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## **Research into newly-introduced probation elements in criminal law<sup>1</sup>**

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### **Extended summary**

#### **Research classification**

The research into newly-introduced probation elements in criminal law was conceived as part of the general research project: “Effects of the transformation of criminal legislation on the state of criminality and the increase in judicial efficiency in relation to the safety of citizens of the Czech Republic with regard to the year 2000”, and was a follow-up of the research on the provision for conditional suspension of proceedings, research on the community service and research on mediation. We conducted the research into newly-introduced probation elements – supervision - in the criminal legislation of the Czech Republic in 1999.

#### **Subject and aim of the research**

The subject of the research was the comprehensive examination of two new provisions of criminal law: a conditional discharge with supervision, which is governed by Section 26 of the Criminal Code, and a conditional prison sentence with supervision, which is governed by Sections 60a and 60b of the Criminal Code.

Both provision meant the introduction of probation elements into Czech criminal law. According to the reasoned statement to Act No. 253/1997 Coll., by which the Criminal Code was amended, this refers to the institutionalised supervision of criminal offenders’ behaviour and of treatment that combines both a penological (sentence, threat of sentence, limitation) and a social (supervision, assistance) aspect.

Probation officers were given responsibility for the performance of the probation supervision. The meaning of probation lies in a differentiated approach to handling the offenders of a variety of crimes and in applying different and more effective methods in reacting to less serious forms of crime. The extent and intensity of the probation supervision must be determined by a court, while the probation officers help to implement the sense of this supervision.

A conditional discharge with supervision under Section 26 of the Criminal Code is closely connected to discharge under Section 24 of the Criminal Code, and the application of both provisions is possible under the same conditions. A conditional discharge with supervision under Section 26 of the Criminal Code is however a stricter alternative as it is not a definitive decision but only conditionally dependent on the fulfilment of certain criteria; it is connected to the setting of a probationary period and may be made stricter by the application of adequate limitations and obligations. Section 26 (4)a to d of the Criminal Code firstly specifies the demonstrative specification of adequate limitations and obligations that may be imposed on the offender in order that he lead a law-abiding life during the probationary period.

A conditional prison sentence with supervision under Sections 60a and 60b of the Criminal Code is a typical form of probation that fulfils the purpose of the Criminal Code without strict

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repression. It differs from a conditional prison sentence under Sections 58 and 59 of the Criminal Code (without supervision) in the length of the sentence, the serving of which may be suspended conditionally. The sentence amounts to a maximum of three years (as opposed to two) and together with the conditional suspended prison sentence also carries an obligatory, court-imposed supervision. Section 60a (3) of the Criminal Code refers to adequate limitations and obligations as stated in Section 26 (4) of the Criminal Code.

Due to the short period of implementation of the newly-introduced provisions the information obtained has been interpreted as partial and for orientation purposes only.

The main aim of the research was to ascertain the implementation of both provisions in practice (i.e. conditional discharge with supervision and conditional prison sentence with supervision) in 1998 and 1999 for cases that had been duly closed, as well as the implications of both provisions for society, the offender and the injured party according to the possibilities and effectiveness of the provisions.

We therefore examined whether the regional (district) courts were applying the fore-mentioned provisions sufficiently and whether the state prosecutors were recommending them to the courts as a way of handling cases. We also looked at their views and ideas.

We also ascertained the way in which probation officers were involved in the application of both provisions, particularly with regard to their probation activity, i.e. whether they are entrusted with the supervision, how they perform it in practice, how the court-imposed adequate limitations or obligations are controlled, how they cooperate with the judges etc. As with the judges, we looked at their views on both provisions and any ideas they might have thereon.

In addition, we examined how the judges defined the content of the supervision in their judgements, what sort of adequate obligations and limitations they impose and other questions relating to this matter. The analysis focused on the enforcement procedure and not on the judgement stage.

The aim of the research was not only to cover the current legislative and practical situation but also to formulate opinions on how desirable and efficient the situation is.

We described and appraised the findings obtained and then drew attention to possible improvements in procedure in the practical implementation of the new provisions. We then formulated ideas that would lead to changes in legislation.

### **Methodology**

The following methods, techniques and procedures were used during the research:

- a) The study of foreign documentation on the relevant matter, particularly legal regulations and experience from implementing the mediation provisions in practice.
- b) The study of Czech expert sources, chiefly Acts and commentaries of magazine articles.
- c) An analysis of statistical data (for 1997 and 1998) from the statistics of the Ministry of Justice.
- d) The study of selected final court judgements on the approval of the mediation decisions of regional and district courts from 1997 and 1998 and other data from court files.
- e) The use of information from questionnaires for experts (judges, probation officers) and from interviews.
- f) An analysis of the views of offenders whose case had been resolved by means of a discharge with supervision and conditional sentence with supervision.

A method of interpretation was selected in which factographic findings were supplemented by information from the research on people's opinions obtained either from questionnaires or interviews.

*The following main findings from the research can be summarised with regard to the supervision provisions*

#### **Statistical data**

The statistical data show that the conditional prison sentence with supervision under Section 60a of the Criminal Code and the conditional discharge with supervision under Section 26 of the Criminal Code were imposed by courts very infrequently during the first year in which they came into effect and did not play an important role in the sentencing structure.

In 1998 courts imposed a conditional discharge with supervision in 18 cases and a conditional prison sentence with supervision in 294 cases. In 1999 the numbers rose respectively to 82 and 659 cases. Despite this increase, both provisions are still very rarely applied.

In 1998 a pronounced unevenness of application was evident in different regions. In 1999 there was an increase in the application of both provisions, in the case of conditional discharges by even as much as four times (1998 – 18 cases, 1999 – 82), and a more balanced application of both provisions in individual regions. The supervision provisions are most often applied for criminal offences under Chapters IX. and VII. of the Criminal Code.

The average length of proceedings for a conditional prison sentence was 351 days, which is relatively long.

Courts rarely impose a conditional discharge with supervision under Section 26 of the Criminal Code.

*An analysis of court files, probation records and court judgements without files* offers the following main findings:

*Judgements applying a conditional prison sentence with supervision (Sections 60a and 60b of the Criminal Code.)*

- This type of alternative sentence was most frequently applied for younger offenders but was not sufficiently applied for juveniles. They were generally used for first offenders with favourable personal and employment assessments. Aggravating circumstances of repeat offences were assessed by the court from previous convictions for 19 people.
- In view of the results of criminal prosecution, custodial sentences were imposed in a relatively high number of cases (24%); this often involved longer periods of custody lasting throughout the entire period of the prosecution proceedings
- As with previously examined alternative sentences and procedures, this punishment was most often applied for property offences and only very rarely for offences against transport safety.
- Sentences were imposed up to their maximum limit (the lower limit of sentencing often did not even allow for the application of a shorter sentence) and with longer, sometimes even the maximum possible probation periods.
- Mistakes were found in the quotation of the relevant legal provisions when pronouncing the sentence.

- Courts made sufficient use of the possibility of imposing adequate limitations and obligations, both as specified in Section 26 (4)a to f of the Criminal Code and of others not specified therein (this does not correspond to the opinion of experts on the possibilities of applying adequate limitations; their position is far more realistic).
- Obligations and limitations were sometimes formulated in such a way that they defined the extent and intensity of the stipulated supervision or fundamental content of the conditional sentence (to lead a law-abiding life during the probation period).
- State prosecutors made relatively rare use in the concluding speech of the possibility to recommend the imposition of a conditional sentence with supervision, despite the court judgment making this a viable alternative, whilst they accept imposition of this form of punishment.
- Convicted offenders generally appealed against the terms of the sentence and the courts of appeal generally altered the sentence from an unconditional prison sentence to a conditional sentence with supervision.

*Judgements applying a conditional discharge with supervision (Section 26 of the Criminal Code)*

- The entirely negligible number of cases and sample of criminal offences makes it impossible to reach more general conclusions from judgements applying a conditional discharge with supervision.
- This alternative was used in 62% of cases involving juvenile offenders.
  - In accordance with Section 314f (i)d of the Criminal Code, a court order was not applied in any single case.
  - It was used in sentencing offenders found guilty of the illegal production and handling of narcotic and psychotropic substances and criminal offences committed in relation to their abuse.
  - For this type of offence the courts imposed courses of protective treatment or the obligation to undergo drug-addiction treatment that does not constitute protective treatment under the Criminal Code.

*Imposition of supervision:*

- In more than half of the final judgements and court orders the verdict on imposition of a sentence or the verdict on discharge with supervision did not specify the details of the offender's obligations under the supervision.
- Where these obligations were specified in the verdict, they primarily constituted the obligation to appear before the court or a probation officer of the local court upon a summons.
- Where the frequency of visits was specified, this generally was restricted to a maximum of one visit per month.
- In certain judgements the setting of the date was left to the decision of the probation officer or upon his agreement with the offender.
- In certain instances of special requirements, the sentence also imposed further limitations and obligations on the offender in relation to the probation officer, particularly where the offender was required to undergo individual social resocialisation programmes, submit documents proving compliance with the obligations and others.
- The sentencing did not always consistently distinguish between adequate limitations and obligations that may be imposed under Section 26 (3) and (4)

and Section 60a (3) of the Criminal Code, and those that may be imposed as part of the supervision so as to make it more effective.

- The criminal files that we borrowed for study also recorded six sentences after 1 January 1998 (when the amendment came into effect) that required the guilty party under Section 59 (2) of the Criminal Code to undergo probation supervision during the probation period.
- The fundamental reason for the errors ascertained, particularly in the content definition of the supervision (or rather lack of definition), other than inexperience and inadequate judicature, was the absence of more detailed and more precise legal provisions.

*Performance of supervision:*

- In regional and district courts the performance of the supervision is entrusted to probation officers.
- In an isolated case the probation officer cooperated with the court before its material verdict.
- The performance of the supervision is recorded in probation records, which are kept separately for each offender. Only in exceptional cases were the probation records kept in the criminal files (for seven offenders)
- Probation officers take action to ensure performance of the supervision immediately after the final court's judgement has been delivered, or upon the issuing of instructions.
- Delays in beginning the performance of the supervision were due to the court's delay in passing the case to the probation officer (these were not isolated cases).
- Visiting dates are determined by the probation officers, often upon agreement with the offender. A flexible approach was used when setting the intervals for visits, taking into account the supervision already completed and the current needs of the offender.
- Where regular reports on the performance of the supervision were delivered to a court, this generally occurred at intervals of six months to one year from the time the decision came into force began. Their structure and content were generally sufficient for the court to judge the state of supervision.
- In two instances of conditional discharge with supervision the court ruled that the offenders had acquitted themselves satisfactorily; in the case of a conditional prison sentence with supervision none of the probation periods have yet been completed.
- In the case of two offenders who received a conditional prison sentence with supervision the court decided during the probation period that they should serve the prison sentence. The reason for the decision in both cases was the committing of a repeat offence of the same type.
- In most cases the supervision imposed is performed by probation officers in a way that ensures the purpose is fulfilled.

***The following main findings can be derived from the analysis of respondents' views contained in the questionnaire:***

#### *Appraisal of the examined provisions from experts' opinions*

- The first point to note is that the appraisal of general and specific items for both provisions by judges
- and probation officers is positive and that the differences in appraisal for both provisions by both groups of respondents are not significant.
- If we use a school marking system for the results of the appraisal, the marks range between 1.8 and 2.8 (exceptionally 3.1), which verbally means between very good and good plus.
- With regard to the provision under Section 26 of the Criminal Code, judges mostly appreciated the possibility of correcting the offender, as well as compensation and the speed of proceedings. Probation officers on the other hand see the complexity of proceedings as acceptable (unlike judges). They also appreciate the speed of proceedings but do not overestimate the importance placed on the correction of offenders. With regard to the provision under Section 60a of the Criminal Code, both groups appreciate the possibility of compensation and the speed of proceedings.

#### *Reasons for the infrequent application of both provisions under examination*

- Among the primary, i.e. the most important reasons, are insufficient personnel and organisational conditions for the effective performance of the supervision. Among probation officers this factor is in first place, while for judges it occupies first and second position with regard to both provisions. The lack of a legislative definition of supervision is also relevant here, in the sense of its content, scope and intensity, and finally the low occurrence of appropriate criminal cases. In the opinion of probation officers the situation is affected by the lack of confidence in the effectiveness of supervision on the part of judges.

#### *Views on the issue of adequate limitations and obligations*

- As Section 26 (4) of the Criminal Code has newly specified the adequate limitations and obligations in the Criminal Code, we asked judges which of them they most often use in imposing conditional discharges and conditional prison sentences and analogically in other cases (e.g. when imposing community service). The most frequent use of limitations and obligations under Section 26 and Section 60a of the Criminal Code are the following: to undergo treatment for dependency on addictive substances which does not constitute protective treatment under this Act, and the obligation to refrain from visiting an unsuitable environment and from contact with certain persons.
- In the case of other provisions, the courts impose adequate limitations and obligations as specified in Section 26 (4) of the Criminal Code on an exceptional basis.
- Judges were also asked to state other adequate limitations and obligations not specified in the Act, but which in their experience they had imposed as part of a conditional discharge with supervision and a conditional sentence with supervision. Judges mentioned particularly the following types of adequate limitation and obligation: to refrain from excessive use of alcoholic drinks, to pay alimony owed, to find permanent employment, compensate damage caused, to prove to the court a lawful form of sustenance including work

assessment, to develop the necessary cooperation with the relevant labour office in applying for employment, and very often also others that define the scope and content of the supervision.

*Legislative suggestions of the respondents*

The majority of respondents of both professional groups regard the current legislation for conditional discharges with supervision and conditional prison sentences with supervision to be satisfactory for their work requirements. The comments and suggestions that they offered applied mostly to supervision, more detailed specification as to its content, a definition of rights and obligations of convicted offenders and specialised judiciary officials responsible for the performance of the supervision. The most frequent suggestions from our report are as follows:

- the Act should define in greater detail the concept, form and organisation of the supervision,
- to regulate the rights and obligations of the body performing the supervision and of the convicted offender, particularly the obligation of the convicted offender to appear before the probation officer,
- to provide legislation for the performance of the probation service at the court and the relation of the probation officer to the judiciary and the client,
- in the case of a conditional discharge with supervision to lengthen the probation period (judges suggest a period consistent with Section 307 (2) of the Criminal Code,
- the Act should specify in greater detail the adequate limitations and obligations (Section 26 (4) of the Criminal Code) in order that it should not be vague and difficult to control, and so that compliance with them should be within the possibilities of the convicted offender,
- to adopt the corresponding procedural norms when the obligations relating to the activities of other institutions, without a corresponding legal framework, do not have any great likelihood of being implemented,
- to simplify the modification of the sentence and, by means of this deterrent, to cause the convicted offenders to comply more fully with the terms of the supervision,
- in Section 60a of the Criminal Code to broaden the judge's responsibility in sentencing to define the scope and intensity of the supervision (likewise in Section 26 of the Criminal Code),
- to enlarge Section 26 of the Criminal Code to include assistance by the probation officer and the guidance of the convicted offender according to his individual development and needs,
- to regulate the hand-over of the performance of the supervision between districts in cases where the offender has another place of residence than that where he was convicted or to which he moved during the probation period (it is pointless for example to send a supervision request every two weeks).

From all the documentation obtained it is possible to formulate **suggestions for the application of the results of the research** which can extend the scope of application and the effectiveness of the provisions for discharge with supervision and conditional sentence with supervision as follows:

*To define the concept, purpose and content of supervision in the Criminal Code*

Court practice is to a large degree hindered by the fact that the Criminal Code does not define the concept, purpose and content of supervision. The judges and probation officers contacted by us (refer to the results of the questionnaire survey) also see the lack of definition of the concept, content, organisation and forms of supervision as one of the major reasons for the relatively infrequent application of the “supervision provisions”. In our opinion supervision should mean regular personal contact between the convicted offender and the probation officer, cooperation in developing and implementing a probation programme and the control of compliance with the obligations and limitations imposed by the court on the offender. The purpose of the supervision should not only be to monitor and control the offender’s behaviour but also expert guidance and assistance.

*To develop the procedural side of supervision for both provisions in the Criminal Procedure Code*

The procedural aspect for supervision with regard to both provisions was supplemented by the new Sections 330a and 359a of the Criminal Procedure Code (amendment to the Criminal Procedure Code implemented by Act No. 166/1998 Coll.) effective as of 1 January 1999. Although this modification led to a certain specification in the performance of supervision and guarantee of its legality, it is in our opinion, which is supported by the findings from court files and the views of experts, still insufficient and does not accord with practice to the required degree. We recommend above all that the relations between courts and probation officers during supervision be regulated in terms of procedure. Regulating the procedure during hand-over of the performance of supervision to the probation officer should limit the instances of delay frequently found between the final court’s verdict (judgement or court order), by which the supervision was imposed, and the actual performance of the supervision.

*To regulate the maintenance procedure for the probation records (files) in the instruction of the Ministry of Justice that defines the internal and office rules for the district, regional and high courts*

The practical activity of probation officers shows that they maintain certain records about their clients, such as records of client interviews, client reports for the needs of the courts, confirmation of the payment of damage compensation, reports on compliance with the adequate limitations and obligations etc. We believe that even after the adoption of the Act on Probation and Mediation Services it would be suitable to regulate a uniform procedure for the maintenance of probation records (files) in the internal and office rules.

*To consider the possibility of compiling a list of organisations operating within the area of the district court in which the convicted offender could perform the adequate limitations and obligations under Section 26 (4) of the Criminal Code*

The further specification of adequate limitations and obligations in Section 26 (4) has provided greater scope to develop new methods of handling convicted offenders. The questionnaire shows that the larger-scale application of obligations and limitations under Section 26 (4) of the Criminal Code is also hindered by the fact that judges are unaware of organisations in which offenders can for example undergo appropriate social training and re-education programmes or programmes of psychological counselling. We believe that it would be highly beneficial to compile a list for the internal use of the courts of those organisations where offenders can carry out the limitations and obligations imposed. The list could be



compiled by a probation officer and the judge would then be familiar when sentencing with those organisations in which the limitations and obligations could be carried out.