating person in such a case. From the point of view of the historical context of the crown witness institution, it can be noted that the Austrian model corresponds to the traditional application of the institution:

³¹ Provisions of Section 209a(1) of the StPO.

³² This follows from the provisions of Section 209a (5) point 2 of the StPO.

the crown witness clarifies the crime in which he or she participated³³. The Slovak and Czech model, which does not include the restriction, is more flexible and allows for wider application of the crown witness institution. On the other hand, it is possible to conclude that there is a potential danger of misuse of this legislation by the police or the prosecutor (public prosecutor's office). There may be a situation that a corruptly motivated prosecutor will want to award impunity to the accused person, so he or she provides this person with information about an unrelated case, subsequently putting that person in the status of the cooperating accused while terminating or conditionally suspending the criminal prosecution. In the Austrian model, where the criminal activity of the crown witness and the third party must at least be related, that situation could not occur even theoretically

4. Subsidiarity and proportionality

Subsidiarity of the application of the crown witness institution means that its application comes into consideration if the information necessary for the clarification of a criminal offense and the conviction of the offender cannot be obtained by other means of evidence. The implication of subsidiarity in this case is the prioritization of “standard” evidence, a means of proof which creates less of a doubt about its credibility.

The principle of proportionality can be understood in the case of a crown witness in two levels. The first level is manifested in the degree to which the cooperating person contributed to the clarification of the criminal offense and conviction of the offender, on the one hand, and the benefits that the cooperating person receives in return (termination of prosecution, waiver of punishment, award of lower sentence, etc.) on the other hand. The authorities applying this institution must therefore take into consideration the level of benefits to be received by the cooperating person in terms of the probative value of the information obtained and its impact on the outcome of the proceedings in which the cooperating person acts as a witness. The second level of the principle of proportionality is manifested in the social interest in the clarification of serious criminal offense committed by a third party and the conviction of that party on the one hand, and the interest in the prosecution of the cooperating person and his or her punishment, i.e. the relation of the nature and severity of the criminal offense to be clarified and the offense committed by the cooperating person. At this level, therefore, the law en-

³³ See for example: FREIBERG, *Der Kronzeuge*, Zeitschrift für die gesamte Strafrechtswissenschaft, Walter de Gruyter, Berlin / New York, 1940, Vol. 59(1), p. 34 et. seq.

forcement authority must consider whether the interest in the clarification of the crime and conviction of the offender is greater than the interest in imposing a penalty on the cooperating person.

Under the legal status in Slovakia, the law does not explicitly stipulate the subsidiarity of the application of the crown witness institution. Subsidiarity is only implicit, in the temporary suspension of criminal prosecution, subject to the condition that a different procedure (criminal charge against the cooperating person) would make it more difficult to clarify a serious crime. Similarly, in the Czech Code of Criminal Procedure, subsidiarity is implicit in the temporary suspension of criminal prosecution, when the legislator stipulates that the police authority proceeds in that way if necessary to clarify the crime in question. The Austrian StPO Code of Criminal Procedure does not regulate subsidiarity. Although the Slovak, Czech and Austrian Criminal Codes provide for subsidiarity only implicitly or not at all, its observance follows from the practical point of view: law enforcement authorities naturally prefer the means of evidence where the likelihood of successful rejection of their plausibility appears to be the lowest. This is reflected in the decision-making process of the supreme courts³⁴, or institutional courts³⁵ by emphasizing the equivalence of the evidence thus obtained in comparison with other evidence, stressing the fact that the cooperating person as a source of evidence cannot be refused *per se*.

³⁴ For example, Ruling of the Supreme Court of the Slovak Republic, file No. 5 To 9/2011, available at <https://www.supcourt.sk/>: “*Only the fact that the cooperation of a person as a witness with law enforcement authorities in criminal proceedings within the meaning of Section 205(1) of the Criminal Procedure Code brings along the statutory advantage for this person, such as the temporary suspension of indictment, does not establish the credibility of such person’s testimony.*” Or 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 institution of a cooperating accused person is a tool for combating serious organized crime and is a standard means of evidence.*”

³⁵ For example, Ruling of the Supreme Court of the Slovak Republic, file No. III. CC 758/2016 of 8 November 2016, available at <https://www.ustavnysud.sk/>: “*The procedure of law enforcement authorities and subsequent courts of law, which use the legally established and, thus, a lawful institution of the cooperating witness, cannot be considered a priori a defective element that weakens the value of the evidence that the courts have reached with such testimonies*” or, for example, Ruling of the Constitutional Court of the Czech Republic, file No. III.CC 859/13 of 13 March 2014, available at <https://www.usoud.cz/>: “*Theoretical discussion and legislative developments in many countries with a developed legal system, however, largely concludes that, in response to serious security risk threatened especially by the organized crime, the institution of the collaborating accused is a legitimate instrument of criminal procedure that meets the requirements of the rule of law ... The institution is currently established many foreign criminal laws and considered to be an extraordinary but nevertheless a legitimate means of combating serious crime..*” In this ruling, the Czech Constitutional Court recalls the extraordinary nature of the application of this institution (its subsidiarity in other words) but emphasizes its legitimacy.

In the legislations examined, the principle of proportionality is governed in a much more extensive and diversified manner. The Slovak legislation expressly regulates the proportionality in the understanding of the second level, thus stipulating³⁶ that the interest in the clarification of that serious crime is beyond the interest in criminal prosecution (for this or other criminal offence) against the cooperating person. The criteria used to assess the priority of the individual interests remain for the consideration of the prosecutor or the court, but this must be justified. The interest can be assessed according to the offenses committed (the cooperating person may be charged with another offense than the convicted offender), and also according to the different rates of participation in the offence, or the degree of completion of the offense.

The Czech legislation stipulates that the prosecutor applies the principle of proportionality even when deciding whether to designate the person as the cooperating accused in the prosecution. The judge is to assess the nature of the offense to be clarified by the testimony of the cooperating person, on the one hand, and the criminal offense which the cooperating person admits, in particular, the circumstances of the case, the share of the cooperating person in committing the offense, the consequences of the offense, i.e. the person as the offender on the other hand. Consequently, the public prosecutor must decide what benefits he proposes to be provided to the person cooperating in the prosecution. The public prosecutor may propose to the court to waive the punishment, while assessing the seriousness of the criminal offence committed by the cooperating person and the criminal offence that the cooperating person helps to clarify. The public prosecutor must then assess the nature of these criminal offences, taking into account the extent by which the cooperating person contributed to the clarification of serious criminal offence, the significance of his or her testimony to criminal proceedings with regard to other evidence. The law requires the public prosecutor to assess the necessity of the petition to waive the punishment in respect of these facts. The second level of proportionality is thus partly complemented by its first level.

The Austrian legislator determines the state prosecutor's office in deciding on the choice of procedure which leads to the suspension of criminal prosecution under reservation, to assess the extent to which the information provided has contributed or will contribute (*das Gewicht des Beitrags*) to the clarification of the criminal offence, on the one hand, and the nature and extent of the cooperating person's own participation in this offence on the other hand.

³⁶ Provisions of Section 215(3) of the Slovak CPC, Section 218(1) of the Slovak CPC.

Subsequently, the law determines the public prosecutor to assess whether or not it is necessary to punish the cooperating person with regard to the result of the assessment as well as with regard to the achievement of individual prevention and repression (permanent deviation from criminal activity), i.e. to assess whether the benefits provided are reasonable. In the Austrian legislation, the second level of the principle of proportionality thus overlaps with its first level.

5. Obligations of the crown witness

The essence of the crown witness institution is a contractual relationship between the state and the offender, the subject of which is the exchange of considerations. In view of the fact that the state is the “most trustworthy” party in that relationship whose authorities are obliged to act in order to achieve justice and only within the limits and in the manner laid down by the law, the cooperating person is obliged to fulfil first, i.e. to meet the obligation of providing testimony, for which the person subsequently receives an advantage or beneficial treatment. The fulfilment of the cooperating person may consist of a number of specified tasks, but the basic that each crown witness legislation counts with, is to provide information to clarify serious criminal activity or to convict its offender.

At the beginning, it should also be added that, in the interest of the smooth cooperation and legal certainty of the cooperating person, he or she must be informed of his or her duties and rights at first contact as well as of the possible consequences of the failure to fulfil his or her duties.

According to Slovak legislation,³⁷ the cooperating person is obliged to participate (by his or her testimony) in the clarification of a criminal offence or conviction of its offender to a significant extent. It follows from this notion that the evidence obtained by the testimony of the crown witness is not only to serve as a confirmation of the issue of fact well established by other evidence, but that this evidence appears to be a necessary condition for the conviction of the offender (criminal charges), as without its existence, the conviction of the offender (criminal charges) would be considerably more difficult or impossible, although it cannot be the only conclusive evidence³⁸. It also follows from the notion of clarification that the crown witness provides information that is new to the police and the prosecutor's office, and thus the confirmation of already-known information is insufficient. An option is

³⁷ Provisions of Section 215(3) of the Slovak CPC, Section 218(1) of the Slovak CPC.

³⁸ See more on this issue below.

permissible that the crown witness provides some new information and partially confirms the facts already known. Similarly, the notion of clarification does not apply to the provision of information that is merely a matter of assumptions and impressions. In addition to the obligation to disclose the facts in the pre-trial proceedings, the crown witness is also obliged to testify in the main proceedings against a third party. Exercise of the right to refuse testifying in the main proceedings against a third party, for example, due to the possibility of giving grounds for the person's own criminal prosecution, must be considered a breach of the duty of the crown witness, thereby losing the opportunity to gain an advantage in the proceedings on its own criminal case. This applies equally to all three legislations examined. The provision of information by which the crown witness significantly contributes to the clarification of the criminal offense, and the testimony in the procedural status of a witness exhausts the obligations of the crown witness under the Slovak legislation, which means that the Slovak legislation provides for the narrowest range of duties of the crown witness amongst the legislations examined.

According to Czech legislation,³⁹ the basic condition for obtaining the status of a cooperating person is the communication of facts to the public representative that can make a significant contribution to the clarification of a crime. The same applies to the significance of the facts as in the Slovak legislation. The cooperating person is also obliged to testify about these facts as a witness. According to Czech legislation, the admission of one's own criminal activity is one of the basic conditions for applying the status of the co-operating person. The cooperating accused is obliged to admit the offence for which he or she is prosecuted, and there is no reason to doubt that this confession was made freely, seriously and definitely. The admission thus must meet the attributes of a standard legal act, and there can be no reasonable doubt that these attributes are not met. Reasonable doubt is a rational doubt, and not any doubt invoked, for example, by other evidence found in the case.

According to Austrian legislation, the condition for treating a person as the cooperating person is the provision of his or her knowledge of facts or evidence that significantly contribute to the extensive clarification of a criminal offense (other than knowledge of the person's own participation in it) or to the identification of the person who participated in the commission of the offense as the leading actor. As with the Slovak and Czech legislation, the contribution of the crown witness must be significant. The Slovak and Czech

³⁹ Provisions of Section 178a (1a) of the Czech Criminal Code.

legislation do not specifically mention the possibility of searching for or detecting the offender on the basis of the information provided, as this possibility is already contained in the notion of detection or conviction of the offender.

The legislation concerning the other duties of the cooperating person in different countries is characterized by significant differences. According to Czech and Austrian legislation, the cooperating person is obliged to admit to his or her own criminal activity, or his or her own participation in the criminal activity being clarified. According to Slovak legislation, the admission of crime by the cooperating person is not required.

According to Austrian legislation, the admission of participation in the criminal offence, by which the cooperating person expresses regrets over the crime committed (*reumütiges Geständnis ... über seinen Tatbeitrag*) is also a condition of the cooperation. The Austrian legislature thus requires a qualified confession: confession with regret, referring in the text of the law to the provision of Section 34(1) point 17 of the Austrian StGB, which considers such confession as one of the attenuating circumstances. An attenuating circumstance applies if the offender confesses to his or her own criminal activity and expresses regrets over it. However, it is not sufficient to apply the institution of a crown witness: in addition to the confession to one's own criminal activity, it is necessary to provide information about the criminal activity of other persons or information about the criminal activity in which the cooperating person participated himself or herself, as well as information about the activities of other participants. Admission of the person's own criminal activity or share in the criminal activity being clarified must be done on a voluntary basis, same as the person's entire cooperation with the public prosecutor's office. Enforcing the confession, although the person originally initiated the cooperation, would mean the violation of the *nemo tenetur se ipsum accusare* principle. In addition to the confession, however, Austrian law also requires another unique obligation: an initiative by the person interested in becoming a crown witness. This person is thus obliged, if he or she is interested in cooperation, to contact the public prosecutor's office, which cannot initiate such doing of the cooperating person as a crown witness *ex officio*. If the initiative is inadmissible on the part of the public prosecutor's office, the more (*a fortiori*) it is forbidden to force cooperation under pressure. Considering the initiative of the crown witness, the admission and regret of his or her crime, it is necessary to perceive this institution as an instrument to extend the possibilities of individualizing the punishment, which means, as we have already mentioned in the in-

troductio, a departure from the idea of negotiated justice, i.e. trade in justice. In Slovakia and the Czech Republic, the issue of the initiative is not legally regulated⁴⁰, according to Czech legislation, the consent of the cooperating accused to such a designation is sufficient⁴¹. In view of the absence of the requirement of the initiative by the cooperating person and the admission of his or her own criminal activity, the Slovak and Czech legislation can be viewed openly as rational and flexible but at the same time allowing opportunism by the cooperating person as well as by the prosecutor's office, which can in this way resolve the issue of insufficient evidence, through a "deal", even on its own initiative

The other and last special obligation of the crown witness in Austrian legislation that does not exist in Slovakia and the Czech Republic, is compliance with the specially defined obligations that apply in the case of deviation. Thus laid down obligation may be the payment of a sum of money, the performance of generally beneficial works, or the performance of a probation period with appropriate limitations and obligations⁴². If not prevented by circumstances worthy of special consideration, the crown witness is also obliged to pay the damage incurred, or otherwise contribute to the elimination of the consequences of the offense⁴³.

The views that the obligation to detect criminal activity can also be applied to the detection of the crime of the cooperating person alone, are to be refused⁴⁴ - both for the legal wording and for the material aspect of the fact that the granting of impunity or award of a sentence below the statutory limit solely in return for the admission of one's own criminal activity is inappropriate. This applies equally to all three legislations examined.

⁴⁰ Practice in the Czech Republic shows that the cooperation initiative comes both from the accused as well as the state prosecutor's office. The accused in the initiator of the cooperation in 65 % of cases. See: BUDAYOVÁ, *Četnost využívání institutu spolupracujícího obviněného a návrhy k jejímu zvýšení (Frequency of Using the Cooperating Accused Institution and the Suggestions for its Increased Application)*, Advocacy Bulletin, 2018, available at: <http://www.bulletin-advokacie.cz/cetnost-vyuzivani-institutu-spolupracujiciho-obvineného-a-navrhy-k-jejimu-zvyseni> of 23 January 2018.

⁴¹ Provisions of Section 178a (1c) of the Czech Criminal Code.

⁴² Provisions of Section 209a para. 1 in conjunction with Section 200 para. 1, 201 para. 1, 203 para. 1 and 2 of the StPO.

⁴³ Provisions of Section 209a para. 1 in conjunction with Section 200 para. 3, Section 201 para. 3 and Section 203 para. 2 of the StPO.

⁴⁴ See for example the document on the crown witness institution 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.

8. Conclusion

From the comparative examination of the legal provisions in question (historical context, context of adopting the legislation, range of offences, subsidiarity and proportionality, obligations of the crown witness) and the identification of their substantial differences, the following questions and subjects for reflections *de lege ferenda* arise.

Firstly, from a dogmatic point of view, is it permissible for a state whose right and duty is to prosecute crimes to conclude an agreement on cooperation with the perpetrator, the fulfilment of which will make the perpetrator non-punishable?

Although the legislation concerning the crown witness in Slovakia, the Czech Republic and Austria is identical in the purpose it follows, various attributes related to such person's status, duties, rights, applicability in various criminal offenses and other facts are different. The joint aim is, on the one hand, to effectively clarify serious crime, in particular organized crime, committed by sophisticated methods, with a higher level of conspiracy where standard criminal law procedures used to clarify crime lose efficiency and, on the other hand, to raise distrust among organized crime members and raise concerns that someone can always betray them by cooperating with the police. The crown witness instrument is a sign of the diversion of continental legal systems from the principle of seeking material truth and their tendency to efficiency and effectiveness - in the sense that it is better to convict criminals for the price of impunity of one of them than not to convict anyone, i.e. it is better to fulfil the obligation to prosecute crimes partially than not at all. Achieving the purpose of detecting serious crime is also reflected in the circumstances of the adoption of the relevant legislation in Slovakia, the Czech Republic and Austria. However, while the legislation of the crown witness is a stable part of the criminal procedure in the Slovak and the Czech Republic, the effectiveness of the legislation in Austria is limited in time, from 2011 to six years and from 2017 to five years, allowing for the regular evaluation of its legal application.

Secondly, what is the scope of clarified offenses of third parties to which the legislation applies?

The first significant difference in the three legislations examined can be found in the question of defining the categories of criminal offenses to which the crown witness legislation applies. Extensive application possibilities in terms of this attribute are provided by Austrian legislation where the range of offenses is determined by the jurisdiction of the courts and the public prosecutor's office: it covers all criminal offenses where the upper limit of the penalty

rate exceeds five years (which, given the overall lower penalty rates in the Austrian StGB de, means fewer criminal offenses) but also the exhaustive enumeration of other criminal offenses. The Slovak legislation deals with crimes committed by organized crime, especially crimes committed by organized and criminal groups and, unlike the Czech legislation, includes all crimes of corruption and misuse of public authority. The Czech legislation permits the application of crown witness to intentional criminal offenses with an upper limit of criminal penalty exceeding five years, whereby in the case of corruption crimes, allowing only crimes of bribe acceptance by an official.

Thirdly, is it necessary to limit the range of criminal offenses of the crown witness, in which it is possible to apply the termination of criminal prosecution, the reduction of punishment or impunity as a reward for co-operation?

The Slovak and Czech legislation does not provide for such a limitation, whereas the Austrian legislation establishes a range of criminal offenses of the crown witness and a range of criminal offenses of a third party, which are clarified, where it is necessary that it concerns the same or at least related criminal activity. Austrian legislation is therefore the most restrictive on this issue. On the one hand, the absence of restrictions may represent the theoretical risk of abuse by the police and prosecutors: for example, a corruptly motivated prosecutor can provide a person with information about an unrelated crime, then puts him or her in the position of a crown witness and terminates prosecution for his or her own criminal activity, on the other hand, the absence of restrictions means more flexibility - wide scope of application of the crown witness institution.

Fourthly, is the admission of the crown witness regarding his or her own criminal activity necessary?

The admission of own criminal offense by a crown witness is a statutory condition for the institution to be applied in the Czech Republic and Austria, whereas it is not required in Slovakia. The Slovak legislation thus reduces the legal requirements to a minimum - clarifying the criminal activity of another person. The absence of the admission requirement supports the broad application of this institution, it is flexible, on the other hand, it allows the crown witness to say only what is in his or her view suitable to say regarding the crime of others. However, it should be noted that the public prosecutor's office must have its own knowledge of the criminal activity of the cooperating person, even without this person's admission of it, for example, to terminate the prosecution against this person. Thus, the admission of crime by the cooperating person is not a necessary legal requirement, but its absence sup-

ports the image of the institution as an institution promoting the trade in justice.

The following second part of the research will examine the issues that relate to the benefits provided to the cooperating person, which may be a reduction in punishment or even a cessation of prosecution. Another question under examination will be the possibility of using the statement of the cooperating accused as evidence.