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Operational Control pursuant to the Act on State Protection Service

Abstract

Operational control is one of the most important powers of the state police services, including, since 2018, the State Protection Service (Służba Ochrony Państwa – SOP). The analysis of the title issue presented in the article leads to the conclusion that the shape of the operational control, which is a novum in the security service, which is the SOP, does not differ from the solutions used in regulating the operational powers of other Polish services, both in terms of the principles and procedure of applying control operational, and the (technical) ways of using this power in practice.

Key words: operational control, State Protection Service, state security, public order, criminal proceedings

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Introduction

According to the police legislation binding in Poland, operational control is one of the powers of the state services exercising operational-reconnaissance activities. This applies to the State Protection Service (SOP) that, having replaced the Government Protection Bureau¹ (BOR), deals with the protection of persons with top functions in the state, and for that purpose has been equipped with operational powers.

In the SOP Act², unlike in the case of the BOR Act³, the operational-reconnaissance activities that the SOP officers⁴ perform with a view to attaining the statutory tasks are stated explicitly. What is more, Art. 19(1)(2) of the SOP Act has the activities classified into two principal groups. The first group comprises activities aimed at acquisition of information about events potentially threatening the persons or facilities protected by SOP. The second group consists in activities which help SOP officers recognize and prevent offences specified in Art. 3 of the quoted Act.

Operational control, regulated in Art. 42 and subsequent provisions of the SOP Act, ought to be treated as part of the second group of operational powers (operational-reconnaissance) of SOP officers. This signifies that its principal function is to detect (preventive-detective). On the one hand, the use of control is to reveal activities which meet the definition of inchoate offences (preparation for crime) and, in effect, to frustrate offence commission (prevention). On the other hand, if a crime is committed, the use of control allows one to determine the circumstances of a criminal act and to detect its perpetrator(s)⁵.

1 BOR acted based on the Act of 16 March 2001 (Journal of Laws 2017, item 985, as amended), hereinafter the Act on BOR.

2 Act of 8 December 2017 on State Protection Service (Journal of Laws 2021, item 575, as amended), hereinafter the Act on SOP.

3 Pursuant to Art. 12(1) of the Act on BOR, the scope of Bureau's activities included those of administrative and policing nature and undertook preventive actions. In practice, „preventive actions” constituted some form of operational-reconnaissance activities, even though they were not named likewise in the cited regulations. Nonetheless, the catalogue of the said actions did not include operational control, for which BOR had no authorization under the Act of 2001.

4 And only officers. This is because the regulations of Art. 19 do not apply to SOP employees. See also K. Walczuk, *Komentarz do art. 19 [in:] Ustawa o Służbie Ochrony Państwa. Komentarz do art. 1-67*, ed. M. Karpiuk, Olsztyn 2019, p. 80.

5 Cf.: M. Rogalski, [in:] B. Opaliński, M. Rogalski, P. Szustakiewicz, *Ustawa o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu. Komentarz*, Warszawa 2017, p. 100;

Material and personal scope of operational control

As emerge from Art. 42(1) of the SOP Act, when performing operational-reconnaissance operations, SOP is authorised to avail of operational control to „determine and prevent” and to „identify, prevent and detect” a category of offences. Article 42(1)(1) and (2) of the SOP Act comprise a catalogue of the said offences and, based thereupon, one may speak of the material scope of SOP’s application of operational control.

A comparative analysis of the provisions of Art. 3 of the SOP Act, which sets out the catalogue of offences combated by SOP, with the provisions of Art. 42(1) referring to Art. 3 demonstrates that both catalogues differ in terms of criminal acts specified therein. This pertains solely to the provisions of Art. 3(2) and Art. 42(1)(1) of the SOP Act. To be more precise, on the basis of the regulations, the catalogue specified in Art. 3(2) includes more offences than the one provided for in Art. 42(1)(1) of the SOP Act. Insofar as the former specified all offences grouped in a given chapter of the Penal Code (the title of which is cited in Art. 3(2)), the latter mentions only some of them.

And so, in accordance with Art. 3(3) SOP, the determines and prevents offences against the Republic of Poland, offences against life or health, offences against common safety, offences against safety in transport, offences against liberty, offences against dignity and physical integrity, offences against public order, offences against attacks and active assault on persons and security of protected facilities. Whereas, in Art. 42(1)(1) of the Act, solely the following from among the above specified penalized in the Penal Code⁶ acts are cited: Art. 134 (an attack on the life of the President of RP), Art. 135(1) (an assault on or an insult of the President of RP), Art. 136(1) (an assault or an insult of the head of another state), Art. 148 (killing of protected persons), Art. 156(1) and (3) (severe health damage of protected persons), Art. 157(1) (medium or slight health damage of protected persons), Art. 163(1) and (3) (bringing a disaster), Art. 164(1) (risk of disaster), Art. 165(1) and (3) (bringing states threatening the health or life of protected persons), Art. 166 (taking over the control of an aircraft or a watercraft), Art. 167 (placing on a watercraft or an aircraft a dangerous device or substance), Art. 173(1) and (3) (transport disaster),

A. Szumski, *Czynności operacyjno-rozpoznawcze Agencji Bezpieczeństwa Wewnętrznego* [in:] *Służby specjalne. Przeszłość i teraźniejszość*, eds. G. Rdzanka, G. Tokarz, Wrocław 2009, p. 282.

⁶ Act of 6 December 1997 the Penal Code (Journal of Laws 2021, item 2345, as amended), hereinafter KK.

Art. 189 (illicit deprivation of liberty of protected persons), Art. 223 (an assault on protected persons), Art. 252(1)–(3) (taking hostage a protected person), Art. 258 (organised crime), and Art. 280–282 (robbery, theft and extortion to the detriment of protected persons).

In the case of offences specified in Art. 3(3) and Art. 42(1)(2) of the Act, the types of the offences in both provisions overlap (they are identical). Both in the first and in the second provision, five identical offences are mentioned by reference to editorial units of the Penal Code. The catalogue is composed of prohibited acts in accordance with the following provisions of the Code:

Art. 228 (passive corruption), Art. 231 (abuse of authority), Art. 265 (compromise of classified information), Art. 266 (compromise of classified information in relation to performed function).

In this respect, we ought to emphasise that SOP's operational control may be applied only in the case of determination and prevention of crimes specified in Art. 42(1)(1) and determination, prevention and detection of crimes identified in Art. 42(1)(2) of the Act. Both groups constitute an exhaustive list of offences (*numerus clausus*), which may be combated with the application of operational control. In a situation where SOP runs operational-reconnaissance activities to determine and prevent offences provided for in Art. 3(2) but not specified in Art. 42(1)(1) of the Act, the power⁷ may not be used as part of the activities, i.e. one may not apply operational control and thereby obtain information or record evidence. In this respect, the solutions adopted in the SOP Act correspond to the standards binding on the basis of such acts as the Act on the Internal Security Agency (ABW), the Central Anti-corruption Bureau (CBA), the Police, the Border Guard Service⁸.

Apart from this vital reservation, the analysis of Art. 42(1) of the Act must focus on a thing of equal importance. The catalogue of offences in relation to which SOP might avail of operational control is not the only legal limitation of services' capabilities in that respect. There is also a personal scope of the use of the institution. It pertains, without a doubt, to the persons (subjects), to

7 M. Bożek, *Komentarz do art. 42 [in:] Ustawa o Służbie Ochrony Państwa. Komentarz...*, ed. M. Karpiuk, p. 164. Further on in the article, we will refer to the remarks made by us in the indicated Commentary.

8 Cf.: M. Bożek, *Zwalczanie przestępstw jako ustawowe zadanie Agencji Bezpieczeństwa Wewnętrznego. Stan obecny i postulaty de lege ferenda*, „*Studia Iuridica Lublinensia*” 2015, vol. 24, no. 1, p. 36 et seq.; S. Hoc, *O potrzebie nowelizacji art. 5 ust. 1 pkt 2b ustawy o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu*, „*Przegląd Policyjny*” 2011, no. 3, p. 7.

whose detriment the said offences are or may be committed and the persons, who may be suspected of committing such offences.

This first case refers to SOP's identification and prevention of offences aimed at persons protected pursuant to Art. 3(1)(a)–(d) or against the safety of facilities specified in Art. 3(1)(e) of the SOP Act. The contents of Art. 42(1) (1) clearly demonstrate it, for the above cited provisions of Art. 3 of the SOP Act are quoted there. This, in turn, signifies that only in such situations, i.e. in the case of identification or prevention of crimes to the detriment of protected persons or facilities, SOP is authorised to use operational control.

In the case listed in Art. 42(1)(2) of the SOP Act, the personal scope of the operational-reconnaissance activities is narrowed to offences committed by SOP officers and employees in relation to performance of professional duties. To be more precise, SOP will be able to apply operational control by identifying, preventing and detecting offences specified in Art. 42(1)(2) but only if it acquires data which shows that those offences might have been committed – as part of their professional duties – by SOP officers and employees. Nonetheless, this does not mean that on the basis of Art. 42(1)(2) of the Act solely the specified category of SOP people is authorised to use operational control. The provisions of Art. 42(1)(2) do not impose such restrictions. The solutions are solely to relate every factual basis for the use of operational control to the identification, prevention and detection by SOP of offences of its officers or employees.

Conditions for the application of operational control

The provisions of Art. 42(1) of the SOP Act, irrespective of the above presented conditions, there are additional prerequisites for SOP to avail of operational control during its activities. The conditions are: 1) futility of measures applied so far; 2) uselessness of other measures at SOP's disposal. This demonstrates that SOP is entitled to apply operational control should other measures used in a given case prove ineffective or, in the SOP's opinion, are useless in a given case.

Given the content of Art. 42(1) *in fine* it suffices for one of the said conditions to be met in a given case for SOP to be able to plan the application of operational control⁹. This explicitly points to the use of the word „or” in

9 See K.J. Pawelec, *Proces dowodzenia w postępowaniu karnym*, Warszawa 2010, p. 61.

the discussed regulation, which demonstrates the application of a separate alternative – i.e. a situation where the addressee of a legal regulation may choose between two mutually exclusive alternatives. Consequently, SOP may exploit operational control when operational-reconnaissance activities do not bring desired outcomes, but when the factual basis for their continuation persists.

As part of the latter option, SOP may use the instrument if it fails to acquire information which would allow identification and prevention or detection of an offence in another manner (with the use of other measures). Without a doubt, such „uselessness of other measures” assessment should be based on some (initial, at least) SOP’s operational findings, or the nature of the offence being identified in a specific case. What is decisive in assessing is that there is nothing arbitrary about it because, due to the derogative nature of operational control (limiting the fundamental rights of a unit¹⁰) it is a measure of last resort. This shows that SOP ought to have at its disposal confirmed information about an intention (preparation) of an offence and that such information must demonstrate that other measures will not be useful as far as prevention or detection of the offence are concerned¹¹.

Modes of operational control use

Ordinary procedure

The final matter regulated based on Art. 42(1) of the Act is the method (type of procedure) of SOP’s use of operational control, whereas the subsequent edition units (paragraphs) of Art. 42 serve as an extension thereto.

According to the adopted solutions, the only body entitled to order operational control is the Regional Court in Warsaw, which issues relevant decisions. Initiative with respect to the issuance of such an order belongs to the SOP Commandant who submits a written application to order operational control to be applied in a particular case. Prior to the submission

¹⁰ See K. Walczuk, *Komentarz do art. 31 [in:] Obronność, bezpieczeństwo i porządek publiczny. Komentarz do wybranych przepisów Konstytucji Rzeczypospolitej Polskiej*, eds. M. Karpiuk, P. Sobczyk, Olsztyn 2018, p. 81–112.

¹¹ See K. Walczuk, M. Bożek, *Konstytucyjne i ustawowe uwarunkowania organizacji i funkcjonowania Agencji Bezpieczeństwa Wewnętrznego*, Siedlce 2015, p. 155–156.

of the application with the Court by the SOP's Commandant, such application is addressed at the Prosecutor General, who evaluates the legitimacy of application of operational control in a given case and decides about its future. Therefore, to be more precise, the required acceptance of the application for operational control by the Prosecutor General carries significant weight. The absence of the Prosecutor's consent terminates the entire procedure of the ordering of operational control, *ergo* prevents its application in a particular case¹².

This demonstrates that three public authority bodies, acting independently, must carry out convergent evaluations of the legal and factual bases of operational control before a decision about its use in a given case is made. What is vital is that one of the said bodies, i.e. the Regional Court in Warsaw, who is the last to adopt a conclusion on the matter, is an authority independent from other state authorities¹³, including the executive branch of government (as part of which function both the Prosecutor General and SOP).

The evaluation of the grounds for the ordering of operational control is done pursuant to the application of the SOP Commandant, which according to Art. 42(2) of the SOP Act should comprise the following components: The number and code name of the case, the description of the offence (if possible), its legal classification, the circumstances justifying the need to apply operational control and demonstrating the non-effectiveness or uselessness of other measures, the details of the person or other details allowing identification of the subject or matter against which operational control is to be applied, and the place and method of its application, and the aim, time and type of operational control to be conducted. If the application concerns a suspect or a defendant, it should also include information about any proceedings pending against them¹⁴.

All elements to be included in a correctly made application for operation control to be ordered performs the guarantee function. They are of utmost importance for the purpose of determining the scope of legal intervention

12 Cf. M. Białuński, *Udział prokuratora w działalności służb specjalnych – uwagi de lege lata* [in:] *Służby wywiadowcze jako element polskiej polityki bezpieczeństwa. Historia i współczesność*, ed. M. Górka, Toruń 2016, p. 169–170.

13 See. M. Karpiuk, J. Kostrubiec, *Zasada podziału i równowagi władz* [in:] M. Bożek, M. Karpiuk, J. Kostrubiec, K. Walczuk, *Zasady ustroju politycznego państwa*, Poznań 2012, p. 120–136.

14 Art. 48(5) of the SOP Act.

in the zone of freedom and protection of the secrecy to communicate guaranteed by Art. 49 of the Constitution of the RP¹⁵.

Regulations set out in Art. 42(3) of the SOP Act are strictly related to the above issue. They impose on the SOP Commandant an obligation to enclose with the application all materials which justify the need to apply operational control.

While the requirement is of a guarantee-type nature, the provisions of Art. 42(3) of the SOP Act do not specify the type or contents of such materials. Only Art. 46(1) of the Act signals that those could be materials previously collected in the case in the application of operational control. Thus, in practice, the materials attached to the application may take on various forms: records comprising the entire operational case, key documents demonstrating the level of SOP's activity and the results obtained in a given case, or a synthetic analysis of the operational case.

The solution at stake involves to both the Prosecutor General and the Regional Court in Warsaw examine the documents illustrating operational-reconnaissance activities pursued in a case in which SOP desires to apply operational control. And only on the basis of such materials they assess whether the conditions (circumstances) justifying the use of the institution exist; otherwise, whether there is a legally admissible ability for SOP to interfere with the freedom aspect of an individual with the use of operational control.

In view of Art. 45(1) of the Act, the SOP Commandant is entitled to delegate his/her competencies under the operational control use to his/her deputy.

Formally, competence delegation ought to be in the form of an authorisation indicating the type of action (decision) the deputy may take on behalf of the SOP Commandant. As provided by Art. 45(1) of the SOP Act, the authorisation may comprise the following actions: submission of applications for operational control or the Court granting a consent to control ordered as a matter of urgency and order control as an extraordinary measure. The principles of the interpretation of the law allow one to state that on the basis of Art. 45(1) of the SOP Act, the SOP Commandant may grant his/her deputy the power to perform all or only some actions, as long as it is clearly set out in the authorisation. Without a doubt, the nature of the authorisation and the scope of delegated competencies support the written form of such power of attorney, despite the fact that the stated provision does not regulate this explicitly.

¹⁵ See the Judgment of the Appellate Court in Wrocław of 27 April 2017, case ref. II AKa 213/16.

Extraordinary procedure

The extraordinary procedure has been defined under Art. 42(4) of the SOP Act as an urgent measure to order and use operational control. The underlying condition for the implementation of the procedure is the risk of „information loss or evidence obliteration or destruction”. Should any delay cause such a situation, the SOP Commandant, acting instead of the Regional Court in Warsaw, is authorised to order operational control. However, rather than an independent competence, it requires a prior written consent of the Prosecutor General, similarly as in the Case of the „normal” procedure of operational control implementation. This demonstrates that it is inadmissible to order operational control as an urgent measure if there is no approval, i.e. a written consent, of the Prosecutor General.

Moreover, at the same time the SOP Commandant has a duty to apply to the Regional Court in Warsaw for an operational control order. The Court should issue the order within five days. If the Regional Court in Warsaw does not express its consent to the application of the ordered operational control, the SOP Commandant has an obligation to withhold it. What is more, all operational control materials gathered in the case are subject to destruction in the presence of a commission and duly recorded.

Given the above, it should be emphasised that the five-day time-frame¹⁶ is a period during which the Regional Court in Warsaw should decide on the application of the SOP Commandant, whereas a lack of consent to apply operational control does not need to be formalised by the court. On other words, the Court has no obligation to issue a ruling on the matter. A lack of express consent will suffice. In any such case, the SOP Commandant is obliged to instruct SOP to close operational control, given the earlier specified consequences. Another vital matter is that the five-day time period shall run from the day on which operational control is ordered by the SOP Commandant (upon a written consent of the Prosecutor General), and not from the day of a phone call, text, or the provision of information via other technical means, i.e. actions under urgent operational control¹⁷.

An additional information obligation imposed on the SOP Commandant was introduced in Art. 46(3) of the SOP Act and it is intra-organisational

¹⁶ Resultant from Art. 42(4) of the SOP Act.

¹⁷ Cf. the ruling of the Appeal Court in Warsaw of 24 October 2008, II Aka 405/07, Apel.-W-wa, 2008, no. 3, item 119.

in nature. Pursuant to the said provision, the Commandant should inform the Internal Supervision Inspector¹⁸ of operational control initiation and use against SOP officers and employees in the events specified in Art. 42(1)(2) of the SOP Act. The events listed are five types of offences of SOP officers and employees, whose identification, prevention and detection are the statutory obligations of SOP [Art. 3(3) and Art. 42(1)(2) of the SOP Act].

It seems that in practice the Internal Supervision Inspector, acting with the assistances of the Bureau of Internal Supervision, appointed as an authority to combat the said category of offences, will deliver information and draft documents relating to the need of application of operational control in such cases. Thus, the regulations of Art. 46(3) are to clarify the question of SOP operational control-related document (information) exchange¹⁹.

Judicial check of operational control use

The stage of familiarisation with the operational materials of the SOP is particularly important for the assessment of the criteria for the legitimacy of the request in the context of the statutory grounds for the application of operational control. Strictly speaking, it is only when these materials are viewed by authorities outside the structures of the SOP that it is possible to correctly assess whether the effort of the service as regards operational control are fully documented with previously verified reliable information²⁰. A special role in this respect is assigned to the Regional Court in Warsaw, as a judicial authority, independent and distinct from the executive authorities, to which the government administration, including services such as the SOP, is subordinate.

The competence of the Regional Court in Warsaw to assess the prerequisites for the application of operational control in a given case is provided for in Art. 46(1) of the SOP Act. The regulation of this issue in a separate unit of the Act demonstrates its importance for the decision-making process

18 See the Act of 21 June 1996 on special forms of supervision by the Minister responsible for Internal Affairs (Journal of Laws 2021, item 2073, as amended).

19 See also Art. 62 of the SOP Act.

20 See: J. Mąka, *Kontrola operacyjna i podsłuch – ocena na tle praktycznego stosowania*, „Przegląd Bezpieczeństwa Wewnętrznego” 2011, no. 4, p. 48; J. Kostrubiec, *Formy działania służb specjalnych* [in:] M. Bożek, M. Czuryk, M. Karpiuk, J. Kostrubiec, *Służby specjalne w strukturze władz publicznych. Zagadnienia prawnoustrojowe*, Warszawa 2014, p. 134–135.

on the state's use of an institution that allows interference with the individual's right to privacy and derivative freedoms²¹.

Based on Art. 46(1) of the SOP Act, the competences of the Court correspond to the responsibilities of the SOP Commandant related to initiation and extension of the period of operational control [Art. 42(1) and (4), Art. 44 of the SOP Act]. In each of these cases, the SOP Commandant is obliged to present materials justifying the need to manage or continue the operational control. A specific type of such materials is those gathered during the operational control ordered in a given case.

In this context, the court's consent is not of a purely formal nature, but constitutes a legal guarantee that operational control will only be ordered when the statutory conditions for its application are met, i.e. in relation to criminal offences for which it is admissible and only when its necessity is demonstrated (other measures are ineffective or useless). Any court decision ordering operational control should be preceded by a thorough assessment of the facts from this perspective. The court's consent, actually, signifies permission for operational control on an individual in connection with a specific criminal offence in respect of which it was permissible to order it and only because it is not possible to recognise, prevent or detect that offence otherwise. The latter requirement is also subject to the court's assessment, which means that the material presented by the SOP Commandant should clearly show that other operational and exploratory measures applied in the case proved to be ineffective or useless.

Pursuant to Art. 46(2) of the SOP Act, requests of the SOP Commandant (for ordering or prolongation of operational control) are examined by the Regional Court in Warsaw by a single judge in a closed-door session. Only the Public Prosecutor General and a representative of the SOP Commandant may attend such a session. Equally importantly, the court's activities related to the examination of the requests filed by the SOP Commandant should be conducted in compliance with the conditions set forth in the Ordinance of the Minister of Justice of 9 September 2017 on the manner of handling interrogation records and other documents or objects covered by the obligation to keep classified information secret or to maintain confidentiality related to the exercise of a profession or function²².

²¹ See especially Art. 47–51 of the Constitution of the Republic of Poland.

²² Journal of Laws 2021, item 1733.

Pursuant to the two-instance principle indicated in Art. 54(1) of the SOP Act, it is possible to appeal against a court's decision on: ordering of operational control, consenting to it in an urgent mode and extending the periods of its application to the court of second instance. Importantly, it is possible to appeal against a decision dismissing the request for the application of operational control in its entirety as well as in part (e.g. with regard to the period of its application)²³.

The SOP Commandant has the right to an appeal measure in the form of a complaint in any case in which the Regional Court in Warsaw issues a negative decision on operational control. On the other hand, the Prosecutor General has the right to an appeal measure only if the court does not give consent to operational control ordered under the urgency procedure.

The provisions of the Code of Criminal Procedure²⁴ apply accordingly to the complaint, which means that the proceedings in such cases are governed by the provisions contained in Part IX (Appeal Proceedings) and Chapter 50 (Complaint and Objection) of the Code.

Forms of operational control activities and its duration

The characteristics of operational control from the point of view of its main feature as well as the scope and forms of the activities it may take in reality is included in Art. 43 of the SOP Act. Firstly, it was pointed out that operational control is classified, which directly results from the nature of operational-recognition activities²⁵. Next, five types of activities were identified that may constitute the content of the SOP's activities as part of the operational control applied. Importantly, pursuant to the wording of the provision, the catalogue of these activities is a closed one (*numerus clausus*). This demonstrates that activities which do not fit in the enumerative list of the above-mentioned

23 Cf. A. Taracha, *Sądowa kontrola czynności operacyjno-rozpoznawczych*, „Studia Iuridica Lublinensia” 2003, no. 2, p. 29–42.

24 Act of 6 December 1997 the Code of Criminal Procedure (Journal of Laws 2022, item 655), hereinafter KPK.

25 See: *Kryminalistyka*, ed. J. Widacki, Warszawa 2002, p. 137; S. Pikulski, *Działania operacyjne Policji*, „Wojskowy Przegląd Prawniczy” 1996, no. 2, p. 52; T. Hanausek, *Kryminalistyka. Zarys wykładu*, Kraków 1996, p. 96; M. Lityński, *Czynności operacyjne w procesie karnym*, „Państwo i Prawo” 1961, z. 6, p. 102; L. Schaff, *Zakres i formy postępowania przygotowawczego*, Warszawa 1961, p. 77; K. Walczuk, *Komentarz do art. 19...*, p. 87.

catalogue cannot be undertaken by the SOP as operational control activities. As a result, the regulation fulfils the guarantee function indicated in the jurisprudence of the Constitutional Tribunal.

According to the adopted solution, the operational control activities of the SOP may consist exclusively in: 1) obtaining and recording of the contents of conversations conducted with the use of technical means, including by means of telecommunication networks; 2) obtaining and recording of the image or sound of persons from premises, means of transport or places other than public places; 3) obtaining and recording of the content of correspondence, including correspondence conducted by means of electronic communication; 4) obtaining and recording of data contained on IT data carriers, telecommunication terminal equipment, IT, and ICT systems; 5) obtaining access to and controlling of the content of mail.

It should be added that the use of the phrase „content of conversations conducted with the use of technical means, including telecommunication networks” in Art. 43(1) of the Act means that, in the course of operational control, not only information may be obtained on the content of telephone conversations (eavesdropping), but also communication by means of: fax, telefax, telegraph, cable television, radio communication, internet²⁶.

Within the meaning of Art. 2(35) of the Act of 16 July 2004, Telecommunications Law²⁷, which is the point of reference here, „telecommunication network” is transmission systems and switching or routing devices as well as other resources, including inactive network elements, which enable the sending, reception or transmission of signals by wire, radio waves, optical waves or other means using electromagnetic energy, regardless of their type.

The second group of operational control activities specified in Art. 43(2) of the SOP Act is obtaining and recording of the image or sound of persons from premises, means of transport or places other than public places. Under

²⁶ See: A. Herzog, *Wykorzystanie materiałów operacyjnych w postępowaniu dyscyplinarnym prokuratorów*, „Prokuratura i Prawo” 2007, no. 2, p. 87–88; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, vol. 1, Warszawa 1999, p. 868–869; K. Dudka, *Kontrola i utrwalanie rozmów telefonicznych w projekcie kodeksu postępowania karnego z 1991 r.*, „Przegląd Sądowy” 1994, no. 7–8, p. 136; B. Kurzępa, *Kontrola i utrwalanie rozmów telefonicznych według kodeksu postępowania karnego*, „Prokuratura i Prawo” 1999, no. 3, p. 79; K. Dudka, *Podstuch komputerowy w polskim procesie karnym – wybrane zagadnienia praktyczne*, *ibidem*, no. 1, p. 69; As well as Resolution of the Supreme Court of 21 March 2000, I KZP 60/99, OSNKW 2000, no. 3–4, item 26.

²⁷ Journal of Laws 2021, item 576, as amended.

this regulation, it is possible to obtain and record „image or sound” as well as „image and sound”. This way of interpretation of this provision is supported by both theory and judicial decisions. This position was also taken by the Supreme Court, which stated that the Polish word „lub” denotes a joint (non-separable) alternative and is the opposite of the Polish word „albo”, proper for a separable alternative²⁸.

The term „sound of persons” as used in the provision should be understood as everything that is picked up by a human being with the sense of hearing. Premises, on the other hand, is a place where people or objects can be located, usually separated from other premises by walls and ceilings. Means of transport, in turn, are all vehicles designed to transport people and goods on land, water and in the air. Importantly, the premises, means of transport and other places referred to in Art. 43(2) of the SOP Act shall not be public places. In the doctrine, the term „public place” is defined as a place generally accessible to an unspecified number of people. Pursuant to Art. 2(6) of the Act on spatial planning and development²⁹, an „area of public space” is understood as „an area of particular importance for satisfying the needs of inhabitants, improving their quality of life and fostering social contacts due to its location as well as functional and spatial characteristics”.

In the light of Art. 43(3) of the SOP Act, the Service may, within the framework of operational control, obtain and record the contents of correspondence, including correspondence conducted by means of electronic communication. In the doctrine, the term „correspondence” is understood as one of the types of human communication between people (interpersonal communication), regardless of the means (media) of communication used for this purpose³⁰. In this sense, correspondence means any way in which people communicate and pass information to each other. Both in the classic way (by letter) and through other technically (technologically) possible forms of communication. Such a broad interpretation of correspondence under this provision has also been confirmed by court rulings³¹.

28 See: Resolution of the Supreme Court of 9 September 2008, III CZP 31/08, OSNC 2009, no. 3, item 36; Resolution of the Supreme Court of 29 September 2006, II UZP 10/06, OSNP 2007, no. 5–6, item 75.

29 Journal of Laws 2022, item 503.

30 See M. Rogalski, *Kontrola korespondencji*, Warszawa 2016, p. 1–5.

31 See order of the Appeal Court in Warsaw of 22 October 2009, II PKz 6/09, *Apel-W-wa*, 2010, no. 1, item 3.

In turn, Art. 43(4) of the SOP Act provides that operational control may consist in obtaining and recording of data contained in IT data carriers, telecommunication terminal equipment, IT and ICT systems. The terms and expressions used in this provision have their legal meanings given to them in the applicable legislation. Thus, the term „IT data carriers” has been defined in Art. 3(1) of the Act of 17 February 2005 on computerisation of the activity of entities performing public tasks³². Pursuant to this provision, „IT data carriers” are materials or devices for recording, storing, and reading of data in a digital form. On the other hand, according to Art. 2(43) of the Telecommunication Law cited above, „telecommunication terminal equipment” is telecommunication equipment intended to be connected directly or indirectly to network terminals. Whereas, in the light of Art. 2(3) of the Act of 18 July 2002 on provision of services by electronic means³³, an „ICT system” is a set of cooperating IT devices and software, ensuring the processing and storage as well as sending and receiving of data via telecommunication networks by means of telecommunication terminal equipment appropriate for a given type of network, within the meaning of the Telecommunication Law.

Obtaining access to and controlling of the content of mail is the last group of operational control activities listed in Art. 43(5) of the SOP Act. In order to determine the meaning of the term „mail”, the provisions of the Act of 23 November 2012 Postal Law³⁴ may be helpful. Article 3 of this law defines such terms as: mail for the blind, courier mail, letter mail, certified mail, registered mail, advertising mail, mail with correspondence, mail with declared value. This means that each of these types of mail is included in the content of a concept with a broader meaning, which is the general term „mail” as used in Art. 43(5) of the SOP Act.

Article 44 of the SOP Act regulates the issues of the time during which operational control may be applied by the SOP as well as the principles and modes of its extension for subsequent periods. Pursuant to section 1 of this provision, operational control may be ordered for the first time in a given case for a period not longer than three months. The use of the phrase „not longer than” means that operational control can also be ordered for shorter periods, even of a few days – depending on the needs and specific circumstances. As a rule, operational control should be terminated when the reasons for its use

32 Journal of Laws 2017, item 570, as amended.

33 Ibidem 2020, item 344.

34 Ibidem 2022, item 896.

cease to exist. This is because they constitute the factual prerequisites for its use and, if they cease to exist, the continued use of operational control loses its justification. Nevertheless, the possibility of extending the period of use of operational control has been provided for. If the reasons for the control do not cease to exist during the period for which the control was ordered, the Regional Court in Warsaw may extend the operational control once for a period of not more than another three months. The court shall issue such a decision upon a written request of the SOP Commandant submitted after obtaining the written consent of the Public Prosecutor General. The time for which operational control was ordered or extended should be counted from the moment (date) on which the court decision was issued within this scope³⁵. The maximum period for the use of operational control by the SOP is six months. If, within this period of time, the operational control does not produce the effects for which it was used, its continuation is legally impossible; unless the prerequisites set forth in Art. 44(2) of the SOP Act arise.

Pursuant to this provision, operational control may continue also after the expiry of the periods for which it was ordered under Art. 44(1) of the SOP Act, yet under one essential condition. Namely, „when, during the application of operational control, new circumstances arise which are relevant to the prevention or detection of a criminal offence or the identification of perpetrators and the obtaining of the evidence of the criminal offence”. In such a situation, the SOP Commandant may submit a written request to the Regional Court in Warsaw to extend operational control for consecutive periods of time, the total length of which shall not exceed 12 months. The submission of such a request shall also require a prior written consent of the Public Prosecutor General.

In practice, there may be several such requests from the SOP Commandant, but the final time caesura is the period of 18 months during which operational control may be applied in a given case [the maximum period of its application under Art. 44(1) and (2) of the SOP Act].

35 E. Samborski, *Zarys metodyki pracy sędziego w sprawach karnych*, Warszawa 2008, p. 69.

The use of operational control materials in criminal proceedings

Being of extreme importance from a practical point of view, the issue of the scope of obtaining and using of the operational control materials in criminal proceedings is regulated in Art. 48 of the SOP Act. The materials obtained in the course of operational control may constitute the basis for conducting of procedural activities in a given case. More specifically, depending on the results of the operational control, they may be used to initiate criminal proceedings or have the value of evidence in the proceedings pending. In such cases, the SOP Commandant is obliged to hand over the operational control materials to the Public Prosecutor General, which should be done together with the application to initiate preparatory proceedings. Importantly, the obligation of the SOP Commandant applies to all materials collected during operational control, not only those justifying the initiation of criminal proceedings or being of procedural significance.

At the same time, it should be added that the evidence which allows the initiation of criminal proceedings, or which is relevant to the proceedings already pending is only the evidence concerning the criminal offences specified in Art. 42(1) of the SOP Act which were indicated in the order on the application of operational control and committed by the person to whom the court's consent pertained³⁶. In other cases, the fate of evidence collected by the SOP in the course of operational control will be determined by the Public Prosecutor General [pursuant to Art. 49(3) of the SOP Act] or the „competent public prosecutor” (pursuant to Art. 168b of the Code of Criminal Procedure), who will decide to initiate preparatory proceedings or to include such material in the evidence of some proceedings already pending. Pursuant to Art. 168b of the Code of Criminal Procedure, „if, as a result of operational control, ordered at the request of an authorised body on the basis of specific provisions³⁷, evidence has been obtained of the commission of a criminal offence prosecuted ex officio or a fiscal offence by a person with regard to whom operational control was applied, other than the offence covered by the operational control order, or an offence prosecuted ex officio or a fiscal offence committed by

³⁶ Cf.: Resolution of the Supreme Court of 23 March 2011, I KZP 32/10, OSNKW 2011, no. 3, item 22; Order of the Supreme Court of 26 April 2007, I KZP 6/07, OSNKW 2007, no. 5, item 37.

³⁷ See: J. Mąka, op. cit., p. 48; J. Kostrubiec, *Formy działania służb...*, p. 134–135.

a person other than the person covered by the operational control order, the prosecutor shall decide on the use of this evidence in criminal proceedings”.

In the proceedings before the court with regard to materials obtained by means of operational control by the SOP (if they have evidential value), the provision of Art. 393(1)(1) of the Code of Criminal Procedure shall apply. This demonstrates that such material can be considered evidence in the case without the need for further „procedural valorisation”³⁸. Consequently, operational control documentation may be read out at the court hearing just like other official documents submitted in preparatory or court proceedings or in other proceedings provided for by the Act. Obviously, provided that the conditions set out in Art. 168a of the Code of Criminal Procedure were observed when the material was obtained, including, above all, that it was not obtained in connection with the performance of official duties by a public official as a result of: murder, intentional infliction of a health impairment or deprivation of liberty. In other situations, the operational control material should be treated as evidence subject to free evaluation in the course of criminal proceedings; also, when the operational control activities would be flawed³⁹.

The issue of the relation between the possibility of obtaining information (evidence) by means of operational control and evidence prohibitions binding on the grounds of the Code of Criminal Procedure has been regulated in Art. 48 (2) of the SOP Act. Evidence may be any recorded information that does not constitute inadmissibility in evidence which enables getting to the truth. It is a general rule, to which the rules of criminal procedure introduce several important exceptions. Referring to these exceptions in Art. 48(2) of the SOP Act means setting clear limits on the use of operational control for procedural (evidential) purposes. In the light of point 1 of the provision, the SOP Commandant is obliged to order an immediate, commission-supervised and recorded destruction of materials containing information referred to in Art. 178 of the Code of Criminal Procedure⁴⁰. This provision introduces into criminal procedure the inadmissibility in evidence concerning the

38 See in particular Art. 47–51 of the Constitution of the Republic of Poland.

39 Journal of Laws 2021, item 1733.

40 See J. Machlańska, *Dowód z podsłuchu procesowego a ochrona tajemnicy obrończej*, „Palestra” 2016, no. 1–2, p. 74–82.

criminal lawyer confidentiality⁴¹ and the seal of confession⁴². On the basis of this regulation, it is forbidden to examine evidence covered by these secrets with the use of such means of obtaining evidence as the hearing of a defence counsel (attorney, legal adviser) or a clergyman.

The question of using the operational control material containing data covered by the mediation confidentiality (Art. 178a of the Code of Criminal Procedure) and reporter's privilege [to the extent referred to in Art. 180(3) of the Code of Criminal Procedure⁴³] as well as information constituting secrets related to performance of a profession or function referred to in Art. 180 (2) of the Code of Criminal Procedure looks different. The latter refers to information covered, inter alia, by notary-client, attorney-client, legal adviser-client, doctor-patient and reporter's privilege.

Pursuant to Art. 48(2)(2) of the SOP Act, the SOP Commandant is obliged to hand over operational control materials to the Public Prosecutor General if the material contains information covered by confidentiality. This does not apply only if the material contains information covered by the mediation confidentiality or reporter's privilege (to the extent referred to in Art. 180(3) of the Code of Criminal Procedure), yet it is related to offences indicated in Art. 240 of the Criminal Code⁴⁴. Some of these acts, in particular criminal offences against the Republic of Poland, are subject to examination and prevention by the SOP, e.g. by means of operational control. Material collected by the SOP with regard to such offences will be subject to admission and use in criminal proceedings under the general principles arising from Art. 48(1) of the SOP Act. In other cases, the rule of Art. 48(2)(2) of the SOP Act will apply and the materials will be sent to the Public Prosecutor General.

Pursuant to Art. 48(3) of the SOP Act, the Public Prosecutor General, upon receiving operational control materials from the SOP Commandant

41 See: M. Wielec, *Zakaz dowodowy tajemnicy spowiedzi w postępowaniu karnym*, Warszawa 2012; K. Pachnik, *Odpowiedzialność karna duchownego przed sądem powszechnym*, „Prokurator” 2011, no. 3, p. 54.

42 See: *Kryminalistyka...*, p. 137; S. Pikulski, op. cit., p. 52; T. Hanausek, op. cit., p. 96; M. Lityński, op. cit., p. 102; L. Schaff, op. cit., p. 77; K. Walczuk, *Komentarz do art. 19...*, p. 87.

43 Pursuant to Art. 180(2) of the Code of Criminal Procedure: „Persons obliged to maintain confidentiality related to their profession, such as notaries, attorneys, legal advisers, tax advisers, doctors, reporters or employees of the statistical office as well as of the Public Prosecutor General's Office, may be questioned as to the facts covered by this confidentiality only if it is necessary for the benefit of the administration of justice and the facts cannot be established on the basis of other evidence”.

44 Journal of Laws 2021, item 576, as amended.

in accordance with Art. 48(2)(2) of the SOP Act, should immediately send them together with an appropriate request to the Regional Court in Warsaw. This request should indicate those pieces of information which contain data covered by the mediation confidentiality (Art. 178a of the Code of Criminal Procedure), reporter's privilege [to the extent referred to in Art. 180(3) of the Code of Criminal Procedure] and confidentiality related to a profession or a function [Art. 180(2) of the Code of Criminal Procedure]. The document should include a request to allow the use, in criminal proceedings, of materials containing information constituting secrets connected with the exercise of a profession or a function [which are not covered by the inadmissibility in evidence set out in Art. 178a and Art. 180(3) of the Code of Criminal Procedure]. For, pursuant to Art. 180(2) of the Code of Criminal Procedure, it is the court that is competent to release persons from the obligation to maintain confidence in connection with their profession or function for the purposes of criminal proceedings.

The Regional Court in Warsaw will, immediately upon submission of the request by the Public Prosecutor General, issue a decision on admitting of the operational control materials to be used in criminal proceedings. In making such a decision, the court will take into account two considerations; namely whether it is necessary for the benefit of the administration of justice and whether the facts in question cannot be established on the basis of evidence other than operational material. If the court does not find such grounds in a particular case, it will order the immediate destruction of the material, considering it inadmissible for use in criminal proceedings⁴⁵.

Pursuant to Art. 48(5) of the SOP Act, the Public Prosecutor General is entitled to file an appeal against the decision of the Regional Court in Warsaw on admitting operational control materials to be used in criminal proceedings. The provisions of the Code of Criminal Procedure shall apply respectively to the appeal. The special role of the Public Prosecutor General which he/she plays with regard to the possibility of procedural use of operational control materials is also confirmed in Art. 49(2) and (3) of the SOP Act.

Pursuant to the first of these provisions, the Public Prosecutor General has the right to request information on the course of the operational control and, thus, also on its effects. Moreover, the SOP Commandant, in accordance

45 See Resolution of the Supreme Court of 9 September 2008, III CZP 31/08, OSNC 2009, no. 3, item 36; Resolution of the Supreme Court of 29 September 2006, II UZP 10/06, OSNP 2007, no. 5-6, item 75.

with the disposition of Art. 49(2), is obliged to inform the Public Prosecutor General on the results of the operational control both in the course of its application and after its completion. In a specific case in which operational control is used, materialisation of this obligation may take the form of a motion to initiate criminal proceedings (preparatory proceedings), which will be filed with the Public Prosecutor General by the SOP Commandant on the basis of materials collected in the course of the control. On the other hand, in section 3, a solution was adopted according to which it is the Public Prosecutor General who conducts procedural activities if the material collected in the case by way of operational control justifies conducting of such activities. In practice, these activities will be conducted by the Public Prosecutor General, obviously with the assistance of subordinate public prosecutors. Nevertheless, the Act reserves to his/her competences the assessment of whether, in a given case, such actions should be conducted at all and whether the collected material sufficiently justifies them. It also provides for the possibility of delegating the procedural actions, initiated, and conducted in connection with the material collected by the SOP within the framework of operational control, to other services. Both the special services – the Internal Security Agency⁴⁶ – and the police services – the Police and the Border Guard – are indicated here.

The decision to entrust the conducting of procedural activities, in whole or in part, with one of these services will be taken by a competent public prosecutor. In practice, this will be the prosecutor issuing the decision on the initiation of preparatory proceedings on the basis of the materials gathered in the course of operational control conducted by the SOP or the prosecutor conducting or supervising the proceedings for which such materials have been transferred under Art. 48(1) of the SOP Act. The decision as to which service will be entrusted with procedural actions in the situation provided for in section 3 of Art. 49 will probably be determined by their material competence as defined in the provisions of the competence acts under which they operate.

Conclusions

The shape of operational control under the Polish Act of 8 December 2017 on the State Protection Service does not depart from solutions applied to regulate operational powers of other Polish state services. In that regard, the

46 Journal of Laws 2022, item 503.

SOP Act reproduces the strong legal standards of Police legislation binding in Poland; both in terms of the rules and procedures of application of operational control, and the (technical) methods of the use of the authority in practice.

The catalogue of prosecuted offences in the case of which SOP may avail of operational control is also strictly defined, as in the event of other services pursuing operational-reconnaissance activities. It shows that the use of operational control by SOP is possible solely with respect to the identification, detection and prevention of offences included in the catalogue, and not when performing all statutory obligations of SOP.

SOP may avail of operational control in the course of its activities only upon a consent of the Regional Court in Warsaw and the Public Prosecutor General. The above bodies conduct an evaluation of the appropriateness of use of operational control in certain cases in which SOP sees is indispensable. In this respect, the procedure of the ordering of operational control is analogous to that of the Acts on the basis of which operate other state services using the same type of authority. This demonstrates that the legal standards of the use of operational control by SOP are identical to those used in the case of other agencies, including judicial check also at the stage of its ordering, which should meet the guarantee function in accordance with the protection of the rights and freedoms of an individual (human rights). Operational control is associated with interference by a public authority with individuals' rights to privacy, which ought to be decided by an authority independent from the executive branch and subordinate services, i.e. the judicial authority.

Novum in the SOP Act, which should be emphasised, is the fact of granting SOP the power to use operational control. This power was not included in the catalogue of BOR officers' powers, whereas the BOR Act did not avail of operational-reconnaissance activities to name one of its legal forms of operations. Given the above, the shape of operational control provided for in the SOP Act is a novel solution, which the officers protecting the top state officials may use for the first time since 1989.

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Kontrola operacyjna na gruncie ustawy o Służbie Ochrony Państwa

Streszczenie

Kontrola operacyjna jest jednym z ważniejszych uprawnień państwowych służb policyjnych, w tym także od 2018 roku Służby Ochrony Państwa (SOP). Analiza tytułowego zagadnienia przedstawiona w artykule doprowadza do wniosku, że kształt kontroli operacyjnej stanowiącej novum w odniesieniu do służby ochronnej, jaką jest SOP, nie odbiega od rozwiązań stosowanych przy regulowaniu uprawnień operacyjnych innych polskich służb zarówno co do zasad i trybu stosowania kontroli operacyjnej, jak i sposobów (technicznych) korzystania z tego uprawnienia w praktyce.

Słowa kluczowe: kontrola operacyjna, Służba Ochrony Państwa, bezpieczeństwo państwa, porządek publiczny, postępowanie karne