U-I-271/08-19
24 March 2011

DECISION

At a session held on 24 March 2011 in proceedings to review constitutionality initiated at the request of the Supreme Court of the Republic of Slovenia, the Constitutional Court

decided as follows:

1. The third paragraph of Article 56 of the Police Act (Official Gazette RS, No. 107/06 – official consolidated text) was inconsistent with the Constitution.

2. The fourth paragraph of Article 56 of the Police Act (Official Gazette RS, Nos. 66/09 – official consolidated text, and 22/10) is abrogated to the extent that it refers to the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information with regard to the taking of evidence by means of the examination of a police employee in criminal proceedings.

3. Until such time as the statutory regulation thereof changes, the Minister in charge of internal affairs can, [at the request of the competent authority,] relieve a police employee of the duty to maintain the confidentiality of the information determined by the first paragraph of Article 56 of the Police Act. In the event the Minister deems that there are reasons why a police employee cannot be partially or entirely relieved of the duty to maintain the confidentiality of information, he shall inform the president of the competent Higher Court thereof and of the reasons for such opinion within eight days of receiving the request. After examining the criminal file and the confidential information which the Minister deems cannot be disclosed, the president of the Higher Court may order that the confidential information be disclosed, determine the scope and conditions of the disclosure thereof, and determine the use of protective measures, if applicable, under the terms and in the manner determined in paragraphs 34-36 of the reasoning of this Decision. The police must enable the president of the Higher Court to have access to the confidential information that is the subject of the court order.

Reasoning

A.

1. Pursuant to Article 156 of the Constitution and the first paragraph of Article 23 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text; hereinafter referred to as the CCA), the Supreme Court stayed the proceedings

following a request for the protection of legality by order No. I Ips 187/2007, dated 8 October 2008, and requested that the Constitutional Court review the constitutionality of Article 56 of the Police Act (hereinafter referred to as the PA-OCT6). The provision thereunder regulates the conditions and procedure for the Minister to decide to relieve a police officer or an individual who has helped the police conduct their tasks determined by an act of their duty to maintain the confidentiality of information. In the opinion of the applicant, this provision determines in an unconstitutional manner the conditions under which a defendant is provided information relevant to his defence.

2. The applicant alleges that the third paragraph of Article 56 of the PA-OCT6 is inconsistent with the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, and 7/94 - hereinafter referred to as the ECHR), which guarantee everyone charged with a criminal offence the right to have adequate time and facilities to prepare his defence; the third indent of Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR, which guarantee the right to present evidence to the benefit of the defendant and the right to obtain the examination of witnesses on his behalf; Article 23 and the fourth paragraph of Article 15 of the Constitution, and the first paragraph of Article 6 of the ECHR, which guarantee the right to the judicial protection of human rights; and Article 2 of the Constitution. The applicant alleges that the challenged provision does not precisely determine the substance of the conditions under which it is admissible to interfere with the mentioned guarantees, that it interferes disproportionately with the mentioned guarantees by not providing for the application of more lenient measures for achieving the aims pursued by the Act, and that the Minister (not a court) is competent to decide on the interference with the mentioned guarantees at his discretion, whereby protection from arbitrary decisions by the competent authority is not ensured.

3. The National Assembly of the Republic of Slovenia did not reply to the request. The Government of the Republic of Slovenia submitted an opinion, rejecting the applicant's allegations as unfounded. It states that the Minister's right to not relieve a police officer of the duty to maintain the confidentiality of the identity of an individual who provides the police information about a criminal offence is of key importance in that the safety of the anonymous source could otherwise be jeopardised. Individuals who provide information to the police are allegedly often afraid for their life and health, and concerned about potential threats to those close to them. These individuals allegedly have a trust relationship with the police, the abuse of which would allegedly be inadmissible. This would make it more difficult for the police to investigate criminal offences. In weighing the right of a defendant to a defence against the right to safety of an individual who provides incriminating evidence, the right of the latter allegedly prevails. The Government furthermore points to the practice developed with regard to undercover agents. In such cases, the Minister relieves the undercover agent of the duty to maintain confidentiality to the extent that it refers to the substance of the measure (collected evidence), but he does not relieve him of the duty to maintain confidentiality to the extent that it refers to the tactics and methods of police work, including regarding his true identity. Such decisions by the Minister are allegedly directly connected to the implementation of

the third paragraph of Article 240 and Article 240.a of the Criminal Procedure Act (Official Gazette RS, Nos. 32/07 – official consolidated text, 68/08, and 77/09 – hereinafter referred to as the CrimPA). The Government states that the legislature in fact did not define the substance of the conditions for relieving one of the duty to maintain confidentiality in Article 56 of the PA-OCT6, however, the hitherto practice shows that decisions on relieving individuals of the duty to maintain confidentiality are made selectively and only in the event specific conditions are fulfilled. The challenged provision is allegedly the only safeguard in cases involving protection of the confidentiality of police work. As the person authorised to relieve individuals of the duty to maintain confidentiality, the Minister is allegedly independent of the pre-trial procedure carried out by the police and directed by the competent state prosecutor. His competence is allegedly circumscribed by the need to protect the lives of individuals, not the substance of specific criminal proceedings. The Minister allegedly does not have discretion in his decisions, as claimed by the applicant, as the conditions that he needs to take into account are allegedly determined. His competence with regard to the decision-making at issue is allegedly not inconsistent with the Constitution. That the court would have competence is allegedly possible in principle, however, due to practical reasons it is less appropriate. The Government furthermore calls attention to the second paragraph of Article 33 of the Classified Information Act (Official Gazette RS, Nos. 50/06 – official consolidated text, and 9/10 – hereinafter referred to as the CIA), whose substance is identical to that of the third paragraph of Article 56 of the PA-OCT6.

4. The Constitutional Court obtained explanations with regard to the legal regime for classifying information from the Ministry of the Interior (hereinafter referred to as the Ministry). Regarding confidentiality in handling information, the Ministry states that sources of reports, information, and complaints are subject to the legal regime as provided by the CIA, whereby Article 56 of the PA-OCT6 additionally determines the duty to protect professional secrecy. In accordance with and under the conditions arising from the CIA, the police as a general rule allegedly classify the identity of individuals collaborating with the police as sources of reports, information, and complaints; less frequently is classification applied to data obtained from such sources. Confidential information is allegedly deemed to mean information whose disclosure to unauthorised persons could have implications for the security activities of the state authorities of the Republic of Slovenia. The Ministry explains that the second paragraph of Article 33 of the CIA contains the same provision in terms of substance as the third paragraph of Article 56 of the PA-OCT6, in which the scope and the purpose of relieving someone of the duty to maintain the confidentiality of information are crucial. The PA-OCT6 allegedly determines the mentioned substance in narrower terms to the extent that it refers to jeopardising the lives or personal safety of individuals, which, in the case under consideration, allegedly entails the source of the report, information, and complaint. Confidentiality conditions on the basis of the provisions of the CIA allegedly apply with regard to the identity of persons carrying out undercover investigation measures, who perform tasks exclusively on the basis of permission granted by the competent state prosecutor.

B. – I.

5. If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the

Constitutional Court in accordance with Article 156 of the Constitution and the first paragraph of Article 23 of the CCA. It follows from the reasoning of the Supreme Court's decision to stay the proceedings that the Supreme Court should have applied the third paragraph of Article 56 of the PA-OCT6, as it regulates the conditions and competences to decide to relieve individuals of the duty to maintain confidentiality, thereby determining the conditions under which a police officer may be examined as a witness with respect to data classified as confidential (Article 235 of the CrimPA), and the conditions under which he may decline to testify (the fifth item of the first paragraph of Article 236 of the CrimPA). It furthermore follows from the decision that the defendant's attorney, in the request for the protection of legality, alleges a violation to the right to a defence under Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR, in that the defence was not allowed to examine a witness on his behalf, i.e. the person with whom the police officer conducted an informal interview in the pre-trial procedure, and summarised the contents thereof in an official note (which is a part of the case file).

6. As is evident from the first-instance judgment, the court rejected the defence's proposal of evidence and its proposal to apply measures under Article 240.a of the CrimPA. It stated that due to objective reasons it did not have at its disposal information about the identity of the person whose examination the defence proposes. In Judgment No. I Kp 1240/2005, dated 10 February 2006, the Higher Court adopted the position that legal and formal reasons rendered it impossible to present evidence by means of the examination of the person who provided the police officer the information in the official note; the evidence was not available because the Minister of the Interior did not enable the disclosure of the identity of the person. With regard to the allegation that the defendant's rights were violated, it adopted the position that in such circumstances the court cannot violate the provisions of laws, the Constitution, or the Convention. In the appeals procedure against the judgment of the court of second instance, the Supreme Court upheld the positions of the lower courts. In Decision No. Kp 6/2006, dated 15 November 2006, it stated that the court unsuccessfully demanded three times that the Minister relieve the criminal detective of the duty to protect the identity of his source of information about the criminal offence as without the Minister's approval the criminal detective was not at liberty to reveal the identity even to the court. According to the position of the Supreme Court, the court of first instance was unable to examine as a witness a person whose identity it did not know and, therefore, could not violate the defendant's right to examine witnesses.

7. During the course of proceedings before the Constitutional Court, the challenged third paragraph of Article 56 of the PA-OCT6 was amended by the Act Amending the Police Act (Official Gazette RS, No. 42/09 – hereinafter referred to as the PA-G). By the amendment, the third paragraph of Article 56 of the PA-OCT6 became the fourth paragraph of Article 56 of the Police Act (hereinafter referred to as the PA), whose substance differs only marginally from the previous third paragraph of Article 56 of the PA-OCT6.

8. If during proceedings before the Constitutional Court a regulation ceased to be in force in the challenged part or was amended, the Constitutional Court decides on its constitutionality or legality if the applicant or petitioner demonstrates that the consequences of its unconstitutionality or unlawfulness were not remedied (the

second paragraph of Article 47 of the CCA). In the case under consideration, the request for a review of constitutionality was made by the Supreme Court. After the Constitutional Court reaches its decision, the Supreme Court will have to decide in the procedure for the extraordinary legal remedy on the correctness and legality of the positions of lower courts which were adopted on the basis of the challenged legal provision that is no longer in force, hence the third paragraph of Article 56 of the PA-OCT6 is still relevant to decisions by the Supreme Court. Therefore, the Constitutional Court deemed that the conditions determined in Article 47 of the CCA are fulfilled and reviewed the challenged provision.

9. The Constitutional Court conducted the review of the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information with respect to the taking of evidence by means of examining a police employee in criminal proceedings. It furthermore took into account that the challenged third paragraph of Article 56 of the PA-OCT6 was replaced with the fourth paragraph of Article 56 of the PA during the course of proceedings before the Constitutional Court. Since the provisions are identical in substance, the Constitutional Court expanded the procedure for the review of constitutionality to the fourth paragraph of Article 56 of the PA pursuant to Article 30 of the CCA. It assessed that this is necessary for a comprehensive resolution of the constitutional issues raised by the case under consideration.

B. – II.

10. Article 56 of the PA-OCT6 stated:

“A police officer must maintain the confidentiality of state, official, or other secrets encountered while performing his duties. The duty to maintain the confidentiality of state, official, and other secrets remains in effect after the police officer’s employment terminates. Police officers shall be obliged to maintain the confidentiality of a source that has filed a report, provided information, or filed a complaint. The Minister[1] may, in substantiated cases when this is in the interest of the criminal proceedings and does not jeopardise the life or personal safety of an individual, relieve a police officer or an individual who has helped the police to conduct their tasks determined by an act of the duty to maintain confidentiality, at the request of the competent authorities.”

11. The above-mentioned article regulated the duty to maintain the confidentiality of information[2] which police officers become acquainted with in the course of the performance of their tasks, and the procedure for relieving police officers of the duty to maintain confidentiality. To the extent that it referred to classified information, it was a *lex specialis* in relation to the CIA, i.e. to the general regulation on classified information.[3] The challenged provision limited the possibility of relieving individuals of the duty to maintain the confidentiality of information only to cases where this was required in the interest of the criminal proceedings and did not jeopardise an individual’s life and personal safety. Only the Minister was able to relieve individuals of the duty to maintain confidentiality.[4]

12. The challenged regulation is connected to some of the basic responsibilities of the police: to prevent, detect, and investigate criminal offences, and to detect and arrest perpetrators of criminal offences (Article 3 of the PA-OCT6). In carrying out this task, the police use various operational methods and measures. Individuals (citizens, registered informers) privy to information about the commission of a criminal offence or preparations therefor, often play a key role in the detection and investigation of criminal offences. Such information may constitute a significant clue regarding criminal activity and its scope, and cause the police to collect information, secure evidence, initiate appropriate proceedings in conjunction with the state prosecutor, etc. In the investigation of complex forms of criminal offences and organised crime, effective police tactics are particularly important. Individuals who provide information about perpetrators of criminal offences may be directly jeopardised were their identity to be disclosed. Trust as a key assumption in the cooperation of individuals with the police is also jeopardised. The regulation of the protection of the confidentiality of sources of reports, information, or complaints, thereby guaranteeing anonymity to individuals who voluntarily collaborate with the police based on a relationship of trust and in secrecy, is, therefore, important for ensuring justice in society.[5] It encourages active citizenship. It is furthermore important to ensure the confidentiality of the identity of persons carrying out undercover investigative measures in pre-trial procedures,[6] and of other sensitive information whose disclosure might facilitate the perpetration of a criminal offence or make the detection or investigation thereof more difficult.[7]

13. In criminal proceedings, the duty of police officers to maintain the confidentiality of the information referred to in the first and second paragraphs of Article 56 of the PA-OCT6 is multi-faceted. Police officers may not disclose confidential information in a criminal complaint or in annexes thereto.[8] A criminal complaint becomes a part of the case file when the state prosecutor sends it to the investigating judge (the fourth paragraph of Article 168 of the CrimPA) or when he brings an indictment or charge (Article 170 and the second paragraph of Article 430 of the CrimPA), with the defendant having the right to learn of the criminal complaint when he asserts the right to examine the case file (the fifth paragraph of Article 128 of the CrimPA). Non-disclosure of confidential information in a criminal complaint entails that the court and the parties to the proceedings are not informed thereof.

14. It is particularly important for the protection of confidential information under what conditions a police officer (or an individual who helps the police carry out their tasks) may be examined as a witness with respect to information whose confidentiality he must maintain. Pursuant to the first point of Article 235 of the CrimPA, it is impossible to examine as a witness “a person who by giving testimony would violate the obligation to maintain the confidentiality of an official or military secret, until the competent authority relieves him of that duty”. Pursuant to the fifth point of the first paragraph of Article 236 of the CrimPA, “a counsel, doctor, social worker, psychologist, or other person [is exempt from the duty to testify] on facts he came to know in carrying out his profession if he is bound by the duty to maintain the confidentiality of information he learns of in carrying out his profession, except […] if statutory conditions are fulfilled under which such persons are relieved of the duty to maintain confidentiality or are bound to disclose confidential information to competent authorities”. The challenged provision determined the conditions under which a police officer or an individual who has helped the police carry out their tasks

determined by an act may be examined as a witness with respect to confidential information. A person's identity may be considered confidential information. It is classified as such if it is so important that its disclosure to unauthorised persons could or might obviously prejudice the security activities of government authorities (Article 5 of the CIA). According to the Ministry, as a general rule the police classify the identity of sources of reports, information, and complaints pursuant to the provisions of the CIA when such sources are individuals who cooperate with the police. In the event that their incriminating statements are directly or indirectly part of the evidence in criminal proceedings, or when the statements are so important for the defence that their effective presentation would require the disclosure of such persons, the protection of the confidential information may trigger a conflict of constitutional values, which the applicant calls attention to.

B. – III.

Starting points of the review

15. In Article 23, the Constitution guarantees the right to judicial protection. Pursuant to the first paragraph of Article 23 of the Constitution, everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Accordingly, any charge against an individual must be decided by a court, i.e. a state authority which fulfils the criteria of impartiality. At the same time, the first paragraph of Article 6 of the ECHR stipulates that everyone is entitled to have criminal charges against him examined by an independent and impartial tribunal established by law. With regard to violations of human rights and fundamental freedoms, judicial protection is also provided in the fourth paragraph of Article 15 of the Constitution. What is also important for the case under consideration is the minimum procedural guarantees in criminal proceedings, which include the following rights to the same extent for everyone charged with a criminal offence: the right to have adequate time and facilities to prepare his defence, and the right to present all evidence to his benefit (the first and third indents of Article 29 of the Constitution). Points (b) and (d) of the third paragraph of Article 6 of the ECHR guarantee the defendant the following minimum rights: to have adequate time and facilities for the preparation of his defence, and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

16. With regard to the third indent of Article 29 of the Constitution, the Constitutional Court adopted the following positions in Decision No. Up-34/93, dated 8 June 1995 (OdlUS IV, 129): (1) under the principle of discretion in the review of evidence, a court decides itself which evidence it will take and how it will adjudge the credibility thereof; (2) a court is not bound to take every item of evidence proposed by the defence; (3) a proposed item of evidence must be legally relevant; (4) the defence must substantiate the existence and legal relevance of proposed evidence with the requisite degree of probability; (5) when there are doubts, any proposal of evidence is to be considered to the benefit of the defendant and the court must take it unless it is obvious that the evidence would not be beneficial. A court is, therefore, obliged to

take evidence to the benefit of the defendant if the defence (explicitly) proposes the taking of evidence and satisfies the burden of proof with respect to the existence and substantive relevance of the evidence. As soon as it is demonstrated that a piece of evidence raises doubts that, in view of the presumption of innocence, would result in an acquittal, the court must take such proposal of evidence and ensure that this aspect of the criminal case is fully investigated. The court takes the decision on the proposal of evidence on the basis of diligent, specific, and concrete consideration of the evidence.[9]

17. In Decision No. Up-207/99, dated 4 July 2002 (Official Gazette RS, No. 65/02, and OdlUS XI, 266), the Constitutional Court, referring to point (d) of the third paragraph of Article 6 of the ECHR, stated that the defendant must be allowed to challenge incriminating statements, either in the investigation phase or at the main hearing, and to examine the author thereof with respect to such statements. In that case, it decided that the right to examine witnesses against the defendant was not violated, as the defendant had the opportunity to examine the injured party in the phase of investigation but did not use the opportunity due to reasons he was responsible for.[10] In Decision No. Up-518/03, dated 19 January 2006 (Official Gazette RS, No. 11/06, and OdlUS XV, 37), the Constitutional Court found that the court used the incriminating statements of police informers and admitted them as evidence in the proceedings without allowing the defence to examine the author thereof with respect to these statements. It stated that the burden of substantiating evidence may be imposed on the defence only in the event the defence demands the examination of witnesses to the benefit of the defendant or the taking of other evidence to the benefit of the defendant.[11] In Decision No. Up-719/03, dated 9 March 2006 (Official Gazette RS, No. 30/06, and OdlUS XV, 41), the Constitutional Court adopted the position that, in the event a defendant is unable to exercise his right to examine witnesses against him, a guilty verdict may not be exclusively or to a decisive degree based on the statements of such witnesses. An item of evidence is also deemed to be, to a significant degree, the basis of conviction when the court which handed down the verdict reviewed the remaining evidence primarily in terms of whether they confirm the controversial statements of the witnesses against the defendant.[12] In that decision, the Constitutional Court decided that inability to exercise this legal guarantee, which is ensured by the ECHR, at the same time constitutes a violation of the right to a defence guaranteed by Article 29 of the Constitution.[13]

18. In accordance with the positions of the ECtHR, the right to a fair trial is expressed in adversarial proceedings and in the equality of arms between the prosecution and the defence. It follows from the right to adversarial proceedings that the defence and the prosecution are given the opportunity to be informed about, and make statements with regard to, allegations and evidence put forward by the opposing party. Furthermore, what follows from the first paragraph of Article 6 of the ECHR is the requirement that prosecuting authorities disclose to the defence essential evidence for the benefit of or against the defendant which they possess.[15] However, the ECtHR emphasises that the right to the disclosure of relevant evidence is not absolute; in a criminal procedure it must be weighed against competing relevant interests such as national security, the protection of witnesses from reprisals, and maintaining the secrecy of methods of police investigation.[16] In *Lüdi v. Switzerland,* it recognised as legitimate the interest of the police to preserve the anonymity of their undercover agent so that they could protect him and make use of him again in the future.

However, according to the positions of the ECtHR, withholding evidence from a defendant is admissible only if it is strictly necessary. Moreover, any limitation on the rights of the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[18] The decision-making procedure must, therefore, as far as possible comply with the requirements to ensure adversarial proceedings and the equality of arms and incorporate adequate safeguards to protect the interests of the defendant.[19]

19. In view of the above, the Constitutional Court must decide whether the third paragraph of Article 56 of the PA-OCT6 was inconsistent with any of the fundamental guarantees that the defendant has in criminal proceedings stated in the request, namely the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the ECHR (the right to have adequate time and facilities to prepare a defence), the third indent of Article 29 of the Constitution and point (d) of the third paragraph of Article 6 of the ECHR (the right to present evidence on his behalf and examine witnesses on his behalf and against him), and the first paragraph of Article 23 of the Constitution in conjunction with the fourth paragraph of Article 15 of the Constitution and the first paragraph of Article 6 of the ECHR (the right to judicial protection). In view of the interconnectedness of these fundamental human rights, and taking into account the case-law of the Constitutional Court and the ECtHR, the Constitutional Court must decide whether the challenged provision, in accordance with the first paragraph of Article 23 of the Constitution, guaranteed the defendant the right to have charges against him examined by an impartial court and the right to a defence, i.e. the guarantee of fair criminal proceedings. The Constitutional Court review does not refer to the question of in which cases the police should keep information confidential, but rather it refers to the question of whether the statutory regulation of the confidentiality thereof was in conformity with the Constitution.

Reasons the challenged regulation is not in conformity with the Constitution

20. When a court assesses that evidence must be taken by means of the direct examination of a witness – either a witness against the defendant whose statement is the main or essential evidence, or a witness on his behalf – while taking into account Articles 235 and 236 of the CrimPA, it cannot disregard the third paragraph of Article 56 of the PA-OCT6 in the event a witness would have to testify on information whose confidentiality he is obliged to maintain (the first and second paragraphs of Article 56 of the PA-OCT6).

21. A court can take evidence by examining a witness if it possesses information that enables the identification thereof (his first name, surname, and possibly his address and occupation),[20] and if the witness is not unreachable for reasons that cannot be influenced. When the identity of a witness is known only to the police, it is evident that, due to the third paragraph of Article 56 of the PA-OCT6, the examination of such a witness used to depend on a decision by the Minister. In his decision-making, the Minister could choose between two options – either to relieve an individual of the duty to maintain confidentiality or to not relieve him of such, while taking into consideration the public benefit (decision-making at the Minister's discretion). Such an interpretation is called for by the word "may" [in the third paragraph of Article 56]

and the fact that in order to decline disclosure it sufficed to make a general reference to the interests of the criminal proceedings or to a witness being put in jeopardy thereby. The scope of the phrase “the interests of the criminal proceedings” is not clear. Even if it is interpreted as encompassing the interest of a defendant to confront a witness against him or to obtain the examination of witnesses on his behalf, the regulation did not require an appropriate assessment of such interest in cases when the witness or other interests were not in serious danger.[21] The regulation even went so far as to require that it is not allowed to disclose confidential information even to a court.[22]

22. The statutory regulation under which the right of a defendant to examine a witness against him or on his behalf depends on a decision made at the discretion of the Minister entails an interference with the guarantees under point (d) of the third paragraph of Article 6 of the ECHR, and the right to a defence under Article 29 of the Constitution. In addition to the above-mentioned, another aspect related to a defendant’s right to have adequate facilities to prepare his defence is also important. Effective exercise of this right depends on the possibilities of a defendant to have access to the evidence (sources and items of evidence). As the applicant states with good grounds, according to the conception of the criminal procedure in force, state authorities are competent to collect evidence (against or on behalf of a defendant). Individuals do not have formal competence to carry out investigations, they can only obtain documents and information that citizens may obtain anyway, and file judicial petitions and proposals, but nothing more than that. Thus, the collection and selection of materials is entrusted to the police and the state prosecutor, which raises the issue of the disclosure of potentially relevant material to a defendant. If a defendant does not have access to the information important for his defence, since such is in the possession of state authorities and the duty to maintain confidentiality applies to it, he is not able to include such in the preparation of his defence. Therefore, the challenged regulation entails an interference with the right of a defendant under the first indent of Article 29 of the Constitution and point (b) of the third paragraph of Article 6 of the ECHR.

23. At the same time, the fact that the decision of a court regarding the taking of evidence (or regarding the scope of such) depends on a prior decision of the Minister, entails an interference with the right to judicial protection. Deciding on criminal responsibility and pronouncing criminal sanctions belong among the classic competences of courts. “Deciding on charges” or a “trial” is interpreted also (or primarily) as deciding which decisive facts need to be established with regard to the criminal offence alleged, what evidence should be taken for such purpose, and careful, diligent, and above all unbiased consideration of such evidence (each piece separately and all together, in accordance with the principle of the unfettered evaluation of evidence). The challenged third paragraph of Article 56 of the PA-OCT6 allowed for the Minister to prevent the taking of evidence in criminal proceedings and thus to interfere with decision-making which, under the Constitution, is reserved for the courts. Since the Minister actually made decisions regarding the implementation of the guarantees under Article 29 of the Constitution and since no judicial protection was ensured against his decisions, the challenged regulation also entailed an interference with the fourth paragraph of Article 15 of the Constitution, which ensures judicial protection of human rights.

24. Human rights may be limited only in cases explicitly provided for by the Constitution and in order to protect the human rights of others (the third paragraph of Article 15 of the Constitution). In accordance with the established case-law of the Constitutional Court, it is possible to limit a human right if the legislature pursues a constitutionally admissible aim and if such a limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), namely with the principle that prohibits excessive interference by the state (the general principle of proportionality).[23]

25. Non-disclosure of certain information related to police work is undoubtedly legitimate. Such a conclusion follows not only from a careful evaluation of the societal reality we live in, but also from important constitutional law values (while respecting the fundamental principles of a democratic state governed by the rule of law and the protection of human rights and fundamental freedoms).[24] The legislature must determine the conditions under which it is admissible to interfere with a defendant's right to confront, directly at the main hearing (or prior to that, even before an investigating judge), witnesses against him or the rights to examine witnesses on his behalf, and/or to obtain, by means of such evidence, information that is important for his defence. With regard to such, it can take into consideration those interests that stem from important constitutional law values, such as the following: state security, the protection of individuals from interferences with their life or person, the protection of the tactics and methods of police work (e.g. the interest that the identity of undercover agents remain concealed so that they can be used in the future). The legislature specifically determined only one aim on which an interference with procedural guarantees regarding criminal procedure is based, i.e. the protection of individuals; however, practice has shown that also other aims are taken into consideration (e.g. the protection of the tactics and methods of police work),[25] which the legislature did not specifically define in an act, although they at the same time entail the substance of the criteria for the permissibility of an interference with the right to a defence. Each interference with human rights or fundamental freedoms must be regulated precisely and unambiguously. Any possible arbitrary decision-making by a state authority must be excluded.[26] The requirement that acts be precise is more emphasised the higher the disputed subject is valued. In criminal procedure, this subject (human freedom) is set the highest.[27]

26. The duty to maintain the confidentiality of sources and undercover agents, and withholding such from the defence (and consequently the public) is an appropriate measure for achieving the aim – i.e. the protection of a witness if his life or safety could be jeopardised. The measure of not disclosing someone's identity is necessary and proportionate if serious danger to his life or person exists or there are other substantial reasons in the public interest, while at the same time the possibility to examine such a witness upon applying protective measures is ensured.[28] Proportionality does not exist when, upon weighing opposing interests (the right to a defence, on one hand, against the right to safety and the interests of public order, on the other), it turns out that the negative consequences that a defendant could experience due to the non-disclosure of the identity of a witness and thus the impossibility of effective cross-examination, could be more severe than those that the witness could experience (e.g. if the level of threat to the witness or the interests of public order is relatively low).[29]

27. When the examination of an anonymous witness suffices for the exercise of the right to a defence, the challenged measure (refusing to disclose the identity of a witness to the court) will not be necessary in such cases. Namely, in some cases it is possible to balance the interest of protecting witnesses and the interest of a defendant to confront them and to contest their statements, or to obtain the examination of witnesses on his behalf. The identity of a witness can be witheld from a defendant and the public while at the same time giving the defence an opportunity to examine the witness. In order to ensure balance between the psychological and physical protection of witnesses, on one hand, and the rights of the defendant, on the other, measures have been enacted by means of which it is possible to maintain the anonymity and thus the security of individuals (informers, undercover agents). Article 240a of the CrimPA ensures anonymity to those witnesses for whom testifying and disclosing their identity could result in serious danger to their life or person or that of other persons. This especially concerns testimony related to serious offences or offences concerning organised crime. When in such cases a court considers whether the use of protective measures is justified, it assesses whether disclosing a witness's identity could seriously jeopardise the life or health of the witness or someone close to him. If it establishes such, the information related to identity should not be disclosed.[30] Under the challenged regulation it was possible for such consideration to not even occur. When the identity of a witness remains unknown to the court, it cannot apply the measures provided for in Article 240a of the CrimPA and ensure balance between opposing interests. The above-mentioned is substantiated by the conclusion that the challenged regulation interfered in an inadmissible manner with the right of the defendant to a defence provided for in Article 29 of the Constitution and the guarantee under point (d) of the third paragraph of Article 6 of the ECHR.

28. With regard to a witness against a defendant, the state has the following two options: either choose to not use such evidence against the defendant and thus ensure the complete anonymity of the source or the withholding of such information, or to insist on using such evidence and thus risk that certain confidential information will be disclosed.[31] In the event a piece of information whose confidentiality must be maintained would be beneficial to the defendant (which is especially evident when it is possible to exculpate the defendant by means of such, e.g. when the evidence provides an alibi), classifying such information as confidential and refusing to disclose it is a barrier to effective implementation of the right to a defence. It is the duty of state authorities who ensure the efficiency of prosecution and of the courts, who must ensure the fairness of proceedings, to assess threats that would follow from different choices and to decide to apply the measure which, upon weighing the legitimate interests and values, is shown to be the least burdensome. This issue requires careful weighing of the interests of public order and/or individuals' personal safety against the right of the defendant to a defence. Whether it is demonstrated, upon appropriate weighing, that such disclosure is well-founded, depends on the circumstances in the individual case, taking into consideration the criminal offence with which the defendant is charged, possible manners of defence, the importance of testifying, and other important elements.[32]

29. The challenged regulation did not ensure such handling of this type of matter, especially since the criteria for decision-making were insufficiently determined and since a final decision regarding the disclosure of information was reserved for the Minister, who does not enjoy the same level of independence and impartiality as the

judicial branch of power. In the system of the separation of powers as established by the Constitution the judicial branch has a special status. The reason for such is primarily in that from the range of constitutional provisions that entail a certain derivation from the principle of the separation of powers, including the system of checks and balances, it is evident that the very emphasised role of the judiciary is that of exercising supervision, especially over the executive branch of power.[33] Since the Minister could at his discretion refuse the request of a court to relieve an individual of the duty to maintain the confidentiality of information related to the identity of a witness, or of other important information necessary for the criminal proceedings, and it was not up to the court to carry out the final consideration of whether the reasons for the non-disclosure of certain information are justified, defendants were deprived of judicial protection (in nonconformity with the first paragraph of Article 23 in reference to the fourth paragraph of Article 15 of the Constitution) and of the right to an effective defence (Article 29 of the Constitution). The challenged regulation was imbalanced since it enabled other interests to prevail over constitutionally ensured guarantees that defendants have in criminal proceedings, even when the necessity to disclose information for the needs of the defence was demonstrated; therefore, it was inconsistent with the rights under the first and third indents of Article 29 of the Constitution and the guarantees of fair criminal proceedings under the first paragraph, and points (b) and (d) of the third paragraph of Article 6 of the ECHR. The Constitutional Court did not address the allegations regarding the nonconformity with Article 2 of the Constitution separately since the relevant aspects that the applicant claimed in relation to the alleged nonconformity with Article 2 of the Constitution were important for the consideration of the nonconformity with the above-mentioned provisions of the Constitution.

30. In light of the above-mentioned, the Constitutional Court found that the third paragraph of Article 56 of the PA-OCT6 was inconsistent with the Constitution (Point 1 of the operative provisions).

B. – IV.

31. The text of Article 56 of the PA-OCT6 was amended by the PA-G such that it now reads as follows:

“Police employees must maintain the confidentiality of classified information, personal information, and protected information encountered while performing their duties. The duty to maintain the confidentiality of such information remains in effect after such employment terminates.

Protected information of the police is information whose handling requires the implementation of certain safety measures and procedures.

Police employees shall be obliged to maintain the confidentiality of a source that has filed a report, provided information, or filed a complaint.

The Minister may, in substantiated cases when this is in the interest of the criminal proceedings and does not jeopardise the life or personal safety of an individual,

relieve a police employee of the duty to maintain confidentiality provided for by the first paragraph of this Article, at the request of the competent authorities.

32. Since the fourth paragraph of Article 56 of the PA does not deviate, in its essence, from the prior regulation, the nonconformity with the Constitution is demonstrated on the same grounds as with regard to the third paragraph of Article 56 of the PA-OCT6. In light of the above-mentioned, the Constitutional Court abrogated the fourth paragraph of Article 56 of the PA to the extent that it refers to the conditions and decision-making procedure for relieving individuals of the duty to maintain the confidentiality of information in criminal proceedings (Point 2 of the operative provisions). The abrogation refers to relieving individuals of the duty to maintain confidentiality in criminal proceedings with regard to the taking of evidence by means of the examination of police employees in order to decide on criminal responsibility or in relation to possible other important issue.

B. – V.

33. The Constitutional Court partially abrogated the fourth paragraph of Article 56 of the PA. The abrogation of the challenged provision to the extent mentioned above does not remedy the unconstitutional situation in its entirety since the decision-making procedure for disclosing confidential information that a police employee has encountered and that is necessary for carrying out criminal proceedings is not regulated. Since due to the abrogation of the special provision, the general provision under the second paragraph of Article 33 of the CIA would subsequently apply, the Constitutional Court determined, on the basis of the second paragraph of Article 40 of the CCA, the manner of the implementation of this decision. By adopting such an approach the Court on one hand protected the constitutionally admissible aim that the legislature pursued by the challenged regulation, and on the other hand it ensured that in the period prior to the adoption of the new regulation, no inadmissible interference with the human rights and fundamental freedoms of defendants would occur. And by determining the manner of implementation it also determined the procedural rules.

34. When a judge in criminal proceedings (either during an investigation or at the main hearing) finds that it is necessary to take evidence by means of examining a police employee and the taking of evidence refers to confidential information,[34] he requires that the Minister in charge of internal affairs relieve the police employee of the duty to maintain the confidentiality of such information.[35] In the event the Minister finds that there are reasons why the police employee cannot be partially or entirely relieved of the duty to maintain the confidentiality of information (e.g. for reasons of state security, the protection of the tactics and methods of police work, the personal safety of an individual), he shall inform the president of the competent Higher Court which the court that filed the request is within the jurisdiction of, of his standpoint and of the reasons for such opinion, and at the same time submit the request of the court. He shall do so within eight days of receiving the request. The president of the Higher Court then initiates the so-called *ex parte* procedure, the subject of which is deciding on the possible disclosure of confidential information to the defence. The police must enable the president of the Higher Court to have access to the confidential information, i.e. they must enable him to access it for the purpose of deciding whether it is admissible to disclose such in the criminal proceedings. If the

police cite special reasons for maintaining confidentiality, they provide the president of the Higher Court the opportunity to access the confidential information at a location and in a manner that they determine. The request for the disclosure of information becomes void if it is related to incriminating evidence obtained by the examination of a witness which is subsequently withdrawn by the state prosecutor.

35. The president of the Higher Court may obtain explanations and opinions necessary for his decision from state authorities. In his decision-making he is not bound by the reasons stated by the Minister, and must *ex officio* also establish other important reasons that require the non-disclosure of the confidential information. Prior to final consideration of whether the reasons for the disclosure of certain confidential information are justified, the president of the Higher Court notifies the defendant and his attorney of the initiation of an *ex parte* procedure and the standpoint of the Minister, and thus enables them to state in a written submission whether the reasons for maintaining the confidentiality of certain information are justified. An adversarial aspect is ensured only to the extent possible while taking into account the nature of the matter. After examining the criminal file[36] and the confidential information, the president of the Higher Court may order that the confidential information be disclosed and determine the scope of the disclosure thereof, all in such a manner that the confidentiality of the information is maintained.[37] He adopts the decision upon carefully considering the needs regarding the taking of evidence and the level of the sensitivity of the information and by weighing the conflicting constitutional law values. If the president of the Higher Court assesses that the disclosure of individual personal information or the entire identity of a source of information is not admissible, he adopts a decision regarding the possible measures provided for in the first paragraph of Article 240a of the CrimPA, or submits to the state prosecutor a motion in accordance with the fifth paragraph of Article 240a of the CrimPA. Disclosure of personal information or the identity of a source of information is not admissible if the safety of the witness or someone close to him is in evident and serious danger.

36. He may adopt the decision after a special hearing has been held at which he examines *in camera* persons who could provide information important for his decision, upon *mutatis mutandis* application of the fifth paragraph of Article 240a of the CrimPA. He must ensure all conditions for the safe handling of confidential information while deciding on disclosure and after such. Appeal is not allowed against the order by which he decides on the requested disclosure of certain confidential information. He sends the order to the Court that filed the request, which serves it on the Minister, the state prosecutor, the defence attorney, and the defendant. If a witness has to be examined in criminal proceedings with regard to whom a protective measure has been ordered, the investigating judge or the head of the judicial panel obtains the essential information related to the identity of the witness by examining the case file held by the president of the Higher Court, or he confirms his identity with the assistance of the president of the Higher Court. During the examination of the witness the judge prohibits questions the answers to which could disclose confidential information to a greater extent than allowed.

37. The manner of implementation that the Constitutional Court established regarding the present decision does not entail that this is the only possibility consistent with the

Constitution. Therefore, it does not limit the legislature in that, with regard to police employees, it should not regulate in a different manner, yet consistently with the Constitution, the issue of relieving a police employee of the duty to maintain the confidentiality of information or the issue of disclosing such information to the extent to which such is essential in order to carry out criminal proceedings. Within this framework, the legislature may also consider the option of introducing a mechanism that would, in exceptional cases, enable the state prosecutor to decide to terminate the proceedings when there is a risk of the disclosure of confidential information due to a court order. Such a mechanism could entail a special guarantee for the protection of confidential information in exceptional cases.

C.

38. The Constitutional Court reached this Decision on the basis of Article 21, the second paragraph of Article 47, Article 43, and the second paragraph of Article 40 of the CCA, composed of: President Dr. Ernest Petrič, Judges Dr. Etelka Korpič – Horvat, Mag. Miroslav Mozetič, Jasna Pogačar, and Mag. Jadranka Sovdat. Judges Dr. Mitja Deisinger, Jože Tratnik, and Jan Zobec were disqualified from deciding on the case. The decision was adopted unanimously.

Dr. Ernest Petrič
President

Notes:
[1] Under Article 2.a of the PA-OCT6, it is the Minister in charge of internal affairs.
[2] The term confidential means all information subject to the duty to maintain confidentiality or classified as secret (i.e. classified information, protected information, and personal information).
[3] The CIA determines the basic principles of the uniform system for the determination of, safeguarding of, and access to classified information in the sphere of activity of government authorities of the Republic of Slovenia relating to public security, defence, foreign affairs, or the intelligence and security activities of the country, and for the declassification of such information (the first paragraph of Article 1).
[4] Cf. the second paragraph of Article 33 of the CIA, which stipulates that the head of an authority may, at the request of the competent authorities, relieve a person of the duty to maintain the confidentiality of information solely for the purposes of and to the extent specified in the request of the competent authority.
[5] In common law systems, informer privilege is recognised as a mechanism which plays a crucial role in implementing the law. It is based on the understanding that protecting the identity of informers is important for the safety of these persons and for encouraging citizens to disclose information about criminal offences and perpetrators. According to the standpoints of the Canadian Supreme Court, informer privilege is of such fundamental importance to the working of the criminal justice system that it cannot be balanced against other interests relating to the

administration of justice. Neither the police nor the court is allowed to make decisions that would relativise its scope. The privilege may be claimed by the prosecution, which cannot make an exception without the consent of the informer. In this sense, the privilege is also a right that the informer has. The privilege prevents not only the disclosure of the informer's name, it also prevents the disclosure of any information that may indirectly reveal his identity. The only admissible exception is the "innocence at stake" exception. See the decision in the case *R. v. Leipert*, 1997, 1 S. C. R. 281.

[6] These include police officers, undercover agents, or agents carrying out measures pursuant to Articles 149.a, 150, 151, 155, and 155.a of the CrimPA. Since these persons help the police or cooperate with the police in the collection of evidence and the detection of serious criminal offences, it is in the interest of the police and in the public interest to keep them anonymous and, consequently, make it possible for them to continue to cooperate on similar tasks.[7] In addition to information that makes it possible to identify human sources of information, information crucial to police work includes information facilitating the identification of individuals who are being investigated by the police; information potentially disclosing operational measures, actions, and methods carried out by the police to prevent criminal offences and to detect or apprehend perpetrators of criminal offences; and intelligence obtained from foreign police forces, security and intelligence services, and international police and security organisations.

[8] In executing their tasks on the basis of Article 148 of the CrimPA, the police must collect all information that may be useful in the successful conduct of criminal procedures (the first paragraph of Article 148 of the CrimPA). On the basis of the collected information, the police put together a criminal complaint in which they state the evidence found in the course of the collection of information. The criminal charge does not include statements made by individual persons in the information gathering process. Items, sketches, photographs, reports, records of the measures and actions undertaken, official annotations, statements, and other material which may be useful for the successful conduct of criminal proceedings are enclosed with the criminal charge (the ninth paragraph of Article 148 of the CrimPA).

[9] Cf. Constitutional Court Decision No. Up-34/93, Para. 15. See also Constitutional Court Decision No. Up-13/94, dated 8 June 1995 (OdlUS IV, 128).

[10] In this decision, the Constitutional Court took into account the positions of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Kostovski v. The Netherlands* (judgment dated 20 November 1989), in which the ECtHR explained the substance of the right to examine witnesses against the defendant. It stressed that, in principle, all the evidence must be presented in the presence of the defendant at a public hearing with a view to adversarial argument. This does not entail, however, that in order to be used as evidence, statements of witnesses should always be made at a public hearing in court. Using as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with the first paragraph and point (d) of the third paragraph of Article 6 of the ECHR, provided the rights of the defence have been respected.

[11] In addition to *Kostovski v. the Netherlands,* the Constitutional Court in this decision also referred to *Lüdi v. Switzerland* (judgment dated 15 June 1992).

[12] In this decision, the Constitutional Court *inter alia* referred to the judgments in the case of *Lucŕ v. Italy,* dated 27 February 2001, and *Mild and Virtanen v. Finland,* dated 26 October 2005. See also the judgment in the case *Krasniki v. the Czech Republic*, dated 28 May 2006.

[13] See also Constitutional Court Decisions Nos. Up-849/05, dated 18 October 2007 (Official Gazette RS, No. 102/07, and OdlUS XVI, 110), Up-487/04, dated 22 June 2006 (Official Gazette RS, No. 69/06, and OdlUS XV, 91), Up-754/04, dated 14 September 2006 (Official Gazette RS, No. 101/06, and OdlUS XV, 94), and Up-483/05, dated 3 July 2008 (Official Gazette RS, No. 76/08, and OdlUS XVII, 78).
[14] Judgment in the case *Brandstetter v. Austria*, dated 28 August 1991, Paras. 66, 67.
[15] Judgments in the cases *Jasper v. the United Kingdom*, dated 16 February 2000, Para. 51, and *Rowe and Davis v. the United Kingdom*, dated 16 February 2000, Para. 60.
[16] Judgments in the cases *Jasper v. the United Kingdom*, Para. 52, and *Rowe and Davis v. the United Kingdom*, Para. 61.
[17] Judgment dated 15 June 1992, Para. 49.
[18] Judgments in the cases *Jasper v. the United Kingdom*, Para. 52, and *Rowe and Davis v. the United Kingdom*, Para. 61.
[19] Judgments in the cases *Jasper v. the United Kingdom*, Para. 53, and *Rowe and Davis v. the United Kingdom*, Para. 62. In *Jasper v. the United Kingdom*, the ECtHR did not establish a violation of the first paragraph of Article 6 of the ECHR, whereby it was crucial that it was a court which decided on the withholding of evidence, i.e. weighed the interests of the defence against other interests. The court decided on the withholding of evidence on the proposal of the prosecution in an *ex parte* procedure; the defence was notified thereof and allowed to take part in the proceedings with its proposals to disclose the evidence. In the case of *Rowe and Davis v. the United Kingdom*, however, the ECtHR established that limiting the rights of the defence was not sufficiently balanced by an appropriate procedure before the court because the prosecution decided to withhold evidence without notifying the court thereof. The ECtHR adopted the position that a procedure in which the prosecution itself decides on the relevance of information withheld from the defence and weighs it against the public interest in secrecy does not satisfy the requirements of the first paragraph of Article 6 of the ECHR. Since the prosecution did not submit evidence to the court, i.e. allow it to decide on disclosure, the defendant was not guaranteed the right to a fair trial. See also the cases *Dowsett v. the United Kingdom* (judgment dated 24 June 2003) and *Edwards and Lewis v. the United Kingdom* (judgment dated 27 October 2004).
[20] Cf. the first paragraph of Article 239 of the CrimPA.
[21] Compare the criterion of a risk to the life or personal safety of an individual under the third paragraph of Article 56 of the PA-OCT6 to the criterion of a serious danger to life or person under the first paragraph of Article 240a of the CrimPA.
[22] The judge can access classified information on the basis of Article 3 of the CIA but he cannot obtain information that only a police officer is familiar with due to his participation in a police action. Even if he could obtain the information in question, he could under no circumstances decide on its disclosure to parties to proceedings since he would be obliged to maintain its confidentiality under the provisions of the CrimPA.
[23] Cf. Constitutional Court Decision No. U-I-18/02, dated 24 October 2003 (Official Gazette RS No. 108/03, and OdlUS XII, 86).
[24] The fact that other legal orders know the regime of protecting confidential information (in relation to police work) is also not unimportant. Cf., for example, Article 203 of the Italian Code of Penal Procedure (*Codice di procedura penale*), Article 44 of the Finnish Police Act (No. 493/1995), and Article 96 of the German Code of Penal Procedure (*Strafprozessordnung*).

[25] It, *inter alia*, follows from the opinion of the Government that the Minister may not relieve a police employee of the duty to maintain confidentiality to the extent that it refers to the tactics and methods of police work.
[26] Cf. Constitutional Court Decision No. U-I-25/95, dated 27 November 1997 (Official Gazette RS No. 5/98, and OdlUS VI, 158), Para. 42.
[27] Cf. Constitutional Court Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS No. 25/96, and OdlUS V, 40), Para. 38.
[28] If, due to protective measures, the possibilities of the defence to examine the credibility of a witness are decreased, the court takes such into consideration in evaluating such evidence.
[29] A defendant must be given the possibility to examine the credibility of a witness against him by cross-examination. In some cases an examination is effective only if the defendant has knowledge of the identity of the witness. Special attention is required in cases when a person (an informer) is a witness to a criminal offence committed or when he acted as an *agent provocateur* when the defence claims that the criminal activity was incited. Cf. the decision of the Supreme Court of Canada in *R. v. Scott*, 1990, 3 S. C. R. 979.
[30] Such an order can be issued by the investigating judge or the head of a judicial panel after a special hearing has been held at which the defence is not allowed to be present (the fourth and fifth paragraphs of Article 240a of the CrimPA). If measures under the first paragraph of Article 240a of the CrimPA do not suffice, the fifth paragraph of this Article calls for the application of the Witness Protection Act (Official Gazette RS Nos. 81/06 – official consolidated text, and 110/07), which envisages also other measures.
[31] The state prosecutor must pay attention to such when he indicates in the request for an investigation that particular acts be performed, or when he proposes in an indictment which evidence should be taken. With regard to the circumstances of the case, he is obliged to consult the police about issues regarding the use of information obtained from informers and undercover agents.
[32] Cf. U.S. Supreme Court Judgment in the case *Roviaro v. United States*, 1957, 353 U. S. 62.
[33] As the Constitutional Court stated in Decision No. U-I-159/08, dated 11 December 2008 (Official Gazette RS No. 120/08, and OdlUS XVII, 71), Para. 25.
[34] An analogous situation occurs when the issue of maintaining confidentiality is raised during the examination of a witness.
[35] The request of the court must contain a statement of reasons.
[36] When necessary, he may obtain an explanation from the judge who filed the request.
[37] Cf. the second sentence of the second paragraph of Article 240a of the CrimPA: "The decision may not contain information that could lead to the disclosure of information that is the subject of the protective measure."