

Operational and Exploratory Activities Conducted by the Services of a Police Nature

Sebastian Kalisz

PhD student
Faculty of Law, Administration and International Relations
Andrzej Frycz Modrzewski Cracow University
Gustawa Herlinga-Grudzińskiego 1, 30-705 Kraków, Poland
Tel. (+48) 502649911
Email: <kaliszsebastian@gmail.com>

The article concerned raises the problem of operational and exploratory activities conducted by the services of a police nature. The main purpose of the article is to emphasize the lack of a legal definition of these activities, regulating only part of the known methods of them in acts, and partial control of an independent authority over their execution. The article gathers the available data on the use of operational control and the acquisition of telecommunications data in the tables.

Keywords: criminal intelligence, Human Rights, operational and exploratory activities.

Operatyvinio tyrimo veikla, kurią vykdo policijos tarnybos

Šiame straipsnyje keliama operatyvinio tyrimo veiklos, kurią vykdo policijos tarnybos, problema. Straipsnio pagrindinis tikslas yra pabrėžti šios veiklos teisinio apibrėžimo trūkumą, taip pat spragas reglamentuojant tik dalį šios veiklos metodų ir dalinę jų vykdymo kontrolę, kurią atlieka nepriklausoma institucija. Straipsnyje pateikiama duomenų apie operatyvinio tyrimo metodų naudojimą ir telekomunikacijų duomenų įgijimą.

Pagrindiniai žodžiai: kriminalinė žvalgyba, žmogaus teisės, operatyvinio tyrimo veikla.

Introduction

The Polish legal system knows the concept of operational and exploratory activities, which is used in the laws governing the activities of certain institutions intended to ensure internal and external security and public order. It should also be pointed out that this type of activities in services engaged in fight against crime, intelligence or counter-intelligence operations, but also in judicial decisions and scientific literature, is alternatively defined as: exploratory work, operational work, operational activities, and operational procedures.

The concept, even though it is not a new definition, does not have a legal definition yet, while forms, methods, procedures and controls of certain operational and exploratory activities are contained in separate laws between departments authorized to their use.

In 2008, a parliamentary draft law on operational and exploratory activities was submitted in the Polish Sejm (Parliamentary document no. 353 of 07.02.2008). In accordance with Article 2 of the draft, operational and exploratory activities constitute a set of procedures, transparent and classified, conducted

Received: 05/05/2020. **Accepted:** 03/07/2020

Copyright © 2020 Sebastian Kalisz. Published by Vilnius University Press

This is an Open Access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

solely in order to: recognize, prevent and detect crime; find people who hide from law enforcement or justice and missing persons, if there are reasonable grounds to suspect that their disappearance is the result of a crime, and to find things lost as a result of the offence or in connection with the offence; establish the identity of the persons and bodies in the event of a suspected criminal act. According to the proponent, such activities were related in particular to obtaining, collecting, processing and checking information about crime in a transparent or non-transparent manner or obtaining documentation, samples and comparative materials in order to disclose or secure the evidence of an offence. This project has not been submitted to the Polish Sejm.

The lack of statutory regulation has been supplemented in the scientific literature on criminalistics. Prof. Jerzy Konieczny claims that the operational and exploratory activities are fixed by law, mostly classified activities of the state organs carried out for the purposes related to information, prevention, investigations or evidence (and in the case of intelligence services having additionally political, military or economic importance) (Widacki, 2016, p. 172).

In turn, Prof. Tadeusz Hanausek considers operational and exploratory activities as a separate system of confidential or secret activities of the police services (also UOP, SG, etc.), conducted outside the criminal process, but usually supporting the current or future objectives of this process and conducted in order to prevent and fight crime and other social phenomena legally defined as negative (Hanausek, 1997, p. 121).

Prof. Adam Taracha indicates the following essential characteristics: operations of state bodies, performed on a classified or confidential basis, on the statutory basis, fulfilling the function related to information, exploration, prevention and evidence (Taracha, 2006, p. 25).

1. Institutions Authorized to Conduct Operational Activities

In Poland only the entitled state institutions, to which the legislator gave such an entitlement, are authorized to conduct operational and exploratory activities. Currently this type of operation can be conducted by: The Police, Border Guard, Military Police, National Tax Administration, Department of State Protection, Office of Internal Oversight Services of the Ministry of Internal Affairs and Administration, Central Anticorruption Bureau, Intelligence Agency, Internal Security Agency, Military Intelligence Service, Military Counterintelligence.

Private investigators are not entitled to conduct operational and exploratory activities, as investigative services are related to obtaining, processing and submitting information on persons, objects and events, carried out on the basis of an agreement concluded with the client, in forms and in non-reserved ranges for state bodies and institutions under separate rules (Article 2 paragraph 1 of the law of 6 July 2001 on investigative services).

Services of a police nature, i.e. the recognition, prevention and detection of offences, determining the perpetrators thereof and for obtaining and reinforcing the evidence include: The Police, Border Guard, Military Police, National Tax Administration, Office of Internal Oversight Services of the Ministry of Internal Affairs and Administration.

Other authorities empowered to carry out operational and exploratory activities known as special services are the Internal Security Agency, Intelligence Agency, Military Counterintelligence, Military Intelligence Service, and Central Anticorruption Bureau. In addition to the tasks related to the recognition, prevention and detection of crime and the prosecution of the perpetrators they carry out, further tasks are concerned with obtaining and processing of information relevant to the protection of internal and external security of the state and its constitutional order. They are subject to the supervision

and coordination by the Minister (Member of the Council of Ministers) Coordinator of Special Services. The last service with a nature related to ensuring the security of the most important people in the state and places of performing official duties and detection of crime directed against these persons is the State Protection Office.

2. Minimum Requirements for Methods of Criminal Intelligence

The competences of each of these services of a police nature are governed by law, as in accordance with the Constitution of the Republic of Poland, and impingement into the rights and civil liberties can only be laid down in the law of this rank. In addition, restrictions on the use of the constitutional rights and liberties may be only established if they are necessary in a democratic state to ensure its security or public order, or for the protection of the environment, health and public morality, or freedom and rights of others, and may not affect the substance of the rights and liberties (Article 31(3) of the Constitution of the Republic of Poland).

By the grounds of the judgement K 23/11 in point 5.3. The Constitutional Court, having regard to the case law of the European Court of Human Rights and of the Court of Justice of the European Union concerning the provisions governing the undisclosed acquisition of information on persons by public authorities in a democratic state of law, pointed to the minimum requirements which must be met by the provisions limiting the constitutional liberties and rights:

1. The collection, storage and processing of data concerning the persons and in particular the sphere of privacy is permitted only on the basis of a clear and precise provision of law (see the CC judgements of: 12 December 2005, case K 32/04; 23 June 2009, case K 54/07);
2. A clear definition is necessary in the law of the state bodies authorized to collect and process personal data, including to apply operational and exploratory activities;
3. In the act must be specified the indication of undisclosed acquiring of information about people, which are: detecting and prosecuting serious criminal offences and preventing them; the law should indicate the types of such offences (see e.g. decision of the CC of 15 November 2010, case S 4/10; ETPC judgements of: 29 June 2006 on the Weber and Saravia vs. Germany, action 54934/00; 10 February 2009 on Iordachi and others vs Moldova, action 25198/02);
4. The law must specify the categories of entities to which the operational and exploratory activities may be undertaken (see judgement of CC of 12 December 2005, case S 32/04; ETPC judgements of: 16 February 2000 on Amann vs. Switzerland, action 27798/95; 10 February 2009 on Iordachi and others vs Moldova, action 25198/02);
5. It is desirable to specify in the act the types of undisclosed acquiring of information and types of information obtained using the individual measures;
6. Operational and exploratory activities should be alternative means of acquiring information or evidence on the persons, when it is not possible to obtain it in any other way (see CC judgements of: 12 December 2005, case K 32/04; 23 June 2009, case K 54/07);
7. In the law there should be the maximum period of operational and exploratory activities against persons, which may not exceed the necessary limits in a democratic state of law;
8. It is necessary to precisely codify the procedures of operational and exploratory activities, covering in particular the requirement to obtain the approval of an independent authority for an undisclosed acquisition of information (see for instance the CC judgement of 12 December 2005, case S 32/04; ETPC judgements of: 29 June 2006 on the Weber and Saravia vs. Germany, action 54934/00; 02 September 2010 on Uzun vs Germany, action 35623/05);

9. A precise identification of the rules of conduct with materials collected in the course of operational and exploratory activities, in particular the rules for their use and the destruction of unnecessary and unacceptable data (see for instance the CC judgement of 12 December 2005, case. K 32/04);
10. To ensure the safety of the data collected from unauthorized access by third parties;
11. To standardize the procedure of informing the persons about an undisclosed obtaining of information about them within a reasonable time after the end of the operational and exploratory activities and ensuring – at the request of the person – the judicial assessment of the legality of these operations; derogation is permitted exceptionally (see e.g. decision of CC of 25 January 2006, case S 2/06);
12. To ensure the transparency of operational and exploratory activities by individual public authorities in the public disclosure and the availability of statistical data, suitable for comparison of the quantity and type of operational and exploratory activities;
13. The differentiation of the intensity of privacy protection, autonomy of information and secrecy of communication in view of the data on people acquired by the intelligence services and the security of the state services or the police services is not excluded;
14. The differentiation in the level of protection of privacy, autonomy of information and secrecy of communication can also occur due the fact that the undisclosed acquisition of information concerns citizens or people with no Polish citizenship (Judgement of the Constitutional Court of 30.07.2014 No. K 23/11).

3. Statutory and Non-Statutory Methods of Operational Work

The laws instituting activities of police services shall include the following methods of operational and exploratory activities that extend to the sphere of protected rights and civil liberties:

1. Interaction, obtaining and sharing information on persons, obtained in the course of operational and exploratory activities by other bodies;
2. Obtaining information on persons, including information that is a legally protected secret;
3. Obtaining telecommunications, postal, and internet data;
4. Jamming telecommunications;
5. Observation in a public place;
6. Operational control that includes:
 - a. obtaining and consolidating the content of discussions carried out using technical measures, including telecommunications networks;
 - b. obtaining and consolidating the images or sound recordings of persons from specific premises, means of transport or places other than the public space;
 - c. obtaining and consolidating correspondence, including the use of electronic communication;
 - d. obtaining and consolidating data contained in the IT data media, telecommunication end devices, information systems and ICT;
 - e. obtaining access and control of consignments;
7. Controlled purchase that includes:
 - a. discrete acquisition or disposal or acquisition of objects from an offence subject to forfeiture or the production, possession, transport or trading in which is prohibited, and also may include acceptance or giving of a financial advantage;
 - b. submission of a proposal of purchasing, selling or taking over of objects from an offence that are subject to forfeiture, or objects the manufacturing, transportation or trading in which prohibited, and also may include acceptance or giving of a financial advantage;

8. Undisclosed supervision over the manufacture, handling, storage and trade in objects from an offence, if it poses no danger to human life or health;
9. Reliance on persons – sources of personal information;
10. The implementation and use of documents that prevent the identification of officers and measures they take for the performance of their duties;
11. Obtaining secret data:
 - a. tax;
 - b. professional, concerning the activity of Cooperative Credit/Savings Banks;
 - c. banking;
 - d. individual data from the social insurance system;
 - e. professional, concerning merchandise exchanges;
 - f. professional, concerning the activities of investment funds and the management of alternative investment funds;
 - g. professional, concerning the trade in financial instruments;
 - h. insurance and reinsurance activities;
 - i. pension funds;
 - j. capital market.

The objectives of these operational and exploratory activities are: preventing, detecting, and establishing perpetrators as well as collecting and securing evidence of violent intentional crimes prosecuted by public indictment. It follows from the above that this type of operations may be carried out prior to the initiation of criminal proceedings, in the course of it or after its completion.

In the Polish legal system, only the use of operational control and collecting data that are legally protected secrets (e.g. banking, finance, insurance, etc.) is done with prior approval of the District Court. Collecting data related to telecommunications, postal services and internet is in turn controlled by the courts of the district already after the fact of its acquisition. Other methods of operational work are not subject to ex ante or ex post judicial control despite the statutory regulation. The consent for a controlled purchase is given by the competent district prosecutor or the public prosecutor general. In the case of application of undisclosed supervision over the objects of crime, the competent prosecutor shall be informed about such operations and may only require their cessation but has no effect on their management. The public prosecutor is to control the operational and exploratory activities carried out by authorized services (Article 57 paragraph 2 of the Law of 28 January 2016 on Prosecution law) and may ask that such operations are carried out by the competent authorities if they would remain in direct connection with the pre-trial proceedings (Article 57 paragraph 3 of the Law of 28 January 2016 on Prosecution law). This control does apply; however, only the operational control, controlled purchase and undisclosed supervision over crime objects as provided for in the detailed regulation on the Prosecution law (§ 1 Regulation of the Minister of Justice of 13 February 2017 on operations of the prosecutor in the framework of control over operational and exploratory activities).

In addition, only for the use of operational control, the maximum time of its application was established – 18 months. In the case of other methods of operational work, these activities may be used indefinitely.

Attention should also be paid to the fact that only in the application of operational control and controlled purchase the catalogue of criminal offences was indicated, for which you can use these methods of operational work. However, this catalogue contains most criminal offences of the specific part of the Penal code and provisions of other penal laws. This catalogue is varied due to the purpose and tasks of the given police service. It is the widest in the case of Police, Military Police and the

Office of Internal Oversight Services of the Ministry of Internal Affairs and Administration, and the narrowest in the case of Border Guard and the National Tax Administration.

Other methods of operational and exploratory activities may be used in the case of criminal offences prosecuted by public indictment, but also in the case of offences prosecuted at the request of the victim.

In addition, only in the case of operational control the necessity to have an evidence of ineffectiveness of other measures of operational work or future unsuitability of such measures was indicated. In turn, during the controlled purchase it is necessary to have the reliable information on criminal offence committed by the person against whom it is planned to apply this method.

The laws of police services include the way of handling the materials being the evidence of any criminal offence. Such materials should be submitted to the competent prosecutor. However, the use of materials in criminal proceedings obtained during the operational control and containing the information covered by the attorney's secret, defender's secret, solicitor's secret, notary's secret as well as the secret of confession or mediation shall be decided by the district court, which made the decision on the application of operational control. Such regulations are not in relation to other methods of operational and exploratory activities.

In the literature on the operational and exploratory activities, but also in the already mentioned draft law on operational and exploratory activities of 2008 indicated are also other methods of this type of activities, not directly related to the competence law of the given police services.

These methods include:

1. Interview – the collection of information by conducting targeted, planned conversations;
2. Terrain penetration – planned and systematic checking of designated sites to find people, carcasses, objects or traces;
3. Ambush – undisclosed deployment of forces and measures in place to which may be entered by suspected person or persons related to the suspect in order to apprehend them or to recover the objects associated with the crime;
4. Experiment – carrying out experiments or reconstruction of events in the specific conditions in order to check, verify or supplement the existing knowledge;
5. Operations analysis – search for and identification of links between the information on the offence or the perpetrator and other data in order to use the results in the operational matters;
6. Trap – the use of a specially designed devices or measures for the determination of persons or goods, identification or apprehending a person;
7. Special objects – tangible operational work measures in the form of real estate, apartments and commercial venues or vehicles in disposal of government services which have a secret real purpose;
8. Operational combination – a planned and prepared project implemented using other methods of operational work, using erroneous conviction against persons, which is directed at the actual meaning of involved events and persons appearing in it for the purposes of conducting the operational work;
9. Operational game – the most complex method of operational work, which is the type of long-term operational combination and special complex events;
10. Special operations – a particular type of combination characterized by masked activities carried out in the framework of the special objects, operational combination and operational game;
11. Operation of “undercover” officers.

It should be presumed that these methods have been specifically dealt with in classified, internal rules of the police services. Moreover, each law uses a special delegation to issue such dispositions.

4. Availability of Statistical Data on Operational Work

The obligation of transparency of information and actions of services entitled to conduct operational and exploratory activities required by the Constitutional Court in the already mentioned judgement is currently being resolved by the submission of two types of annual information by the general prosecutor, currently acting as the Minister of Justice (The obligation referred to in Article 175b, § 2 of the Law of 27 July 2001 Law on the common courts system, and in Article 11(1) of the Law of 28 January 2016, Prosecution law) to the Sejm and the Senate.

The first information applies to the total number of people related to the application for the control and recording of discussions or the application for the operational control, with an indication of the number of persons, where:

1. The court has ordered control and recording the conversations or operational control;
2. The court has refused to order control and recording of conversations or operational control;
3. The application for operational control does not have the prosecutor's permission – specifying the number of persons in these categories for which the operational control was requested by the competent authority.

The other information is applied to the processing of telecommunication, postal and internet data divided into the number of cases of data sharing for the given type of data and the results of the checks carried out. The bodies authorized to acquire such data shall be obliged to communicate the courts with the half-yearly information in this respect. Previously, the obligation to share telecommunication data was imposed on telecommunications companies that submitted reports to the Office of Electronic Communications. It was abolished on 07.02.2016. Its purpose was to specify the length of the period of necessary data storage, and in no way it reflected the scale of the intervention of the state authorities in the privacy of citizens.

On the basis of the annual information presented to the Sejm and Senate of the Republic of Poland, the following summary of the data obtained by all the eligible services was prepared:

1. Operational Control (OC) (Senate Document No. 317 of 08.03.2013, no. 598 of 21.03.2014, no. 850 of 05.03.2015, no. 95 of 23.02.2016, no. 209 of 15.06.2016, no. 530 of 13.06.2017, no. 876 of 15.06.2018):

	2012	2013	2014	2015	2016	2017
Applications for OC	4206	4509	5435	5673	6035	6562
OC ordered by the court	3956	4278	5221	5431	5881	6402
OC refused by the court	25	16	12	20	45	14
The Prosecutor has not given consent to OC	225	215	202	222	109	146

2. Telecommunications, postal and internet data (since 2016) (Senate Document no. 543 of 30.06.2017 and no. 887 of 28.06.2018)

	2016	2017
Total data including:		
telecommunications	1,147,092	1,227,314
postal services	1,806	13,630
internet	23,150	23,913
The number of controls	121	71
including negative	3	4

The above numbers show that the authorized bodies apply more operational control each year. Detailed data indicate the fact of using this method in the operational work by the largest service, i.e. the Police. The attention should be paid to the small number of denials of control by district courts and the reduced number of denials by the prosecutor.

The quantity of telecommunications, postal services and internet data increased only slightly. The Police is again the leader in gathering that data. What is puzzling is the reduced quantity of control of data collecting conducted by the courts. In the information submitted to the Sejm and the Senate, we cannot find any comments about the trends.

Conclusions

The above mentioned regulations for the use of operational and exploratory activities seem to have the following problems:

1. Most of the operational and exploratory activities are not subject to control by an independent authority and there is no established maximum limit for their application;
2. A large part of the methods of operational work has no statutory rules, although it interferes with the zone of legally protected liberties and rights;
3. There is no protection of information covered by the legally protected secrets (attorney, defender, etc.) obtained in the course of the operational activities other than operational control;
4. The catalogue of criminal offences for which the various methods of operational work may be used generally involves the majority of criminal offences and is varied due to the purpose of the given police service;
5. A lack of uniform regulation for the operational and exploratory activities for all services of a police nature in relation to working methods, forms and the procedures for using them; a proposal for such adjustment of 2008 has not been accepted.

In my opinion, all these problems should be resolved with a single regulation covering operational and exploratory activities carried out by the services of a police nature.

Literature

National legal acts of the Republic of Poland

The Constitution of the Republic of Poland. OJ of 1997 item 483.

The law of 6 July 2001 on investigative services. OJ of 2018 item 2163.

The Law of 27 July 2001 Law on the common courts system. Consolidated text OJ of 2016, Item 2062 as amended.

The Law of 28 January 2016 on Prosecution law. Consolidated text OJ of 2019 item 740.

Regulation of the Minister of Justice of 13 February 2017 on operations of the prosecutor in the framework of control over operational and exploratory activities. OJ of 2017, item 292 with further amendments.

Judgement of the Constitutional Court of 30.07.2014 No. K 23/11 [online]. 11.12.2018. Available at: <http://otkzu.trybunal.gov.pl/2014/7A/80>.

Parliamentary document no. 353 of 07.02.2008.

Senate Document No. 317 of 08.03.2013, no. 598 of 21.03.2014, no. 850 of 05.03.2015, no. 95 of 23.02.2016, no. 209 of 15.06.2016, no. 530 of 13.06.2017, no. 876 of 15.06.2018, no. 543 of 30.06.2017 and no. 887 of 28.06.2018.

Special literature

Widacki, J. (red.) (2016). *Kryminalistyka*, wyd. III, C.H. Beck.

Hanausek, T. (1997). *Kryminalistyka. Zarys Wykładu*, Zakamycze.

Taracha, A. (2006). *Czynności operacyjno-rozpoznawcze aspekty kryminalistyczne i prawnodowodowe*. Lublin.

Operational and exploratory activities conducted by the services of a police nature

Sebastian Kalisz

(Andrzej Frycz Modrzewski Cracow University)

S u m m a r y

The author indicates operational and exploratory work methods in Poland. Only the use of operational control and collection of data of legally protected secrets is done with the prior consent of the district court. In turn, the acquisition of telecommunications, postal and internet data is controlled by the district courts after they are obtained. Other methods of operational work in spite of statutory regulation is not subject to judicial review prior to and subsequent. The article has been noticed that only two methods of operational work are defined catalogue of offenses in respect of which it is permitted to conduct such activities. The index of crimes is diverse because of the purpose and tasks of the police services. The article gathers the available data on the use of methods of operational work in the tables. The article also indicates the problems arising from insufficient legal guideline of the use of operational methods with the only most accurate conclusion that these issues require a separate and full statutory regulation.

Operatyvinio tyrimo veikla, kurią vykdo policijos tarnybos

Sebastian Kalisz

(Krokuvos Andrzej Frycz Modrzewski universitetas)

S a n t r a u k a

Autorius straipsnyje apibūdina operatyvinio tyrimo veiklos metodus Lenkijoje. Tik gavus išankstinį apylinkės teismo sutikimą, gali būti naudojamas operatyvinės kontrolės metodas ir renkami teisėtai saugomų paslapčių duomenys. Savo ruožtu telekomunikacijų, pašto ir interneto tinklais perduodamų duomenų rinkimą kontroliuoja apygardos teismai. Kiti operatyvinės veiklos metodai, nepaisant teisinių nuostatų, nėra nei išankstinės, nei vėlesnės teisminės kontrolės objektas. Straipsnyje pažymima, kad tik du operatyvinės veiklos metodai yra įtraukti į nusikaltimų, dėl kurių tyrimo galima taikyti operatyvinio tyrimo metodus, sąrašą. Šis sąrašas yra įvairus dėl policijos veiklos tikslo ir uždavinių. Straipsnyje pateikiami operatyvinio tyrimo metodų naudojimo statistiniai duomenys. Be to, nurodomos problemos, kylančios dėl nepakankamo operatyvinio tyrimo veiklos metodų teisinio reguliavimo, tai leidžia padaryti išvadą, jog minėtiems klausimams spręsti būtinas atskiras ir išsamus įstatyminis reglamentavimas.

Sebastian Kalisz is a doctoral student at the Faculty of Law, Administration and International Relations Andrzej Frycz Modrzewski Cracow University. After graduating from law studies at the University of Wrocław, he also completed post-graduate studies in criminal tax law. His main scientific interests are operational and exploratory activity, criminal proceedings, human rights.

Sebastian Kalisz yra Krokuvos Andrzej Frycz Modrzewski universiteto (AFMKU) Teisės, administravimo ir tarptautinių santykių fakulteto doktorantas. Be teisės studijų Vroclavo universitete, jis taip pat baigė mokesčių baudžiamosios teisės magistrantūros studijas. Svarbiausi moksliniai interesai ir tyrimų sritys – operatyvinio tyrimo veikla, baudžiamasis procesas, žmogaus teisės.