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KONTROLA OPERACYJNA ROZMÓW TELEFONICZNYCH W PROJEKCIE USTAWY Z 2 LISTOPADA 2021 R. O ZMIANIE USTAWY O SŁUŻBIE WIĘZIENNEJ ORAZ NIEKTÓRYCH INNYCH USTAW

THE OPERATIONAL SUPERVISION OVER TELEPHONE CALLS IN THE 2ND NOV, 2021 BILL ON THE BILL ON THE CHANGE OF THE BILL ON PRISON SERVICE AND SOME OTHER BILLS

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Streszczenie

Artykuł dotyczy realizacji kontroli operacyjnej w projekcie ustawy z 2 listopada 2021 r. o zmianie ustawy o Służbie Więziennej. W pierwszej części opracowania scharakteryzowano obraz przestępczości w zakładach karnych, której dopuszczają się zarówno osadzeni, jak też funkcjonariusze i pracownicy Służby Więziennej. Następnie opisano, jaką rolę odgrywa aparat telefoniczny w funkcjonowaniu jednostek penitencjarnych uwzględniając zarówno telefony legalne, jak i uzyskane przez więźniów w sposób niezgodny z prawem. W drugiej części artykułu skupiono się na przepisach zawartych w projekcie ustawy

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prezentując kolejno: Inspektorat Wewnętrzny Służby Więziennej, procedurę zarządzania i prowadzenia kontroli operacyjnej, jej zakres przedmiotowy i formę tej kontroli. Całość opracowania kończy podsumowanie.

Słowa kluczowe: Służba Więzienna, funkcjonariusz, zakład karny, osadzony, kontrola operacyjna, telefon, rozmowy telefoniczne, przestępstwo, postępowanie karne

Abstract

The following article discusses carrying out operational control in the Act of 2 Nov 2021 amending the Act on Prison Service. The first section outlines the picture of crime committed both by prisoners and prison service in correctional institutions. Subsequently, the role of a telephone set in the functioning of prisons, including legal phones and the ones obtained by prisoners in an illegal way, is described. The second part focuses on the rules included in the draft act and describes the following aspects: Internal Inspectorate of the Prison Service, operational control procedure and the form of this control. The last section of the article summarizes the topic.

Keywords: Prison Service, penitentiary, operational control, telephone, telephone calls, crime, criminal proceedings

1. Introduction

This paper focuses on the operational control over conversations made with the use of technical means, including through telecommunication networks, to be implemented under the draft Act of 2 November 2021 amending the Prison Service Act and certain other acts (hereinafter referred to as the Draft Act of 2 November 2021).[3] Before specific provisions that regulate this ultimate mode of operational and exploratory activities (*czynności operacyjno-ropoznawcze*) are discussed, it is necessary to outline their context, namely the circumstances that led to a situation in which a special unit of the Prison Service is to be authorised to conduct such activities. The changes are proposed against the backdrop of an increase in criminal activity within penitentiary facilities understood both as the rate of crimes committed by detainees, either imprisoned or on remand, and by officers and other staff members of the Prison Service. To analyse the matter thoroughly, it is vital to discuss specific features and causes of such criminal activity and the role played in it by telephone devices and calls made via them. The second part of the paper focuses on the analysis of legal regulations, both existing and proposed ones, in so

[3] Rządowe Centrum Legislacji, https://legislacja.gov.pl/projekt/12353000/katalog/12826414#12826414 (dostęp: 23.01.2022). Projekt znajduje się obecnie na etapie zgłaszania stanowisk do projektu przez uprawnione podmioty w ramach opiniowania projektu.

far as they refer to "telephone tapping", i.e. procedures designed to order it, a list of crimes justifying the tapping and a form of operational control; the envisaged status of the Internal Inspection of the Prison Service is also described.

The issue is of paramount importance as at stake are the amendments to the Prison Service Act[4] that may soon enter into force and revolutionise the functioning of this organisation in terms of opportunities and effectiveness of prosecuting crimes committed not only outside the prison. To this end, legislative solutions need to be firstly transformed into efficient actions of a sort of an internal affairs office for the Prison Service, the establishment of which is provided for in the draft act. This is not an easy task in terms of logistics and technical aspects, as proven by the record of the State Protection Service (SOP). Even though the State Protection Service has been authorised to conduct operational control since 1 February 2018,[5] such activities have not been undertaken until the end of 2020.[6]

This paper is blazing the trail not only because it covers the first thorough analysis of the amendments planned, but also because it comments on crucial practical implications of operational control, hardly described by legal authors and in the existing case-law. Operational control is a taboo as operational and exploratory activities are within the remit of the Police and carried out secretly. For this reason, the present authors raise practical issues related to the proposed regulations along with their theoretical analysis. These are complex matters and due to the limitations of the paper, in some cases certain emerging issues are only signalled.

The analysis of the topic consists in the exploration and interpretation of the proposed legal provisions, from time to time in the context of similar solutions already existing within the legal system. The literature review covers not only legal literature, but also works from the fields of sociology and criminology that cover the issues under discussion. Many remarks have been formulated on the basis of professional experience of the authors who dealt with the practical aspects of operational control in their capacity as public prosecutors. The ultimate objective of the study was to answer the following question: do the solutions provided for in the draft Act of 2 November 2021 in the area of operational control are designed correctly from a legal perspective and will they contribute to any improvement in the functioning of the Prison Service and penitentiary facilities?

It should be also pointed out that the paper is of specialised nature and focuses on detailed aspects related to the use of operational control as provided for in the proposed legislation. For this reason, the authors decided not to discuss basic matters such as the definition of operational and exploratory activities or

[4] Ustawa z dnia 9 kwietnia 2010 r. o Służbie Więziennej (Dz. U. z 2021 r. poz. 1064, ze zm.).

[5] Zob. art. 42 i n. ustawy z dnia 8 grudnia 2017 r. o Służbie Ochrony Państwa (Dz. U. z 2021 r. poz. 575, ze zm.).

[6] Wynik to z przedstawianych Sejmowi i Senatowi przez Prokurator Generalny corocznych, jawnych informacji o łącznej liczbie osób, wobec których został skierowany wniosek o zarządzenie kontroli i utrwalania rozmów lub wniosek o zarządzenie kontroli operacyjnej (informacje składane są na podstawie art. 11 § 1 ustawy z dnia 28 stycznia 2016 r. – Prawo o prokuraturze (Dz. U. z 2021 r. poz. 66, ze zm.).

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operational control. This decision was also driven by the limited volume of the paper. The authors believe that readers interested in the topic, not necessarily specialists in the legal aspects of "tapping", will complement their knowledge in this regard by consulting other publications of more general nature. The same is true about some other issues that are only briefly referred to in the paper (such as the relation between operational control and administrative surveillance over prisoners' phone calls) as a versatile analysis of these topics would require a separate study.

2. Criminal activity in prisons

Prison facilities and temporary detention centres are a "separate universe", which differs in many aspects from the daily reality of people who are not isolated. The universe in question is populated 24/7 by a large number of residents. As at 21 January 2022, all penitentiary facilities in Poland were populated by the total of 72,074 detainees, including 62,674 detainees sentenced to imprisonment, 8,641 detainees on remand (pre-trial detention) and 759 detainees sentenced in petty offence proceedings.[7] The Prison Service Corps, as at 21 December 2020, consisted of almost 28,600 officers and other staff members.[8] Some of them, arguably relatively few, are involved in one way or another in activities that satisfy the elements of a crime. Various types of crimes are committed: physical violence and harassment, drug dealing, corruption, participation in an organised criminal group, etc. According to the report by the Supreme Audit Office,[9] the following numbers of incidents were reported in 2017–2019: 2017 – 3608, 2018 – 2637, and 2019 – 2594. An incident is a situation that caused a threat or breach of security of the Prison Service organisational unit or convoy, a life threat to a person on remand, sentenced in criminal proceedings or in petty offence proceedings, or to an officer or a staff member of the Prison Service, as well as a breach of law by such persons. This leads to a conclusion that the problem of "prison" crime is serious and it should be minimised. The existing mechanisms have proved insufficient and an increase in alarming symptoms related to the execution of imprisonment sentence is observed both on the part of prisoners and on the part of uniformed services and civil staff of penitentiary facilities. There are several reasons for this *status quo*: easing of prison discipline in the recent years, increasing aggression on the part of prisoners, and a number of rights enjoyed by detainees, which generate demanding attitudes and provoke abuses of rights. Occasionally, prisoners have

[7] *Informacja o zaludnieniu jednostek penitencjarnych*, https://www.sw.gov.pl/strona/statystyka-komunikat (dostęp: 21.01.2022).

[8] Ministerstwo Sprawiedliwości. Centralny Zarząd Służby Więziennej. Roczna Informacja Statystyczna. Tabela 73 Funkcjonariusze i pracownicy zatrudnieni w dniu 31.12.2020 r., dostępne na stronie: https://sw.gov.pl/strona/statystyka-roczna (dostęp: 21.01.2022).

[9] *Bezpieczeństwo osadzonych. Informacja o wynikach kontroli*, raport Najwyższej Izby Kontroli z 2020, Departament Porządku i Bezpieczeństwa Wewnętrznego, nr ewid. 52/2020/P/19/040/KPB.

significant resources left "outside" and are able to allocate significant funds to corrupting the officers of the Prison Service.

Table 1. Data on the number of notifications of a suspected criminal offence filed in 2016-2020 with respect to officers of the Prison Service and staff members of penitentiary facilities.[10]

Notification of a suspected offence	committed by officers of the Prison Service	committed by staff
2021	77	2
2020	114	3
2019	98	1
2018	73	2
2017	86	1
2016	50	1
total	498	10

The aforementioned negative factors were not ignored by the authority supervising the Prison Service and led to the draft act of 2 November 2021 proposed by the Minister for Justice. The explanatory memorandum[11]indicates that the aim of the amendments is to take into account a multidimensional aspect of criminal activity carried out by detainees in prison facilities and temporary detention centres. The focus is on two areas of penitentiary facilities functioning where criminal activity occurs:

1) crimes committed by persons isolated under a court decision, and
2) crimes committed by officers and other staff members of the Prison Service.

As far as the first scenario is concerned, the surface area of prisons and temporary detention centres is limited and delineated by a wall that forms a boundary between the place of isolation and the "free world". Negative modifications of reality caused by imprisonment conditions have a disintegrating impact and are conducive to tensions not only among prisoners, but also between prisoners and the Prison Service. This leads to pathological situations as a convicted person enters a new reality and loses their sense of freedom and independence. This, in turn, affects their personality, causing degradation and stigmatisation, which even pushes those who never wished to have any further

[10] Uzasadnienie z dnia 2 listopada 2021 r. do projektu ustawy o zmianie ustawy z dnia 9 kwietnia 2010 r. o Służbie Więziennej, Rządowe Centrum Legislacyjnego, https://legislacja.gov.pl/projekt/12353000/katalog/12826414#12826414, s. 4-5 (dostęp: 21.01.2022), dalej: uzasadnienie.

[11] *Ibidem*, s. 4.

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conflicts with law into a pursuit of acceptance in the crime-inducing environment and leads to the "second life", being a part and parcel of prison reality. On the other hand, prisoners are nonetheless under the influence of the penitentiary facility administration and are expected to adhere to a rigid discipline. Among those engaged in criminal activities, however, there are also some officers and staff members of the Prison Service. They deal with prisoners, who are often linked to organised crime organisations, and this generates temptation or a subjective sense of duress in terms of establishing relations that are not only ethically reprehensible, but also amounting to a criminal offence. This poses a risk of corruption and other attempts of influencing officers, which often leads ultimately to a crime being committed. The source of this conduct may be tracked back to the willingness to gain *ad hoc* profit or sometimes to fear about oneself or family members.

3. Telephones as an important element of prison life

Imprisonment is the most sever type of sanctions for a committed criminal offence. Even though it entails the deprivation of unrestricted ability to enjoy certain rights available to people who have not been convicted and the imposition of restrictions, a prisoner is still a subject of natural rights and enjoys irrevocable human dignity. The sanction cannot therefore exceed any reasonable level of severity and should be executed in a humanitarian manner and in compliance with the standards provided for by the Constitution of the Republic of Poland[12] and the Penal Enforcement Code (*kodeks karny wykonawczy*).[13] As part of the sanction dimension that serves social rehabilitation, prisoners have limited access to telephones. A person who remains in a penitentiary facility, and in particular a person on remand, if authorised to remote communication in any time and place, could obstruct criminal proceedings, for instance by contacting other suspects in order to make alibis consistent, by intimidating witnesses, etc. On the other hand, however, an emotional bond with family members constitutes a personal right of a human being and must be legally protected, which is why it would be a mistake to completely deprive detainees of their ability to maintain personal contacts or arrange basic life matters via telephone. For this reason, penitentiary facilities are equipped with telephones to be used by detainees. The dark side, however, is that the entire market of illicit phones has developed and telephones are used mainly for purposes of committing criminal offences.

[12] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. z 1997 r. Nr 78, poz. 483, ze zm.).

[13] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny wykonawczy (Dz. U. z 2021 r. poz. 53, ze zm.; dalej: k.k.w.).

3.1. Legal phones

Pursuant to Article 105(1) of the Penal Enforcement Code, a convicted person should be allowed to maintain links with their family and other close persons, among others by means of telephone calls. For this reason, Article 105b(1) and (2) of the Penal Enforcement Code grants a right to use an automated payment telephone line available for credit or collect calls. Such a telephone device is available within the prison facility and telephone calls may be made with the use of coins, tokens, phone cards or payment cards.[14] In justified cases, a prison director may authorise a prisoner to use another device for the purpose of making telephone calls. Indeed, a director organises the internal functioning of a penitentiary unit in such a manner that it is possible to maintain discipline and to ensure security and imprisonment sentence execution, including the protection of the society against criminal activity (Article 73(1) and (2) of the Penal Enforcement Code). This also includes the manner in which a prisoner may contact the outside world using a telephone. A prisoner may only be deprived of this right in the event of a threat to public order or the facility's security and only for a specific period of time (Article 105b(3) of the Penal Enforcement Code) and such deprivation may be used as a disciplinary sanction (Article 143(3)(1) of the Penal Enforcement Code). The right to use a telephone may be subject to further limitations in the case of persons remanded in custody (Article 217c of the Penal Enforcement Code). Persons on remand are allowed to use telephones in accordance with the rules set forth in the organisational regulations governing temporary pre-trial detention. Earlier, however, a consent in this regard must be given by a judge or a relevant public prosecutor who decide on the use of a telephone, unless there is a justified concern that such use may be for the purpose of obstruction of justice or committing a criminal offence. An authority that intends to make a person of interest subject to operational control covering the legal telephone used in the prison facility, should know precisely their procedural status, not least that it would usually concern another case than the secret exploratory operation.

Apart from legal issues, the organisational arrangements of telephone tapping are equally important, when such tapping has been approved by the court. It is necessary to determine what telephone is used by a person of interest, when and what are the conditions of such use. The general provisions of the Penal Enforcement Code that regulate the prisoner's right to use a telephone have been clarified in the following acts ranked below statutory acts, issued under Article 249(1) of the Penal Enforcement Code: Regulation of the Minister for Justice of 21 December 2016 on the Organisational Regulations on the Execution of Imprisonment Sentence[15] and Regulation of the Minister for Justice of 22 December 2016 on the Organisational Regulations on Temporary Detention.[16] Internal

[14] Art. 2 pkt 2 ustawy z dnia 16 lipca 2004 r. – Prawo telekomunikacyjne (Dz. U. z 2021 r. poz. 576).
[15] Dz. U. poz. 2231.
[16] Dz. U. poz. 2290.

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arrangements, on the other hand, are based on an order issued by a director of the detention centre or prison facility, clarifying the provisions of the acts of higher rank by adapting them to the specific conditions of the penitentiary facility. The internal regulations define, among others, specific time, place, as well as conditions of using automated payment phone lines and other means of communications. They also provide for extraordinary circumstances, including conditions and procedure for approving additional telephone calls. Moreover, various instructions and guidelines addressed to the Prison Service are applicable in penitentiary facilities and detention centres, that is documents issued by a head of the unit that serve as guides, specifying how calls are to be made and how devices are to be used. [17]

Telephone calls available to prisoners are supposed to serve the needs not only of convicted persons or those remanded in custody, but also of other people. Telephone calls are usually made to family members who use the opportunity to have contact with a person staying in the prison facility, and it is ensured that prisoners are in touch with their counsels and legal representatives or institutions. According to Article 8 of the Penal Enforcement Code, as far as enforcement proceedings are concerned, a convicted person may use the help of their counsel appointed in such proceedings and from time to time such representation is mandatory. Article 78 of the Penal Enforcement Code applies accordingly in this regard and a person sentenced to imprisonment has a right to contact their counsel or legal representative who is an advocate or attorney-at-law without other people being present, and conversations with them cannot be subject to any surveillance. The convicted person is also entitled to communicate with representatives of associations, foundations and organisations, as well as churches and faith organisations (Article 38(1), Article 42 and Article 102(7) and (8) of the Penal Enforcement Code). Pursuant to the legal regulations referred to, the authority with surveillance powers need to be careful to avoid the surveillance of any content that may be protected as a secret under law as such secret cannot be used in operational and exploratory activities, not least shared during court proceedings.

3.2. Illicit phones

The possession of illicit mobile phones by prisoners has not been thoroughly analysed in Poland as yet. Similarly, it is difficult to find many studies on this subject in literature published in English. For this reason, a study commissioned by Her Majesty's Prison and Probation Service and the resulting report entitled "The demand for and use of illicit phones in prison"[18] published in 2018 is of particular

[17] M. Mudy, *Prawne i praktyczne aspekty telefonii osadzonych*, „Ochrona i Bezpieczeństwo Obiektów i Biznesu. Wydanie specjalne", https://ochrona-bezpieczenstwo.pl/files/wyd_spec_securitech_cz2.pdf, s. 19 (dostęp: 21.01.2022).

[18] A. Ellison, M. Coates, P. S. Pike, W. Smith-Yau, R. Moore, *The demand for and use of illicit phones in prison*, Ministry of Justice Analytical Series 2018, https://www.gov.uk/search/all (dostęp: 21.01.2022).

value. The study covered all prisons in England and Wales, and research methods included interviews with heads who were in charge of security in prisons and prisoners themselves. The study proved that mobile phones were an important element of prison life and they were used not only for resocialisation purposes, but also for the purpose of committing crimes. In 2013, the British prison service disclosed 7,451 illicit mobile phones or SIM cards within units subject to its supervision. The authors of the report determined that trade in such devices was perceived by officers as one of the main threats to discipline, and at the same time access to mobile phones helped criminals orchestrate criminal activity outside the walls of prisons.

Table 2. The aim of using illicit phones by inmates according to the survey carried out among prison inmates in England and Wales.[19]

Reason for using a mobile phone	Activity in %
Drug dealing within the prison	89
Prisoners wishing to maintain contact with family/friends	81
Criminal activities outside the prison	79
Playing a role in the prison economy	69
Harassing victims/witnesses outside the prison	61
Gang activities	49
Staff corruption	33
Inappropriate staff/prisoner relationships	30

The scale of the problem varied depending on a prison; illicit phones were used more often by the members of organised crime groups and more rarely by women and juveniles. The telephones were the main tool used in order to arrange service black market, in particular in terms of dealing drugs and other illegal substances, but also to intimidate persons outside the prison. Inmates taking part in the survey could also see positive aspects of access to illicit phones: remote communication toned down tension that otherwise could lead to confrontations with the staff and disruptions in the prison regime.

Similar conclusions were reached in the studies conducted by two English universities: Staffordshire and Leicester.[20] They show that mobile phone technology constitutes a major challenge for the functioning of penitentiary service. The presence of mobiles in prison cells fosters organised crime not only at the national, but also at the international level. The system of using this type of devices affects many aspects of prisoners' life, e.g. some prisoners were forced to store mobile phones for other prisoners involved in organised mafia structures. The

[19] *Ibidem*, s. 22.

[20] J. Treadwell, K. Gooch, G. Barkham Perry, *Crime in prisons*: *Where now and where next?*, January 2019, https://researchportal.bath.ac.uk/en/publications/crime-in-prison-what-nowandwhere-next (dostęp: 21.01.2022).

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studies confirm a claim that illicit phones are an element that facilitates illegal activities in the prison, in particular drug dealing, but they are also used by the perpetrators of domestic violence who attempt to contact their victims. It rarely happens that a telephone is used exclusively to talk to family and friends.

As far as the Polish reality is concerned, in the survey focused on the corruption as perceived by the officers of the Prison Service, carried out in 2013 in the Prison Facility in Barczewo and the Temporary Detention Centre in Ostróda, respondents were asked the following question: "What benefits could be drawn by a prisoner who would manage to corrupt an officer of the Prison Service?". The respondents mentioned more frequent access to telephone calls firstly (70%), followed by the facilitation of delivery, into the cell, of dangerous or unauthorised objects, such as mobile phones, drugs and steroids (40%).[21] All three research projects confirmed, then, that an illicit telephone is highly demanded by people in isolation and it is used mainly to carry our illegal activities, sometimes directly satisfying the elements of a criminal offence.

The issue discussed is complex and from time to time it affects areas that seem to have nothing in common at first glance. To illustrate this, it is enough to think about a right enjoyed by the officers of the Prison Service to use their private mobile phones during working hours as the device may be taken over by prisoners if lost or stolen. In the letter of 3 December 2020 sent by the Director General of the Prison Service to the Polish Commissioner for Human Rights,[22] it is pointed out that unlimited acceptance of the use of private mobile phones by officers and staff members of the Prison Service during working hours would pose a significant threat for the security of penitentiary facilities and it would seriously impede the implementation of tasks entrusted to the Prison Service. It is also stated that the unlimited use of such devices would disrupt the systems of detecting illicit electronic devices existing in prisons and temporary detention facilities. For this reason, officers and staff members may not use their private mobile phones at work.

4. Internal Inspectorate of the Prison Service

Having regard to the fact that the community of penitentiary facilities, both prisoners and staff members, happen to be involved in or prone to various forms of criminal activity, is it necessary to fight against this undesirable phenomena. Various organisational, legal or educational measures of impact may be applied. Even though prisons and detention centres have their own structures and instruments that serve to eliminate undesirable factors, the plan to establish the Internal Inspectorate of the Prison Service is of paramount importance from the

[21] M. Kotowska, *Zagrożenie zjawiskiem korupcji ze strony członków zorganizowanych grup przestępczych z perspektywy funkcjonariuszy Służby Więziennej*, „Studia Prawnoustrojowe" 2015, nr 27, s. 143, 147.
[22] Nr pisma BPR-I.070.103.2020.PB (pismo w dyspozycji autora).

perspective of this paper focused on operational control. Currently, the Prison Service has the Bureau of Internal Affairs, which is an organisational unit in the Central Board of the Prison Service, responsible, among others, for:

1) preventive measures to eliminate unacceptable conduct of the Prison Service officers and staff members and disclosing such cases,
2) raising awareness among the Prison Service officers and staff members about threats related to corruption and looking for mechanisms to counteract such threats,
3) implementing tasks of initiating, planning and conducting external inspections in organisational units,
4) coordinating activities related to processing complaints, requests, and applications in cases concerning officers, petitioners and prisoners, and supervising Prison Service organisational units in this regard,
5) reviewing financial statements of the Prison Service officers.

It may be concluded that the current tasks of the Prison Service and relevant rights are targeted at penitentiary and social rehabilitation measures and at ensuring security and public order in correctional facilities. The officers of the Prison Service do not have any offensive competences that would enable them to investigate, prevent or detect criminal offences: they cannot conduct operational and exploratory activities or investigations targeted at prosecuting criminal offences related to the functioning of the Prison Service. If it is taken into consideration that the Bureau of Internal Affairs in Warsaw has a limited number of staff members and no field offices, it is difficult to regard it as an effective tool to combat criminal activity in prisons. Equally, it is difficult for the Police or the Central Anti-Corruption Bureau to effectively fight against the threats discussed as the community of prisoners and Prison Service officers is very closed, penitentiary facilities are isolated from the external world, with the isolation being enhanced by closed cells, separated from other prison rooms with an additional wall. For this reason, this is not an easy task to detect, monitor and fight against criminal relations occurring in such environments.

These tasks could be executed effectively only by an internal unit of the Prison Service entitled to carry out operational and exploratory activities, and by an extended structure located at least in all large penitentiary facilities, with an adequate number of officers, as well as equipment and financial resources guaranteed to meet the intended objectives. Such a unit should exist within the structure of the Prison Service as only with insiders it is possible to learn specific local conditions and to effectively fight against threats. To this end, amendments under the current legislative procedure are supposed to grant the officers of the Internal Inspectorate of the Prison Service, who would carry out their tasks exclusively within the Internal Inspectorate, the right to conduct administrative and organisational as well as operational and exploratory activities, similarly as it is the case of other public order services. Structures of this kind already exist, and these are, for example, Bureau of Internal Affairs within the Police (see Article 5b

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of the Act on Police of 6 April 1990,[23] Bureau of Internal Affairs of the Border Guard (see Article 3c of the Act on Border Guard of 12 October 1990[24]) or the Bureau of Control and Internal Affairs of the Central Anti-Corruption Bureau (see Article 11(2) of the Act on the Central Anti-Corruption Bureau of 9 June 2006[25]).

According to Article 5b(1), (2) and (4) of the Act on Police, its Bureau of Internal Affairs is an organisational unit of the internal affairs services that performs, across the country, tasks related to identifying, preventing and combating criminal offences committed by police officers and Police staff members as well as economic crimes to the detriment of the Police contrary to Articles 296-306 of the Polish Criminal Code,[26] identifying and prosecuting offenders who have committed such crimes, and in so far as it is instructed by the Inspector of Internal Supervision, identifying and prosecuting officers and staff members of the Police, Border Guard and State Protection Service or fire fighters and staff members of the State Fire Service. The Bureau is managed by the Chief Officer of the Bureau of Internal Affairs of the Police who reports to the Police Commander in Chief and is appointed to act as a managerial body of the Bureau by the Minister for the Interior and Administration. A similar mechanism of functioning is proposed for the Internal Inspectorate of the Prison Service: Article 8 of the Act on the Prison Service is supposed to be supplemented by point 1a and 1b establishing such Inspectorate as an organisational unit supervised by the Minister for Justice. According to § 1(7) of the draft act, the new Article 11a(2–6) of the Act on the Prison Service stipulates that the Internal Inspectorate of the Prison Service is to be managed by the head who would report to the Minister for Justice and act as the Deputy Director General of the Prison Service. The head of the Internal Inspectorate, with its office in the capital city of Warsaw, would become the supervisor of officers serving in the Inspectorate. He would also be a supervisor of field offices of the Internal Inspectorate of the Prison Service and their respective head officers.

As for competences, the proposed Article 11a(1) of the Act on the Prison Service stipulates that the Inspectorate is an organisational unit which carries out, across the country, the tasks provided for in Article 23aa(1) and (2) of the Act, namely consisting in identifying, preventing, discovering as well as obtaining and recording evidence of crimes committed by:

1) detainees in penitentiary facilities or detention centres,
2) persons who are not officers or staff members of the Prison Service in connection with performance of official duties by officers or staff member of the Prison Service, and
3) officers and staff members of the Prison Service in connection with their performance of official duties;
4) the tasks of the Internal Inspectorate would also include the disclosure of assets at risk of forfeiture in relation to crimes for which operational

[23] Dz. U. z 2021 r. poz. 1882, ze zm.
[24] Dz. U. z 2021 r. poz. 1486, ze zm.
[25] Dz. U. z 2021 r. poz. 1671, ze zm.
[26] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz. U. z 2021 r. poz. 2345, ze zm.).

control may be carried out.

The scope of activities of the Inspectorate reflects the solutions existing in other services. Although detainees and the Prison Service should naturally be of interest to the Internal Inspectorate, the question remains whether it is justified to extend their scope of interest to other persons. This solution, however, should be seen as valid. From time to time, crime-inducing conduct of the Prison Service staff members includes such actions as manipulating public procurement procedures, offering bribes or passing a kite, and generally acting in concert with third parties who are outside the prison system. If illegal help for detainees comes directly from a person who is outside the prison (i.e. there is no intermediation or help on the part of guards), legal regulations exclude the possibility of applying operational control carried out by the Internal Inspectorate of the Prison Service (such persons do not fall under the list included in Article 23aa(1) and (2) of the draft act). In such circumstances, it is necessary to cooperate with other services such as the Police or the Central Anti-Corruption Bureau, authorised to carry out operational control activities in relation to such persons of interest.

5. Operational control carried out by the Internal Inspectorate of the Prison Service

Operational control is the most advance form of operational and exploratory activities in several aspects. It amounts to an interference in fundamental civil rights and freedoms, such as the individual's right to privacy, freedom of communication and secrecy of messages, as enshrined in the Constitution, and the right to information autonomy. For this reason, the standards of applying such control must be clarified in legal regulations and determine that it may be used only in connection with the most serious crimes and when other measures proved ineffective or are useless. The European Court of Human Right, and the Polish Constitutional Court, require in their case-law[27] that the legal regulations governing operational control clearly identify the category of persons who may be "tapped", a list of crimes eligible, the maximum duration of surveillance, measures to guarantee an adequate use of records obtained or their destruction, protection of legally protected secrets and judicial review of such activities. It is then worth analysing whether such criteria are satisfied by the proposed provisions of the Act on the Prison Service.

5. 1. Procedure of initiating and conducting operational control

[27] Judgmen of the Constitutional Court of 30 July 2014, K 23/11, OTK ZU 2014, No. 7/A, item 80; CJEU judgment in joint cases C–203/15 and C–698/15 (Home Office przeciwko Watson), http://curia.europa.eu/juris/document/document.jsf? docid= 186492 &doclang=EN, retrieved: 08.03.2022 r.; wyrok Izby ETPC z 12.01.2016 r., sprawa Szabó i Vissy p. Wegrom, skarga nr 37138/14, dostępny na stronie: https://www.sw.gov.pl/assets/94/39/36/fb64b715488bee1c8debe0ac0677993670308b8e.pdf, data odczytu: 08.03.2022 r.

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A procedure provided for in the draft act to initiate operational control is identical to procedures in other statutory acts pertaining to specific ministries, namely:

1) it is conducted to prevent and detect eligible crimes specified in the list and identify persons who committed them as well as to obtain and secure evidence of such crimes,
2) it is an ultimate measure in a sense that it is used when other measures proved ineffective or are useless (subsidiarity clause),
3) decisions on operational control are made by the Regional Court in Warsaw (*Sąd Okręgowy w Warszawie*) upon written request of the Head of the Internal Inspectorate of the Prison Service filed after the Prosecutor General's approval is obtained,
4) its duration is limited: the first control is launched for the period not exceeding 3 months and may be extended, but the total duration of such control may not exceed 18 months,
5) the Act defines conditions that need to be satisfied by a request for control or its extension, e.g. specific indication of the person of interest, a form of "tapping", the qualification of a crime and a description of factual circumstances of the case that justify the control,
6) after the control terminates, any material collected should be shared for the purpose of criminal proceedings or destroyed and it should be adequately documented how the activities ended.

Ultimately, it is the Regional Court in Warsaw that decides whether operational control should be conducted by the Internal Inspectorate of the Prison Service or extended, and this serves to ensure that the request is processed by an authority that is independent of the service and public prosecutor's office, but at the same time is in possession of legal knowledge and practical experience. Before the request reaches the court, however, it must be submitted to the Prosecutor General, which means in practice that it must be registered in the Secret Registry of the National Public Prosecutor's Office. Firstly, the request is analysed by public prosecutors of the Department of Supervision over Operational and Exploratory Activities, and then the Prosecutor General is informed of the nature of the case and a recommendation is issued regarding the approval of the Internal Inspectorate's request for operational control to be ordered by the court or refusal in this regard. If time is of the essence, the Head of the Inspectorate may order such control after the approval is given by the Prosecutor General provided that a request for the continuation of "tapping" is filed with the court at the same time. If the court fails to grant the request, such control should be halted, and any materials collected during its duration need to be destroyed immediately.

The activity of the Prosecutor General in terms of operational control, also the control to be carried out in the future by the Internal Inspectorate of the Prison Service, could be divided into three groups of tasks. Apart from participating in the procedure of processing such requests, the Prosecutor General supervises also,

in general, the correctness of such control and provides information to the Sejm and the Senate. This obligation arises under Article 57(2) of the Act on Public Prosecution and special acts. The Prosecutor General is also entitled to review materials collected as part of the control provided that the conditions applicable to transmission, storage and sharing of non-public information are satisfied. As for other supervisory rights, Article 36(4) of the Act on Public Prosecution stipulates that the minister for justice is required to specify, by means of a regulation, the manner in which a public prosecutor carries out their activities to supervise operational and exploratory activities specified in Article 57(2) of the Act on Public Prosecution. Under this provision the Minister for Justice issued the Regulation of 13 February 2017 on the Execution of Public Prosecutor's Activities to Supervise Operational and Exploratory activities,[28] which refers to public prosecutors' supervision over any service entitled to conduct operational control. A public prosecutor supervises such activities, first and foremost, by examining the actual grounds of such activities, as well as their legality, correctness and effectiveness. Yet another important competence of the Prosecutor General arises from Article 57(3) of the Act on Public Prosecution. The Prosecutor General may request that operational and supervisory activities be carried out by authorised bodies if these activities are directly related to the pending investigation, and may consult materials collected within such procedure. As far as obligation to inform the parliament is concerned, this matter is regulated by Article 11(1) of the Act on Public Prosecution. The Prosecutor General provides therefore the Sejm and Senate with unclassified information about the total number of persons covered by requests for operational control and in the future the Head of the Internal Inspectorate of the Prison Service will be required to provide relevant data for the purpose of this information being included in the report drafted under Article 11(1) of the Act on Public Prosecution. Such a regulation is a compromise between the need to keep confidential the manner in which an operational control is conducted by services and the disclosure of certain pieces of information about such surveillance in order to ensure social review of actions undertaken by services.

According to the draft act, operational control should be halted immediately after the reasons for it ceases to exist and no later than upon the expiry of the period for which it has been ordered. After the control is completed, the Head of the Internal Inspectorate informs the Prosecutor General about its results in two scenarios. The first occurs when the operational control proved effective and evidence was collected proving that a criminal offence had been committed, and the Internal Inspectorate provides the public prosecution with all the materials gathered during the "tapping" for the purpose of their use in court proceedings. On the other hand, any materials that do not contain evidence justifying the initiation of criminal proceedings or evidence relevant to the pending criminal proceedings are subject to immediate destruction against a certificate of destruction under the supervision of a committee. The end of control is to be documented by a

[28] Dz. U. z 2017 r. poz. 292.

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memorandum sent by the Head of the Inspectorate to the Public Prosecutor, including the duration of such control and its results.

5.2. Eligible crimes

A concept of eligible crimes has been used in each ministry-specific statutory act that provides for the use of operational control. The list of crimes in the case of which such control is possible is of restrictive nature; i.e. it defines the scope of operational possibilities for each service, taking into account tasks for which specific services have been established. The list cannot be extended, for example, by introducing "tapping" in cases that entail similar crimes. If criminal offences other than a crime specified in Article 23ao(1) are identified as part of exploratory activities, they should be mentioned in the statement of reasons included in the request for operational control, but they should not be quoted among crimes referred to in the main part of the request. The proposed Article 23ao(1) identifies three sets of criminal offences:

1) criminal offences under the Criminal Code:
   a) criminal offences violating basic rights of each individual, such as life, health and freedom (contrary to Article 148, Article 156(1) and (3), Article 157(1), Article 158, Article 159, Article 163–165, Article 189, Article 190a, Article 197, Article 198, Article 202(3), Article 223 and Article 280–282),
   b) criminal offences committed by public administration officials (Article 228(1) and (3-5), Article 229(1) and (3-5), Article 230(1), Article 230a(1), Article 231(2) and Article 305),
   c) criminal offences against proper functioning of the judicial system (Article 234-236, Article 238, Article 239, Article 242, Article 243, Article 245, Article 246 and Article 247), and
   d) other criminal offences (Article 258, Article 269, Article 286 and Article 299(1), (2), (5) and (6));
2) cases relating to illegal production, possession, making available or trade in weapons, munitions, explosives, drugs, psychoactive substances, their precursors or new psychoactive substances, and nuclear and radioactive materials;
3) tax crimes if the value of the subject matter of the crime or depletion of public receivables exceed the amount equal to fifty times lowest remuneration for work, established under separate legal provisions.

The use of operational control by the Internal Inspectorate of the Prison Service is possible only when criminal offences are related to detainees, officers of the Prison Service or staff members of the Prison Service. The draft act emphasises that this delineation of the scope not only reflects social expectations, but it is also dictated by the need to complement activities undertaken as part of the national

anti-corruption policy and to ensure high ethical and moral standards within the service. Operational control carried out by the Internal Inspectorate of the Prison Service beyond the scope described above would be illegal and those who would approve it would be liable under Article 231 of the Criminal Code, while any material collected as part of such control would be evidence of doubtful nature even in the light of Article 168a of the Criminal Code.

If Article 23ao(1) is not read carefully, it may be erroneously inferred that the authors of the draft act qualified certain crimes incorrectly. Article 23ao(1)(1) mentions, for instance "Article 163-165", which literally means that the act provides for the control in the case of all crimes without any distinction in terms of guilt-related aspects and no matter whether basic, privileged or qualified type of the crime occurs. Article 163(2) of the Criminal Code refers to an involuntary crime and so does Article 164(2) and 165(2) of the Criminal Code. The list of crimes should be, however, read in conjunction with the general rule under Article 23ao(1) which states that operational control may only be used to prosecute intentional criminal offences. In the case of Article 190a of the Criminal Code, the possibility of using operational control will apply only to paragraph 3 given paragraphs 1 and 2, meaning crimes prosecuted upon complaint. The situation is similar in the case of Article 286(4) and 305(3) of the Criminal Code. It needs to be considered, however, whether the list of crimes should not be extended by means of adding Article 199(1) of the Criminal Code, which penalises sexual use of dependence since a risk of such activities in the prison environment is high.

When looking at the first category of crimes listed in Article 23ao(1), it should be noted that the prison environment is a place of stay for usually depraved people who committed serious crimes, while isolation further increases their aggression and frustration. It is not rare to see violence, including battery, injuries and other violations of bodily integrity, rapes and other sexual abuses of vulnerable persons among prisoners, as well as various types of coercion. Such violence is also targeted at officers and staff members of the Prison Service and from time to time their family members become targets as well. Therefore, operational control may cover the activities of a detainee, either imprisoned or on remand, who used an illicit telephone device to communicate with other people in order to commit a crime, gave instructions to them or requested specific actions from criminals under his/her authority. Criminal offences may be also committed by staff members and officers of penitentiary units. It is very symptomatic that the explanatory memorandum focuses on counteracting crime among the officers of the Prison Service, while references to detainees are made less often. It may be concluded that the Ministry of Justice has noted the increasingly witnessed issue of corruption and other pathological behaviours among officers, without turning a blind eye on prisoners who also commit crimes while serving their sentences.

Pursuant to Article 115(13)(7) of the Criminal Code, the officers of the Prison Service enjoy the status of a public official, which means that they may be liable for crimes which, when classified in terms of features of a person who satisfied the elements of a crime, are committed by a "public official". Corruption is the most

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serious threat among prohibited acts committed by public administration officials. According to literature, persons involved in organised criminal groups have ample opportunities to corrupt officers of specific services, including the Prison Service.[29] Officers may facilitate the delivery of prohibited objects, such as drugs and psychoactive substances, alcohol products or remote communication devices, to prisoners. Depraved officers are driven by low motives and desire to gain financial or personal profits.[30] Thanks to bribery, a detainee may gain additional privileges, receive information they are not authorised to have; from time to time the officers of the Prison Service are corrupted so that a prisoner can be granted a temporary release or transferred to another penitentiary unit. Apart from satisfying the elements that indicate the venality of a person serving a public function, such crimes also entail the abuse of powers or failure to perform official duties. On the other hand, "bribery" is a real threat in the area of public procurement and other procedures that are related to investments in the prison system infrastructure or other forms of spending public funds, showing mismanagement. This is an opportunity to corrupt the officers of the Prison Service, also at managerial positions, by unfair business owners who wish to receive "help" in being granted a public contract or performing other projects. Activities of the Central Anti-Corruption Bureau show that operational control used in such cases, sometimes accompanied by offering or accepting a bribe by a person of interest (Article 23ap of the draft act), is the best and sometimes the only form of operational and exploratory activities, and enables the criminal structure functioning in closed environments to be dismantled. It seems in this context that Article 29(1) of the Act on the Central Anti-Corruption Bureau should be complemented by the addition of the Chief Officer of the Internal Inspectorate of the Prison Service, being an authority obliged to cooperate with Heads and Chief Officers of other services to combat corruption in public institutions and fight against actions to the detriment of economic interests of the state.

As for the list of crimes against the proper functioning of the system of justice, detainees are one way or another involved in the functioning of the system of justice as each of them has participated in criminal proceedings in which parties to proceedings, witnesses or other defendants have taken part and they are subject to procedures under penal enforcement law. For this reason, there is a real threat that some detainees may give false evidence or exert influence, by violence or unlawful threat, on parties to proceedings or aggrieved parties, or that they may produce false evidence or procure an alibi. Sometimes a person of interest may be driven by the intention to take revenge on persons who, in their opinion, "betrayed" them and contributed to their conviction. It is therefore accurately stated in the explanatory memorandum[31] that crimes against the system of justice are related to illegal, and therefore contemptible, actions undertaken against participants to

[29] M. Kotowska, *Zagrożenie zjawiskiem korupcji ze strony członków zorganizowanych grup przestępczych…*, s. 141.
[30] Uzasadnienie, *ibidem*, s. 22.
[31] Explanatory statement, ibidem, s. 22.

criminal proceedings. Not only do such crimes violate procedural rights of these participants, but also violate widely understood human rights. Disclosure and elimination of such behaviour in the Prison Service is supposed to ensure that procedural safeguards available to participants of criminal proceedings are respected and to secure respect of dignity and human rights.

Article 258 of the Criminal Code also comes into play at this point. This article is included in all lists of crimes specified in statutory acts regulating operational control because organised crime groups are one of the most serious threats to rights protected by law, also in prisons and temporary detention centres. It is stated in the explanatory memorandum that officers of the Prison Service, due to their occupation, can be valuable channels of communication with other detainees or group members who stay free.[32] Law enforcement authorities proved on numerous occasions that such illegal collaboration did take place, which is why, Article 258 of the Criminal Code is validly included in the list of eligible crimes. According to present authors, however, similar arguments cannot be found to support the inclusion of Article 286 of the Criminal Code, which concerns the crime of fraud. It is universal in various domains of human activity and presumably the authors of the draft act assumed that some officers and staff members of the Prison Service take steps to gain material benefits under false pretences. The fact that Article 269 of the Criminal Code was put on the list is even more controversial. Given that the explanatory memorandum does not refer to this issue, one may conclude that there are no rational and well-thought arguments for this idea. In practice, IT data of special importance for public institution, meaning a prison or a temporary detention facility understood as an organisational unit composed of material and personal resources, may be destroyed only by an officer or another member of the staff of the Prison Service since detainees do not have access to such data. Abuse in this regard probably includes an unauthorised search of databases by the Prison Service or inserting or deleting certain entries, but these actions may be subject to operational control as crimes contrary to Article 231 of the Criminal Code. It is difficult, however, to imagine factual circumstances that would satisfy elements covered by Article 269 of the Criminal Code.

The presence of money laundering in the proposed Article 23ao(1) sparks controversies. The authors of the draft act claim that allowing operational control when a crime against Article 299 of the Criminal Code is suspected will complement activities in the area of combating corruption. It should be noted, according to the explanatory memorandum, that financial advantage accepted by the officers of the Prison Service will sooner or later go into the legal market, either directly or after a number of steps intended to hide their criminal origin. A wide range of activities described in Article 299 of the Criminal Code provides for the possibility of punishing an offender who has committed a core crime (corruption) and a derivative crime (money laundering).[33] The authors of the draft act assumed,

[32] *Ibidem*, s. 22.
[33] *Ibidem*, s. 22.

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then, that detainees, imprisoned or on remand, also make attempts to hide proceeds of their crimes and knowledge in this matter may be gained when they serve their sentences or when an interim measure is ordered. Doubts arise, however, whether the officers of the Internal Inspectorate of the Prison Service should deal with economic crimes that differ in nature from corruption or prison violence. Operational and exploratory activities related to Article 299 of the Criminal Code are rather atypical and involve a tedious process of obtaining information from financial institutions and public administration offices, complicated analytical processes or even an exploration of market mechanisms. These type of activities go beyond the walls of the prison and require time and expertise in economics and the market. Therefore, there is a risk that the officers of the Internal Inspectorate of the Prison Service will focus their "processing capacity" on tasks that they are not adequately prepared for, while neglecting their core areas of concern. Or they will even refrain from taking actions aimed at collecting evidence that concerns money laundering. For identical reasons, no clear and reasonable arguments are available to justify the inclusion of tax crimes in the list of eligible offences. An attempt to understand the line of reasoning followed by the authors of the draft act is not easy given that the explanatory memorandum does not mention this aspect, even though the conditions of including other crimes in the list are described in detail. There are other services more competent to cover these cases than the Internal Inspectorate of the Prison Service, notably the National Revenue Administration, which was granted powers to conduct operational control. If the proposed amendments enter into force, the Internal Inspectorate of the Prison Service could possibly enter into agreements with other services, such as the Central Investigation Bureau of Police, National Revenue Administration or the Central Anti-Corruption Bureau, and process cases concerning money laundering or tax frauds in cooperation with them.

Any cases relating to persons illegally producing, possessing, making available or trading in weapons, munitions, explosives and nuclear or radioactive materials must be prosecuted under all circumstances and it needs to be remembered that criminals have access to such objects or substances all too often. These crimes are covered by Article 263(1-3) and Articles 171(1-3) of the Criminal Code. The same applies to drugs as the fact that prisoners are in their possession is one of the main challenges for the Prison Service. Meanwhile, the experience of the Central Investigation Bureau of Police shows that operational control is one of the most effective forms of operational work to fight against drug crimes at the early stage of exploring organised groups. Phone tapping is occasionally combined with sting operations and covert surveillance of shipping, as provided for in the draft act (Article 23ap and Article 23aq).

5.3. Forms of control

The term "forms of operational control" refers to the methods of obtaining sensitive information about the person of interest, including in particular "location" in which such information is recorded, downloaded and then transmitted (usually remotely) and stored by services. A widely understood "location" of data may be private space, such as a private house or an office, but also a terminal device or a telecommunication network. According to Article 11a(12) of the proposed act, the Head of the Internal Inspectorate of the Prison Service specifies, by means of an instruction, forms and methods of operational and exploratory activities, taking into consideration legal regulations on the protection of classified information. The aim is to ensure that operational work technicalities remain confidential. Otherwise, the work of such services would be ineffective both in a narrow and wide perspective. In the first scenario, if persons of interest were aware that they were of interest to law enforcement authorities, they could mitigate actions taken against them, they would become very careful or they would even refrain from illegal activities for a while in order to avoid proofs of their guilt being collected. In a wider sense, public disclosure of certain information and a debate over secret methods of work used by the police and other services would result in offenders gaining knowledge on how to effectively avoid leaving traces and this in fact would foster their impunity.[34]

The draft act provides for five forms of control identical to those envisaged in the other nine statutory acts regulating the use of such surveillance. According to the proposed Article 23ao(5), operational control is carried out secretly and consists in:

1) obtaining and recording the content of calls made with the use of technology-based solutions, including telecommunication networks;
2) using and recording image or sound from rooms, means of transportation or places other than public space;
3) obtaining and recording the content of correspondence, including correspondence via electronic communication means;
4) obtaining and recording data stored in IT data carriers, telecommunication terminal devices, IT and ICT systems;
5) gaining access to parcels and their control.

An activity described in Article 23ao(5)(1) is a typical form of tapping aimed at intercepting telephone conversations in a form of human voice, but it may also cover the sound transmitted through the telecommunication network and received by a terminal device, i.e. a telephone. For this activity to be performed by the Internal Inspectorate of the Prison Service, a legal procedure will need to be followed and factual arrangements will need to be made as it will be necessary to clearly determine, for example, that a specific person of interest actually uses the

[34] A. Tomaszuk, D. Piekarski, P. Opitek, *Nadzór prokuratora nad realizacją kontroli operacyjnej (część I)*, „Prokuratura i Prawo", 2021, nr 12, s. 137.

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device which is supposed to be put on surveillance. This also entails a scenario in which persons other than the person of interest use the same telephone device, i.e. when all "residents" of a specific prison cell illegally use the same device. If this is the case, proportionality and adequacy are taken into account to determine whether the person of interest is the main user of the telephone or uses it rarely in comparison to other people, what is this person's role in illegal activities and whether other prisoners are also engaged in the crime. It should be also considered whether it is possible to obtain desired information with less "invasive" means than operational control.

Both telephone devices officially available in a prison facility and mobile phones illicitly possessed by detainees or private smartphones of officers or staff members of the Prison Service may be subject to surveillance under operational control. As far as a telephone that is a part of equipment of a penitentiary facility is concerned, its system of functioning needs to be analysed: it needs to be determined what the technical parameters of the device are, who the operator is, how calls are initiated, etc. With generally available telephones to be used under statutory acts and internal regulations of prison facilities, it should be considered to carry out control only when a person subject to exploratory activities is using it. Besides, according to Article 90(9) and Article 91(11) of the Penal Enforcement Code, telephone conversations of convicted persons are or may be subject to administrative control exercised by the administration of the prison, except for their conversations with such persons as their counsel or a legal representative who is an advocate or attorney-at-law (Article 8(3) of the Penal Enforcement Code). Article 242(1) of the Penal Enforcement Code states that the surveillance of a phone call means getting to know its content and the possibility of ending or recording the call. This definition also includes "optic" surveillance that consists in preventing the detainee from selecting specific numbers of unauthorised receivers, changing the phone number during the call and controlling the phone number selected.[35] It is, however, necessary to make a distinction between operational control and administrative control even though their scopes may overlap; a detainee using a legal phone may be simultaneously subject to both types of control conducted independently. This is yet another proof of the specific nature of penitentiary facilities that must be taken into account when "telephone tapping" is used.

Operational and exploratory activities that precede operational control in a form provided for in Article 11a(5)(1) of the draft act require that organisational arrangements for telephone calls in a specific penitentiary facility be established. This, however, will not be easy as according to A. Mudy,[36] telecommunication services in penitentiary facilities are not homogeneous and, from the factual perspective, the organisation of telephone calls differs from one prison or detention centre to another, depending on the type of unit, architecture and technologies

[35] Wyrok SA w Katowicach z 9.04.2019 r., V ACa 808/17, LEX nr 2848099.
[36] M. Mudy, *Prawne i praktyczne aspekty telefonii osadzonych…*, s. 18-20.

available within the facility. Telephone services for detainees are provided by various providers and operators using various technical solutions. They include individual automated payment phone lines operated by renowned suppliers, but also smaller operators. Technically speaking, connection is established in a standard manner, but certain mixed solutions are also offered both when it comes to operators and telephone lines. Among telephone systems used, there are also systems that support communication via services of any telecommunication service provider. Increasingly often, or even universally, VoIP technology is used as it ensures flexible adaptation to changes and opportunities offered by the telecommunication market. Systemic solutions are also used under which a device is started when identifiers and PIN codes are entered by a detainee or a valid code is sent remotely by an officer, enabling the connection to be made. It is also possible to encounter tailor-made solutions consisting in the blocking of telephones at hours other than the time in which detainees may use them.

6. Conclusions

The proposed establishment of the Internal Inspectorate of the Prison Service provided for in the draft Act of 2 November 2021 and its competences to conduct operational control should be seen as a positive development. It is assumed that this will enable stronger and more effective prevention of and fight against criminal activity in prisons and temporary detention centres, in particular in the light of an increase in crime-inducing activities in penitentiary facilities witnessed in recent years. If the proposed changes enter into force, it will not be easy to achieve the objective set. It is necessary to possess significant financial resources and make wide organisational efforts to establish logistics for the purpose of operational control, which covers collecting and recording the content of communications via technical means, including telecommunication networks. In any specific case, the "tapping" must be preceded by other operational and exploratory activities to ensure that a situation is recognised and assessed correctly and that proper arrangements are in place before the surveillance is implemented. It is equally important to have appropriate staff of the Internal Inspectorate of the Prison Service, a factor which may even determine whether activities can be performed. Operational activities are based on specific personal traits of officers of the operational division who should be aware not only of legal regulations, but also of forensic tactics and techniques, and have long professional experience. The Internal Inspectorate of the Prison Service, if established, will need to acquire such talents, which is not an easy task.

Other challenges typical of the Prison Service cannot be ignored. The closed environment of penitentiary facilities, due to its specific features, will generate problems of factual and legal nature related to the implementation and continuation of operational control as well as other operational and exploratory

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activities. For example, a question that requires a detailed analysis which exceeds the scope of this paper is as follows: "Is it allowed to carry out operational control that consists in recording image and sound of a prison cell where there are detainees other than the person of interest?". Potentially, it may be assumed that the person of interest may talk to other detainees about planned or committed crimes and such conversations could be recorded in an audio and video format to gain valuable information for the purpose of detecting or preventing crime. However, serious restrictions are imposed as the implementation of this form of control would mean that also other detainees who share a cell with the potential offender and who have nothing to do with the crime planned or committed by the person of interest would be subject to constant surveillance. Another problematic scenario occurs if the Internal Inspectorate of the Prison Service discloses that a detainee who is imprisoned or on remand uses an illicit smartphone and at the same time there are technical solutions and substantive grounds to use the device for operational control purposes. If this is the case, must the Prison Service take the illicit smartphone from the detainee or could officers omit to perform their duties if the Inspectorate informs them that the device should stay in the possession of the detainee? These and other legal dilemmas will need to be resolved if the draft Act of 2 November 2021 enters into force. The Department of Supervision over Operational and Exploratory Activities in the National Public Prosecutor's Office will be engaged in a search for answers.

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