

## JURISDICTION OF THE COURT IN PRE-TRIAL PROCEEDINGS IN THE CZECH REPUBLIC

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**Abstract:** The article focuses on the topic of determining the jurisdiction of the court in pre-trial criminal proceedings. In the past, the Constitutional Court of the Czech Republic issued an important ruling which raised interpretative issues concerning the determination of the local jurisdiction of the court in pre-trial proceedings. In the context of this ruling, the draft new Criminal Procedure Code submitted by the Commission for the New Criminal Procedure Code will be analysed. The aim of the article is to answer the question whether the proposed wording of the new legislation provides a solution to the problematic issues related to the Constitutional Court's ruling in question. For the time being, the recodification of the criminal procedural law has been postponed, but the text submitted by the Commission may serve for possible future amendments to the effective Criminal Procedure Code, so it is still desirable to deal with the materials produced by the Commission.

**Keywords:** pre-trial proceedings, criminal proceedings, jurisdiction of the court, judge for pre-trial proceedings, recodification of the Criminal Procedure Code

### Introduction

Determining the jurisdiction of the court in pre-trial proceedings, or more precisely, determining local jurisdiction, has in the recent past

aroused controversy in Czech professional discourse.<sup>1</sup> This was due to the fact that the current legislation is not very consistent. In the course of the recodification work on the new Criminal Procedure Code, the Constitutional Court of the Czech Republic (hereinafter referred to as the "Constitutional Court") intervened in the then established interpretation and practice and made a fundamental decision which set a uniform direction for the future procedure of criminal law enforcement authorities in connection with determining the jurisdiction of the court in pre-trial proceedings.<sup>2</sup> This article will briefly outline the impact of the Constitutional Court's decision on practice and theory. It will also highlight problematic issues concerning the legal regulation of the jurisdiction of the court in pre-trial proceedings, which are linked to the interpretation of the Constitutional Court. Last but not least, the proposed legislation submitted by the Commission for the New Criminal Procedure Code (the "Commission") in the framework of the recodification work on the new Criminal Procedure Code will be analysed. **The draft text of the new Criminal Procedure Code has so far not been favorably received,**<sup>3</sup> however, the text of the proposal itself is likely to be used for further amendments to the existing Criminal Procedure Code. For this reason, it remains worthwhile to address the effectiveness and quality of the proposed legislation drafted by the Commission. The main aim of this article is to provide an answer to the question of whether the proposed legislation provides a solution to the current problematic aspects linked to an important ruling of the Constitutional Court. The setting of the jurisdiction of the court in pre-trial proceedings is closely related to the new institution of **the pre-trial judge** under consideration and directly affects the functionality of this subject of criminal proceedings<sup>4</sup>

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<sup>1</sup> POCHYLÁ, Veronika. Přípravné řízení de lege ferenda: Soudce práv a svobod. *Trestněprávní revue*, 2017, vol. 11-12, p. 260.

<sup>2</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravném řízení a jeho příslušnost – současnost a budoucnost. *Státní zastupitelství*, 2017, vol. 5, p. 13.

<sup>3</sup> Cf. information on the Czech Justice website, [cit. 24 August 2023] available from: <https://www.ceska-justice.cz/2023/05/poslanci-a-senatori-nehceji-novy-trestni-rad-davaji-prednost-upravam-toho-stareho/> or <https://www.ceska-justice.cz/2023/05/novy-trestni-rad-je-ve-snemovne-nepruходny-potvrdil-blazek/>.

<sup>4</sup> ŠČERBA, Filip. Pravomoc soudce pro přípravné řízení. *Trestněprávní revue*, 2021, vol. 3, p. 125.

## 1. Jurisdiction of the court in *de lege lata* pre-trial proceedings

Under Article 38(1) of the Charter of Fundamental Rights and Freedoms ("CFR"), the jurisdiction of the court and the judge is established by law. The Criminal Procedure Code<sup>5</sup> regulates the jurisdiction of the court in pre-trial proceedings in Section 26, which provides that the district court in whose district the public prosecutor who filed the relevant proposal is active (local jurisdiction) is competent to carry out acts in pre-trial proceedings. The court before which the public prosecutor lodged the application becomes competent to carry out all acts of the court throughout the pre-trial proceedings.<sup>6</sup> In relation to the general provisions of the Code of Criminal Procedure governing subject matter and local jurisdiction (§ 16, § 17 and § 18 of the Code of Criminal Procedure), § 26 of the Code of Criminal Procedure is *lex specialis*.<sup>7</sup>

### 1.1 Jurisdiction of the court in pre-trial proceedings

With the establishment of the Czech Republic on 1 January 1993, the judicial system was preserved and continued to be conceived as a four-part system (district courts, regional courts, high courts, the Supreme Court of the Czech Republic).<sup>8</sup> Jurisdiction of the court to act in pre-trial proceedings was introduced by Act No. 558/1991 Coll. with effect from 1 January 1992. The wording of Section 26 of the Code of Criminal Procedure was amended by Act No 292/1993 Coll., effective as of 1 January 1994. The explicit wording was supplemented to state that it refers to the **district court**. The intention was, inter alia, to speed up proceedings. Therefore, only the Regional Court, not the High Court, was newly competent as a court of second instance. The amendment also introduced the establishment of the court's jurisdiction throughout

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<sup>5</sup> Act No. 141/1961 Coll., on Criminal Procedure (Criminal Procedure Code), as amended.

<sup>6</sup> Unless the case is transferred due to the jurisdiction of another prosecutor acting outside the jurisdiction of this court (Art.26(2) of the Criminal Procedure Code).

<sup>7</sup> HERANOVÁ, Simona. In: JELÍNEK, Jiří a kol. *Trestní právo procesní*. 5. aktualizované a doplněné vydání. Praha: Leges, 2018, p. 209.

<sup>8</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravném řízení a jeho příslušnost...., See footnote 7.

the pre-trial proceedings after the first petition was filed by the public prosecutor. We are thus familiar with this institution even today.<sup>9</sup>

There are exceptions to the rule that the district court is always the court with subject-matter jurisdiction to carry out acts in the pre-trial phase, regardless of the nature of the offence being prosecuted.<sup>10</sup> The Criminal Procedure Code provides for special jurisdiction for certain acts. Section 158e(4) of the Criminal Procedure Code provides for the jurisdiction of the High Court, or the judge of the High Court in whose district the prosecutor of the prosecutor's office filing the application is active, to approve the use of an agent.<sup>11</sup>

## 1.2 Local jurisdiction of the court and respect for the right to a lawful judge

The interpretation of Section 26 of the Code of Criminal Procedure did not raise doubts or other negative reactions in judicial practice and professional literature for some time (until approximately 2014). However, it was the practice of regional and supreme prosecutors' offices that gradually began to attract criticism. In fact, higher prosecutors could submit their motions for pre-trial actions to all district courts located within their jurisdiction. The Higher State Prosecutor's Office in Olomouc could therefore choose any district court in Moravia. Quite logically, the fear of a deliberate abuse of Article 26 of the Code of Criminal Procedure grew, since the local jurisdiction of the court to decide on the pre-trial proceedings was based solely on the discretion

<sup>9</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravném řízení a jeho příslušnost..., s. 13; § Section 26(2) of the Criminal Procedure Code: *The court with which the public prosecutor has filed a motion pursuant to paragraph 1 shall become competent to perform all acts of the court throughout the entire preparatory proceedings, unless the case is transferred due to the jurisdiction of another public prosecutor acting outside the jurisdiction of that court.* This is an expression of the principle of *perpetuatio fori*, or continuing jurisdiction (PROVAZNÍK, Jan. Právo na zákonného soudce v přípravném řízení trestním. In: KYSELOVSKÁ, Tereza, SPRINGINSFELDOVÁ, Nelly, KŘÁPKOVÁ, Alica, KADLUBIEC, Vojtěch, CHORVÁT, Michal, DRLIČKOVÁ, Klára (eds.), *Sborník z konference COFOLA 2017*, Brno: Masarykova univerzita v Brně, Právnická fakulta, 2017, p. 241).

<sup>10</sup> DURDÍK, Tomáš. In: DRAŠTÍK, Antonín, FENYK, Jaroslav a kol. *Trestní řád. Komentář*. I. díl. Praha: Wolters Kluwer ČR, a.s., 2017, p. 203.

<sup>11</sup> In the context of the judge's decision on a complaint against a decision of a prosecutor and a police authority pursuant to Section 146a of the Code of Criminal Procedure, the determination of the jurisdiction of the court is not governed by Section 26 of the Code of Criminal Procedure. In such cases, the court acts as a second instance authority and Section 146a of the CC is special in relation to Section 26 of the CC (DURDÍK, Tomáš. In: DRAŠTÍK, Antonín, FENYK, Jaroslav a kol. *Trestní řád. Komentář*. I. díl. Praha: Wolters Kluwer ČR, a.s., 2017, p. 206).

of the prosecutor working at the regional or chief prosecutor's office. Thus, prosecutors could choose according to their "good experience" with particular judges, as they naturally knew in advance the work schedule of the courts in question.<sup>12</sup> It should be noted, however, that no abuse has been proven and the Constitutional Court has not found any violation of fundamental human rights.<sup>13</sup>

The local jurisdiction of the court in pre-trial proceedings is firmly linked to the obligation to respect the right to a lawful judge. I will then outline the importance of respecting the right to a lawful judge in the context of this topic and the impact of the above practice on the activities of the Constitutional Court. More precisely, I will analyse the Constitutional Court's reactions to the criticised legislation, which resulted in two important judgments. The analysis will also include the unresolved issues raised by the first ruling in particular.

### *1.2.1 The issue of local jurisdiction of the court in pre-trial proceedings in connection with respect for the right to a lawful judge*

Respect for the right to a lawful judge in pre-trial proceedings is more specific than in court proceedings and entails the possibility of serious errors that often cannot be corrected. In the first place, the principle applies that a violation of fundamental human rights in criminal proceedings cannot be established where there have been partial errors or breaches of the law, but the proceedings as a whole have been fair. This is a conclusion drawn from the case law of the European Court of Human Rights ("ECtHR").<sup>14</sup> In relation to the right to a lawful judge, the situation is different. The result is not material, which means that it is irrelevant that the illegal judge did some act substantively correct.<sup>15</sup> According to the Constitutional Court, *"the constitutional principle of a lawful judge cannot be circumvented, whatever the reasons for doing so; still less can it be obscured by reference to the 'otherwise substantive correctness' of a decision that was issued in violation of it, ..."*<sup>16</sup> Thus, once it is established that all the acts were decided by a court or judge not having local jurisdiction,

<sup>12</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravném řízení a jeho příslušnost..., p. 13.

<sup>13</sup> Cf. the Resolution of the Constitutional Court of 17 September 2012, Case No. I.ÚS 2632/12 or the Resolution of the Constitutional Court of 21 May 2015, Case No. III.ÚS 2717/13.

<sup>14</sup> E.g. ECtHR judgment of 20 October 2016, Dvorski v. Croatia, no. 25703/11 or ECtHR judgment of 29 November 2016, Lhermitte v. Belgium, no. 34238/09.

<sup>15</sup> PROVAZNÍK, Jan. Právo na zákonného soudce v přípravném řízení trestním..., p. 244.

<sup>16</sup> Ruling of the Constitutional Court of 7 September 2009, Case No. I. ÚS 1922/09, paragraph 15.

the evidence obtained will be seriously flawed and, as a consequence, absolutely ineffective.

Second, the defence only learns about the conduct of the pre-trial proceedings after a delay. This is all the more so if the acts were carried out by a court with no local jurisdiction, which is a significant limitation on the objection of the court's lack of local jurisdiction.<sup>17</sup> The Constitutional Court imposes on the accused (more precisely, on the person against whom the proceedings are being conducted) the requirement of timely raising the objection of an unlawful judge, which it expressed, for example, in its ruling of 6 June 2002, Case No III ÚS 711/01. According to the Constitutional Court, the objection "... *cannot be confused with a procedural means of overturning ex post a decision already made.*" The objection must be raised immediately after the accused becomes aware of the existence of the facts justifying it.

### *1.2.2 The significance of the ruling of the Constitutional Court of 19 April 2016, Pl. ÚS 4/14 and its impact on application practice*

In 2014, a group of members of the Chamber of Deputies of the Parliament of the Czech Republic submitted a proposal to repeal Section 15(3), second sentence, and (5) of Ministry of Justice Decree No. 23/1994, on the Rules of Procedure of the State Prosecutor's Office, the establishment of branches of certain State Prosecutor's Offices and details of acts performed by legal waiters, as amended (hereinafter referred to as the "Rules of Procedure of the State Prosecutor's Office"). It is therefore the sub-legislative regulation regulating the jurisdiction of the public prosecutor's office that has been challenged, not Article 26 of the Code of Criminal Procedure.<sup>18</sup> The core of the problem was seen in the fact that the contested legal regulation of the court's jurisdiction for decision-making in pre-trial proceedings was derived from the jurisdiction of the public prosecutor's office, which, however, is not established by Act No. 283/1993 Coll., on the Public Prosecutor's Office (hereinafter also referred to as "the Public Prosecutor's Office

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<sup>17</sup> It should be noted that I am not referring here to a situation where the defence knows from the outset that a court with no local jurisdiction is acting in the case and deliberately "saves" the objection for the end of the pre-trial proceedings in order to render any evidence obtained useless (PROVAZNÍK, Jan. *Právo na zákonného soudce v přípravném řízení trestním...* p. 245-246).

<sup>18</sup> VICHEREK, Roman. *Anketa: Jak by podle vašeho názoru měla být v budoucím trestním řádu upravena příslušnost soudu v přípravném řízení trestním? Trestní právo*, 2018, vol. 3, p. 2.

Act"), but by the Rules of Procedure of the Public Prosecutor's Office, i.e. by a "mere" decree.<sup>19</sup>

The Constitutional Court ruled on this proposal of a group of MPs in a landmark ruling of 19 April 2016, Pl. In the Ruling, the Constitutional Court applied "*the principle of the priority of constitutionally consistent interpretation of a legal regulation or its individual provision over its derogation, with the proviso that it is the duty of all public authorities to interpret and apply the law with regard to the requirement to protect fundamental rights and freedoms.*" By this Ruling, the Constitutional Court established that if the relevant petition is filed by a prosecutor of a regional or supreme prosecutor's office, the general rules of jurisdiction of courts in the Code of Criminal Procedure apply and the local jurisdiction of the district court is determined according to the criteria set out in Article 18 of the Code of Criminal Procedure. This interpretation is constitutionally consistent and in accordance with Article 38(1) of the CFR.<sup>20</sup> That interpretation, however, raised **new procedural problems**. The Constitutional Court did not even hint at a solution to the disputed issues raised, although a number of problems were pointed out in the so-called separate votum. Thus, to this day, no clear solution or procedure has been established for some of the problematic aspects.

### 1.2.3 Interpretive problems associated with the Ruling

One of the problems linked to the Award is its **prospective effect** (*ex nunc*), which is explicitly mentioned in paragraph 120 of the Award. This means that in proceedings where the jurisdiction of the court has already been established pursuant to Article 26(2) of the CPC, although it was established contrary to its conclusions, according to the Constitutional Court, the conclusions arising from the Ruling cannot be applied retrospectively. It can thus be said that the Constitutional Court has thus approved the previously established local jurisdiction of the court for pre-trial proceedings and that this jurisdiction, established according to previous practice, is not affected by any defect.<sup>21</sup> If at the time before the issuance of the Ruling the local jurisdiction pursuant to Section 26(1) of the Criminal Procedure Code was established at the district court, but it did not meet the requirements of the Ruling, in order

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<sup>19</sup> PROVAZNÍK, Jan. Právo na zákonného soudce v přípravném řízení trestním..., p. 242.

<sup>20</sup> VICHEREK, Roman. Anketa: Jak by podle vašeho názoru měla být v budoucím trestním řádu upravena příslušnost soudu v přípravném řízení trestním? *Trestní právo*, 2018, vol. 3, p. 2.

<sup>21</sup> PROVAZNÍK, Jan. Právo na zákonného soudce v přípravném řízení trestním... p. 247-248.

to preserve the right to a lawful judge, the first immediately subsequent motion to perform an act in the pre-trial proceedings had to be filed with a court that met the criteria set out in the Ruling. For the period preceding the Ruling, the right to a lawful judge remains.<sup>22</sup>

Another problem arose in connection with **the determination of the court with local jurisdiction** for the first act in pre-trial proceedings pursuant to Section 18 of the Code of Criminal Procedure. In particular, the amount of effort that the prosecuting authorities had to expend to determine the court with territorial jurisdiction was problematic, if the criteria under Article 18 of the Code of Criminal Procedure were not entirely clear in the case.<sup>23</sup> On this issue, the Constitutional Court provided guidance in a later ruling.<sup>24</sup> The requirements for justifying the choice of the court with territorial jurisdiction will be lower at the beginning of the pre-trial phase due to the very nature of the early stage of the proceedings, lack of relevant information, etc. However, this does not mean that the prosecuting authorities are not obliged to give proper reasons for the choice of the court with territorial jurisdiction for pre-trial proceedings. Some 'relief' is granted to the prosecuting authorities where the local jurisdiction of the court is quite clear (e.g. the act clearly took place within the jurisdiction of one court). In this situation, no special justification is needed.

Another problematic aspect related to the Ruling was that the Ruling did not even present a solution to the possible emergence of **competence disputes** related to the application of Article 18 of the CPC in cases where the procedure according to the criteria in question would be ambiguous. The increased risk of conflicts of competence is all the more serious in the context of the short time limits in the pre-trial proceedings for the performance of acts. If a decision is taken on an application for remand in custody, where a decision must be taken within 24 hours of its submission, and the court will not consider itself competent to decide, it will be virtually impossible to resolve such a competence dispute within the statutory time limit.<sup>25</sup>

A possible future problem could be the interpretation of Section 26(2) of the CPC, which allows the principle of continuing jurisdiction to be broken in a situation where a case is transferred due to the jurisdiction of another prosecutor acting outside the jurisdiction of the

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<sup>22</sup> Resolution of the Constitutional Court of 13 December 2016, Case No. II.ÚS 3327/16.

<sup>23</sup> PROVAZNÍK, Jan. Právo na zákonného soudce v přípravém řízení trestním... p. 248.

<sup>24</sup> Ruling of the Constitutional Court of 31 January 2017, Case No. II.ÚS 4051/16.

<sup>25</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravém řízení a jeho příslušnost..., p. 13.



court where the first proposal in the case was filed. Such situations will probably not be frequent, but their occurrence cannot be ruled out.<sup>26</sup>

The ruling also did not address the procedure in the case of filing a proposal with the court where the judge whose criminal activity is to be heard sits. Alternatively, there is some other reason why the case should not be heard in that court because all judges are disqualified. In such circumstances, the procedure of applying to another district court for a writ of certiorari would certainly be justified. However, after the Ruling, such a possibility is not allowed. An analogous use of Article 25 of the Code of Civil Procedure is offered as a solution.<sup>27</sup> The public prosecutor would, before filing a motion to take action, seek to remove the case from the court where the filing of the motion would be inappropriate or illegal, even though under the rules for assessing local jurisdiction that court would otherwise have jurisdiction to take action. The transfer of the case to another district court would be decided by the regional court, which would be jointly superior to both district courts. This would be a kind of preventive use of analogy, which is in principle permissible in criminal procedural law.<sup>28</sup>

Above, I have highlighted the issues that arose after the publication of the Ruling. I will also outline whether, and if so how, the Commission for the New Criminal Procedure Code has dealt with the above-mentioned interpretative problems in the framework of the recodification work on the new Criminal Procedure Code.

## **2. Jurisdiction of the court in pre-trial proceedings de lege ferenda**

In connection with the recodification of the Criminal Procedure Code, it is proposed to maintain the current situation in the future and to leave the subject matter jurisdiction of the court in pre-trial proceedings in favour of district courts. The legal regulation thus set up is well established, but in connection with the considerations on the

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<sup>26</sup> PROVAZNÍK, Jan. Právo na zákonného soudce v přípravném řízení trestním... p. 249.

<sup>27</sup> § Section 25 of the Code of Criminal Procedure regulates the institution of withdrawal and transfer of a case: "For important reasons, a case may be withdrawn from the competent court and transferred to another court of the same type and level; the decision on withdrawal and transfer shall be taken by the court which is the closest joint superior of the two courts."

<sup>28</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravném řízení a jeho příslušnost..., p. 13.

creation of the institute of a **judge for pre-trial proceedings** it acquires a new dimension.<sup>29</sup>

Draft paragraph text of the new Criminal Procedure Code<sup>30</sup> (hereinafter referred to as the "Draft CPC") in Section 26 (c8) (1) provisionally regulates the jurisdiction of the court to perform acts in pre-trial proceedings in such a way that *"the district court, whose local jurisdiction shall be determined in accordance with the general rules, shall have jurisdiction to perform acts in pre-trial proceedings in which the prosecutor of the district prosecutor's office is competent to supervise the maintenance of legality (hereinafter referred to as "supervision")."* The second paragraph states that *"the district court at the seat of the regional court or its branch, the local jurisdiction of which shall be determined in accordance with the general rules, shall have jurisdiction to carry out acts in pre-trial proceedings in which the public prosecutor of the regional or chief public prosecutor's office is competent to exercise supervision; in the case of the Municipal Court in Prague, the District Court for Prague 1 shall have jurisdiction, in the case of the Regional Court in Prague, the District Court Prague-East shall have jurisdiction, in the case of the Regional Court in Plzeň, the District Court Plzeň-City shall have jurisdiction and in the case of the Regional Court in Brno, the Municipal Court in Brno shall have jurisdiction."* At first glance, the wording differs from the current legislation in Section 26 of the Criminal Procedure Code.

## **2.1 Subject Matter Jurisdiction of the Court or the Preservation of Tradition or a Bold Change?**

According to the Draft CPC, subject-matter jurisdiction remains with the district courts, with no exceptions. The Commission based itself on the existing system of courts in force in our territory since 1994. A change in the subject matter jurisdiction of the court to carry out acts in pre-trial proceedings would require a reform of the judiciary. However, the Commission could not have envisaged this when preparing the recodified Criminal Procedure Code, as the Ministry of Justice of the Czech Republic has no plans to change the judicial system in the foreseeable future.<sup>31</sup>

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<sup>29</sup> ŘÍHA, Jiří. Rozhodování soudce v přípravě řízení a jeho příslušnost..., p. 13.

<sup>30</sup> Available from: <https://www.justice.cz/web/msp/rekodifikace-trestniho-prava-procesniho>.

<sup>31</sup> ŘÍHA, Jiří. Trestní soudnictví v zahraničí – mezinárodní srovnání. *Trestněprávní revue*, 2015, č. 5, p. 105.

Despite the fact that the Commission's proposal does not allow for a differently set subject matter jurisdiction of the trial court than the district court, there are opinions among current criminal law experts and criminal law practitioners that a differently set subject matter jurisdiction would be preferable. I will now briefly outline the views in question.

Establishing the jurisdiction of the court in pre-trial proceedings according to the jurisdiction of the prosecutor supervising the pre-trial proceedings and, in connection with this, filing a motion for the performance of an act should be considered precisely with regard to the nature and type of seriousness of the crime under consideration. The pre-trial judge would thus be able to carry out his or her tasks more efficiently, as this situation would better reflect the complexity of the case.<sup>32</sup> Not only the district courts, but also the regional and supreme courts could be competent in the pre-trial proceedings. This setting of jurisdiction is logical and practical. On the other hand, it may seem illogical that in cases of more serious crime, the complexity of such cases is taken into account by the supervision of legality in the pre-trial proceedings by the prosecutor of the regional prosecutor's office, but the nature of the crime is not taken into account in relation to the court's decision-making in the pre-trial proceedings. There are also opinions in the professional discourse that only the regional court should be competent to act in pre-trial proceedings, regardless of the type of seriousness of the case. The division of jurisdiction between district and regional courts is inappropriate because of the potential for disputes over subject matter jurisdiction.<sup>33</sup> The determination of subject-matter jurisdiction in favour of the regional courts is intended to be more convenient on the grounds that the decision-making of judges in pre-trial proceedings may be more difficult than that in the main trial. Decisions must be swift and take into account the case law of the Czech courts and the ECtHR. This relates to the reasons why a judge specialised in criminal law should decide in pre-trial proceedings, not a civil judge. If, in a small district court, the criminal judges are excluded from deciding on the main trial by performing an act in the pre-trial proceedings, a situation could arise where a civil judge would have to decide on the main trial, since the possible bias of all the judges of the criminal division is not a reason for another court to decide on

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<sup>32</sup> POCHYLÁ, Veronika. Přípravné řízení de lege ferenda... p. 260.

<sup>33</sup> GRÍVNA, Tomáš. Anketa: Jak by podle vašeho názoru měla být v budoucím trestním řádu upravena příslušnost soudu v přípravném řízení trestním? *Trestní právo*, 2018, vol. 3, p. 2.

the case. There are indeed district courts with fewer than twelve judges. These courts account for one third of the total number of courts. By contrast, there are also district courts with fifty judges. The introduction of county court jurisdiction is intended to be more logical and economical in that it could be 'spread' over several locations, regardless of the existing division of the country.<sup>34</sup> For example, there are two criminal judges at the District Court in Písek, but they simultaneously handle both the criminal and civil agendas. The civil judges also have accessibility. It is highly surprising that the District Court in Prachatice has only one criminal judge, while two other judges simultaneously handle the civil agenda and participate in deciding the T-related agenda (Nt, Tm, Rod, etc.). At the Náchod District Court, two criminal judges decide and one judge deals with both the criminal and civil agenda.<sup>35</sup>

It is also proposed to retain the subject matter jurisdiction of the court in pre-trial proceedings in those district courts in whose district the regional court is located. This alternative makes sense in view of the location of the detention facilities, which are located in or near regional towns. This would eliminate the costs associated with transporting defendants in custody to court. However, the disadvantage of this option may be that it would exacerbate the disparities between district courts. The district courts located in the regional cities would become larger, as a result of which more judges would have to be assigned by the work schedule to deal only with the pre-trial agenda. In other words, these 'large' district courts would have to have several (perhaps more than ten) pre-trial judges.<sup>36</sup> Of the 75 district courts + 10 district courts in Prague and the Municipal Court in Brno (86 in total), the largest district courts are currently the Municipal Court in Brno (76 judges), the District Court in Ostrava (76 judges) and the District Court in Karviná (48 judges).<sup>37</sup> Under this option, the pretrial agenda would be heard in fourteen district courts.

However, most of the above-mentioned options for subject-matter jurisdiction are inappropriate for the time being, in particular because of the current distribution of the judicial system. Concentration of the

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<sup>34</sup> VÁVRA, Libor. Anketa: Jak by podle vašeho názoru měla být v budoucím trestním řádu upravena příslušnost soudu v přípravném řízení trestním? *Trestní právo*, 2018, vol. 3, p. 2.

<sup>35</sup> Information is available from the court work schedules for 2023 available on the website of the Ministry of Justice of the Czech Republic [justice.cz](https://justice.cz).

<sup>36</sup> ŘÍHA, Jiří. Příslušnost soudu v přípravném řízení – možnosti a úskalí budoucí právní úpravy. *Trestní právo*, 2018, vol. 3, p. 9.

<sup>37</sup> Czech Judiciary 2021: Annual Statistical Report. Ministry of Justice, 2022 [online]. [cit. 24 August 2023] Available from: <https://justice.cz/web/msp/statisticke-udaje-z-oblasti-justice>.

pre-trial agenda in regional courts would significantly increase the burden not only on regional courts but also on the superior courts as second instance bodies (the Supreme Court if the superior courts were also competent). The number of cases decided in pre-trial proceedings is considerable and one can foresee really significant consequences, not excluding financial costs (e.g. for transporting files, general travel costs, costs of upgrading technology, etc.). It should also be borne in mind that a pre-trial judge sitting at a regional court could be faced with a difficult situation where he or she simultaneously receives requests to participate in proceedings under Article 158a of the Code of Criminal Procedure at locations which are quite far apart within his or her area of jurisdiction. A similar situation could also apply to the option of concentrating the agenda in the district courts in whose district the regional court is located.<sup>38</sup> The implementation of any of the options would also have an impact on the staffing of police departments. Imagine a situation where a journey of several tens of kilometres would have to be made to the court for each receipt of a decision or criminal file, which would mean that police officers would spend a lot of time travelling instead of working on cases.

If the court system were to be reformed in the future, two or more small district courts could be merged, reducing the number of these district courts and making the court caseload more balanced. The introduction of the institution of the pre-trial judge would also be easier, and the services and substitutability of judges would also be more manageable. The obstacle of judges being excluded from hearing a case in the main trial would also be removed, as a single judge could deal with the pre-trial agenda. The organisational change introduced by the amendment to Act No 6/2002 Coll. on Courts and Judges, as amended, could provide a solution. For the smaller district courts established by law, the pre-trial agenda would be transferred to the larger district courts adjacent to the smaller ones.<sup>39</sup>

According to the explanatory report to the new Criminal Procedure Code,<sup>40</sup> the current concept of the court's subject matter jurisdiction in pre-trial proceedings should therefore be maintained and only district courts will have subject matter jurisdiction. As stated in Section

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<sup>38</sup> ŘÍHA, Jiří. Příslušnost soudu v přípravém řízení – možnosti a úskalí..., p. 9.

<sup>39</sup> Ibid.

<sup>40</sup> The explanatory report to the new Criminal Procedure Code and the text of the new Criminal Procedure Code are available on the website of the Department of Criminal Law of the Faculty of Law of Charles University in Prague: Documents | Law Faculty of Charles University (cuni.cz).

26(2)(c8) of the Draft CPC, in cases where the regional and chief prosecutors' offices will have jurisdiction in the pre-trial proceedings, the district court will also have jurisdiction, but the district court will be the one that is located in the district of the regional court or its branch.<sup>41</sup> This option should prevent the overloading of regional courts, high courts and the Supreme Court, which would very likely occur with the option of determining jurisdiction according to the jurisdiction of the prosecutor's office and with the concentration of the agenda only in regional courts. This is a **rational compromise** that could serve as an incentive to amend the effective Criminal Procedure Code if the recodification of the Criminal Procedure Code does not take place yet.<sup>42</sup>

## 2.2 Local jurisdiction of the court in pre-trial proceedings under the draft new Criminal Procedure Code

From the outset of its work on the new Criminal Procedure Code, the Commission envisaged a local jurisdiction regime linked to the general rules for determining the local jurisdiction of the court to hear and determine a case, which are set out in Article 18 of the current Criminal Procedure Code.<sup>43</sup> Thus, the Draft CPC explicitly expresses what is now only apparent from the above-mentioned rulings of the Constitutional Court. The first criterion is the place where the offence was committed, the second criterion is the accused's place of residence or work, and the third criterion is the place where the offence was committed.<sup>44</sup> Pursuant to Section 26 (c8) (1) of the Draft CPC, if the prosecutor of the district prosecutor's office will supervise the pre-trial proceedings, the local jurisdiction of the court will be determined according to the general rules. According to Article 26 (c8)(2) of the Draft CPC, if the prosecutor of a higher prosecutor's office (regional or supreme) will supervise the pre-trial proceedings, the *"local jurisdiction shall be the district court at the seat of the regional court or its branch, whose local jurisdiction shall be determined in accordance with the general rules."*

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<sup>41</sup> Explanatory Report to the New Criminal Procedure Code - Commentary to Section 26 (c8) of the Draft Criminal Procedure Code, pp. 23-24. Available from: Documents | Law Faculty of Charles University (cuni.cz).

<sup>42</sup> ŘÍHA, Jiří. Příslušnost soudu v přípravném řízení – možnosti a úskalí..., p. 9.

<sup>43</sup> ŘÍHA, Jiří. Příslušnost soudu v přípravném řízení – možnosti a úskalí..., p. 9.

<sup>44</sup> Explanatory Report to the New Criminal Procedure Code - Commentary to Section 26 (c8)(1) and (2) of the Draft Criminal Procedure Code, p. 24. Available from: Documents | Law Faculty of Charles University (cuni.cz).

In order to resolve the issue of jurisdictional disputes, it was suggested that in case of doubt as to jurisdiction, the court should nevertheless decide on the prosecutor's motion to take action and at the same time take other actions that cannot be delayed. The obligation of the court to act even in the case of doubt about jurisdiction applies until the correct court is determined (Article 26 (c8)(4) of the Draft CPC).<sup>45</sup> It can be noted that this wording of the legislation covers a gap in the area on which the Constitutional Court did not comment in its Ruling. Even a court with no local jurisdiction is obliged to take the necessary steps to ensure that the statutory time limits for the performance of acts are complied with. A dispute over jurisdiction must not be detrimental to the speed of proceedings. A dispute over jurisdiction raised by a judge will determine the competent court in the future, and the acts of the court without jurisdiction cannot subsequently be regarded as ineffective.<sup>46</sup> It should be noted that the legal form presented is not ideal. The possibility for the court before which the public prosecutor has filed the application to decide on grounds of urgency allows, de facto and de jure, that the public prosecutor may make the choice of court at his or her discretion.<sup>47</sup>

In order to resolve cases of doubts about the impartiality of judges and situations in which all judges of a given court are excluded, the above-mentioned proposal for the analogous use of the current Article 25 of the Criminal Procedure Code (the so-called delegation). According to § 31 (c13) (2) of the Draft CPC, the solution for these circumstances will be newly regulated directly in the law under the institute of withdrawal and assignment: *"In pre-trial proceedings, a case may be transferred to another court of the same type and level for important reasons, in particular for the reason referred to in paragraph 1(a), before the public prosecutor submits a motion to the*

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<sup>45</sup> "Any doubt as to jurisdiction shall not relieve the court with which the public prosecutor has filed a request for action of its obligation to rule on such request within the statutory time limit and to carry out other necessary actions which cannot be delayed until another competent court has been designated."

<sup>46</sup> Explanatory Report to the New Criminal Procedure Code - Commentary to Section 26 (c8)(1) and (2) of the Draft Criminal Procedure Code, p. 25. Available from: Documents | Law Faculty of Charles University (cuni.cz); The fact that acts performed by an incompetent court will not automatically be considered ineffective will not be written into the law. Nevertheless, this idea will be taken into account. Later on, the deciding court will be free to consider whether or not there has been tampering by the prosecutor (ŘÍHA, Jiří. Příslušnost soudu v přípravém řízení – možnosti a úskali..., p. 9).

<sup>47</sup> GRIVNA, Tomáš. Anketa: Jak by podle vašeho názoru měla být v budoucím trestním řádu upravena příslušnost soudu v přípravém řízení trestním? *Trestní právo*, 2018, vol. 3, p. 2.

*competent court to perform the act; the public prosecutor shall submit the motion to transfer the case to the nearest jointly superior court."* The demonstrative example given in Section 31 (c13) (1) (a) of the Draft CPC applies precisely to the exclusion of all judges of a given court from deciding a case. In contrast to the 2008 Substantive Intent of the new Criminal Procedure Code, other court personnel are no longer explicitly mentioned. By inserting the second paragraph into Section 31 (c13) of the Draft CPC, the Court of Criminal Procedure is thus responding to exceptional situations (allegedly in units per year), where the public prosecutor, based on his doubts about the impartiality of judges of a certain court, may file a motion to the regional court, which will designate another court to act in the pre-trial proceedings and subsequently "assign" the case to it. The referral of the case shall be decided by *"the regional court in whose district the district court otherwise having local jurisdiction according to the general rules is located."* In designating a new court, the regional court should not choose a court from the other side of the country. It should assign the case to the court nearest to the one that would otherwise have local jurisdiction. As far as other court staff are concerned, the court's organisational arrangements should be made, as this is not a reason to break the statutory judge rule.<sup>48</sup> This is a special and **optional procedure**, different from the institution of withdrawal and transfer of the case, which has been described as inappropriate and insufficient to ensure the objectivity and confidentiality of the proceedings. Thus, the withdrawal and transfer of the case does not apply even by analogy.

The existing legislation containing the principle of *perpetuatio fori* has been retained in Section 26 (c8)(5) of the Draft CPC.<sup>49</sup> The change in this legislation was the addition of references to provisions concerning decisions on the jurisdiction of the court in cases of jurisdictional disputes and the withdrawal and transfer of a case, including a new treatment of situations relating to the exclusion of judges.

The proposed text of the new Criminal Procedure Code submitted by the Commission is clearly not perfect. The intention was to reach an

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<sup>48</sup> For example, the judge himself is the accused, the judge has a close relationship to the accused, the judge is an interested person, the risk of disclosure of classified information, etc. (Explanatory Report to the New Criminal Procedure Code - Commentary to Section 26 (c8) (1) and (2) of the Draft Criminal Procedure Code, pp. 26-27.

<sup>49</sup> "The court designated pursuant to paragraphs 1 to 3 shall become competent to carry out all acts of the court throughout the pre-trial proceedings; this is without prejudice to sections 30 and 31/c12 and section c13."



acceptable compromise, respecting the right to a lawful judge and the necessary preservation of that right.<sup>50</sup> First of all, the Commission's efforts to resolve the interpretation problems associated with the publication of the Constitutional Court's ruling should be highlighted, which in my opinion has been successful. It is indeed difficult to find a flawless and ideal solution. Each option brings with it possible pitfalls and scope for unfair practices. The successful compromise produced by the Commission **may inspire an amendment to the current regulation** of the jurisdiction of the court in pre-trial proceedings in the event that the recodification of the Code of Criminal Procedure is postponed until a later date.

### 3. Comparison with Slovak legislation

The Slovak Republic is cited as a model for inspiration when considering a change from a four-member court system to a three-member system.<sup>51</sup> For this reason, the legal situation in Slovakia concerning the jurisdiction of the court in pre-trial proceedings will now be outlined.

In Slovakia, the recodification of criminal procedural law took place in 2005. It brought with it several new institutes, including **the pre-trial judge** (*sudca pre prípravné konanie*).<sup>52</sup> With the new Criminal Procedure Code effective as of 1 January 2006 (Act No. 301/2005 Coll., Criminal Procedure Code, as amended, hereinafter referred to as the "CP"), the three-part judicial system - district courts, regional courts and the Supreme Court of the Slovak Republic - was confirmed. A significant change was that, in addition to the district courts, the

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<sup>50</sup> ŘÍHA, Jiří. Příslušnost soudu v přípravném řízení – možnosti a úskalí... , p. 9.

<sup>51</sup> ŘÍHA, Jiří. Trestní soudnictví v zahraničí – mezinárodní srovnání. *Trestněprávní revue*, 2015, no. 5, p. 105.

<sup>52</sup> MARKOVÁ, Veronika. Zásada sudcu pre prípravné konanie a niektoré vybrané aplikačné problémy. In HRUŠÁKOVÁ, Milana, PROVAZNÍK, Jan, VALDHANS, Jiří (ed.). *Dny práva 2017, část IX., Zásady trestního práva hmotného i procesního a jejich uplatňování v praxi*. Brno: Masarykova Univerzita, 2018, p. 206. The position of the pre-trial judge is defined in Section 10(3) of the Criminal Procedure Code as a judge of the court of first instance who, before the commencement of criminal prosecution and in preliminary proceedings, decides on interference with fundamental human rights and freedoms, on complaints against decisions of the prosecutor and in other cases provided for in the Criminal Procedure Code. Its status and competence vary depending on the stage of the proceedings at which it carries out its activities (MARKOVÁ, Veronika. Zásada sudcu pre prípravné konanie... , p. 207). For example, the Pre-Trial Judge is empowered under Section 348(1)(a) and (2) of the Criminal Procedure Code to issue a criminal warrant, which he does in his capacity as a single judge.

regional courts no longer ruled at first instance. The first instance agenda was transferred only to the district courts (with the exception of the Specialised Criminal Court). There are 54 district courts in Slovakia, and not every district town is the seat of a district court.<sup>53</sup>

The **district courts** decide by a single judge or in panels on all remaining offences not listed in section 14 of the Criminal Procedure Code. The district courts have a judge for pre-trial proceedings, and the jurisdiction of the court in pre-trial proceedings is laid down in Article 24 of the Code of Criminal Procedure (see below). They are divided into 'ordinary' district courts (54), district courts in the seat of the regional court (8) and district courts referred to in a special law (3), which decide in the first instance on military offences (cf. Article 16(2) of the Code of Criminal Procedure).<sup>54</sup>

The **Specialised Criminal Court** was created in 2009 as a successor to the Special Court (*Špeciálny súd*). The Specialised Criminal Court decides on criminal and other cases provided for in the Criminal Procedure Code. The Specialised Criminal Court is a court of first instance and has the status of a regional court.<sup>55</sup> It is the only one of its kind, decides in panels of three judges and has nationwide jurisdiction.<sup>56</sup> Section 14 of the Criminal Procedure Code contains an exhaustive list of offences falling within the jurisdiction of the Specialised Criminal Court (e.g. damage to the financial interests of the European Union or premeditated murder). At the same time, the competence of the Office of the Special Prosecutor is thus determined (*Úrad špeciálnej prokuratúry*).<sup>57</sup> If it occurs that the Specialized Criminal Court is unable to make a decision in a particular case (due to the exclusion of judges, etc.), the Regional Court in Banská Bystrica will exercise its jurisdiction.<sup>58</sup> Appeals against decisions of the

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<sup>53</sup> ŘÍHA, Jiří. *Trestní soudnictví v zahraničí...*, p. 105.

<sup>54</sup> *Ibid.*

<sup>55</sup> Slovakia – national specialised courts. [cit. 24 August 2023] Available from: [https://e-justice.europa.eu/content\\_specialised\\_courts-19-sk-sk.do?member=1](https://e-justice.europa.eu/content_specialised_courts-19-sk-sk.do?member=1).

<sup>56</sup> ŘÍHA, Jiří. *Trestní soudnictví v zahraničí...*, p. 105.

<sup>57</sup> PALKOVIČ, Jaroslav. In ČENTĚŠ, Josef a kol. *Trestný poriadok – Veľký komentár*. 3. aktualizované vydanie. Bratislava: EUROKÓDEX, 2017, p. 40.

<sup>58</sup> Section 91 of Act No. 757/2004 Coll., Act on Courts and on Amendments and Additions to Certain Acts, as amended: "*If there is no panel established at the Specialised Criminal Court or if for any other reason the Specialised Criminal Court is unable to exercise its jurisdiction pursuant to this Act or a special act, it shall be exercised by the Regional Court in Banská Bystrica; the panel of the Regional Court shall in such a case consist of three judges, one of whom shall be the chairman of the panel.*"

Specialised Criminal Court are decided by the Supreme Court of the Slovak Republic.

The jurisdiction of the court for acts in pre-trial proceedings is therefore regulated by Section 24 of the Criminal Procedure Code, which is a special provision in addition to the general provisions on the subject matter and local jurisdiction of the court (Sections 15, 16 and 17 of the Criminal Procedure Code).<sup>59</sup> The rules determining the jurisdiction of the court for proceedings on the merits are combined with the specifics of pre-trial proceedings.<sup>60</sup> As a general rule, the **district court** which would be competent to hear the indictment proceedings shall be competent to hear the case in the first instance (Article 24(1) of the Code of Criminal Procedure). If the **district court at the seat of the regional court** is competent to hear the case in the first instance (Article 16(1) of the Code of Criminal Procedure), it shall also be competent to hear the pre-trial proceedings (Article 24(2) of the Code of Criminal Procedure). If the district courts are competent in the first instance under Section 16(2) of the Criminal Procedure Code to decide on military offences, they also decide on acts in the pre-trial proceedings. In the cases referred to in Article 16(5) of the Criminal Procedure Code falling within the competence of the Specialised Criminal Court, only the Specialised Criminal Court takes pre-trial measures (Article 24(3) of the Criminal Procedure Code).<sup>61</sup> The above list shows four variants of the jurisdiction of the courts in pre-trial proceedings, in three cases it is a district court and in one case it is a court in the capacity of a regional court.

Slovakia has therefore abandoned the concept of court jurisdiction for pre-trial proceedings as it applies in the Czech Republic. They have introduced a three-judge court system, which, however, entails a complex distinction as to which court will hear the case at first instance. There is a certain disadvantage and a negative side to this complicated division of cases, as the preliminary proceedings often involve a recharacterisation of the offence as a different offence, which, in the case of the Slovak legislation, may also change the jurisdiction of the court to carry out acts in the pre-trial proceedings.<sup>62</sup> The Slovak system is made up of a number of rules and is actually more complex

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<sup>59</sup> PALKOVIČ, Jaroslav. In ČENTĚŠ, Josef a kol. *Trestný poriadok...*, p. 54.

<sup>60</sup> ŘÍHA, Jiří. *Trestní soudnictví v zahraničí...*, p. 105.

<sup>61</sup> Section 24(4) of the Civil Procedure Code also provides for special jurisdiction for exhaustively enumerated acts.

<sup>62</sup> ŘÍHA, Jiří. *Příslušnost soudu v přípravém řízení – možnosti a úskalí...*, p. 9.

than it may seem. In fact, it does not take advantage of the three-part system, which is supposed to eliminate jurisdictional disputes. On the contrary, the Slovak concept rather increases the risk of jurisdictional disputes, with regard to the four types of cases (as mentioned above), where the jurisdiction is given to three types of district courts and the Specialised Criminal Court. For this reason in particular, Slovakia is not the most suitable model for future reform of the Czech criminal justice system.<sup>63</sup>

## Conclusion

De lege ferenda, the Commission's intention was to clarify the rules on the jurisdiction of the court in pre-trial proceedings so as to leave no doubt as to the application of the relevant rules and to cover the resolution of legal issues not covered by the current Criminal Procedure Code. The Commission has opted for a sensible compromise designed to respect the right to a lawful judge and to address the contentious issues raised by the publication of the Ruling.

The district courts should continue to have subject-matter jurisdiction over pre-trial proceedings, as any other solution would require a reform of the judiciary and a change from a four-part system to a three-part system. An intermediate step between the current situation and judicial reform could be an organisational change made by an amendment to the Courts and Judges Act, which would consist in transferring the pre-trial agenda from small district courts to larger district courts adjacent to the small ones.

The current link between the determination of the local jurisdiction of courts in pre-trial proceedings and the general rules on the determination of the local jurisdiction of courts in criminal proceedings should be retained and newly enshrined in law. It should be newly written into the law that if a prosecutor of a higher prosecutor's office (regional or supreme) exercises supervision in pre-trial proceedings, the district court at the seat of the regional court or its branch will have local jurisdiction. Its local jurisdiction shall be determined in accordance with the general rules (together with specifics for certain regional courts).

In order to resolve jurisdictional disputes, it was suggested that even if there is doubt about jurisdiction, the court should nevertheless rule on

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<sup>63</sup> ŘÍHA, Jiří. *Trestní soudnictví v zahraničí...*, p. 105.

the prosecutor's motion to take action and at the same time take other actions that cannot be delayed. The obligation of the court to act even in the event of doubt as to jurisdiction is to remain in force until the competent court has been determined. This jurisdictional dispute will be raised by a judge of a court which does not feel it has jurisdiction. In situations in which all judges of a given court are excluded from deciding, the public prosecutor will be able to apply to the regional court to determine which court will take the required action in the case. The Commission has also maintained the rule of continuing jurisdiction of the court in pre-trial proceedings.

Although the form of legislation presented by the Commission is not perfect, it can be assessed as a very successful attempt to find acceptable solutions to current problematic issues and to incorporate these solutions into the new Criminal Procedure Code. Alternatively, the proposed legislation is suitable for use in amending the current Criminal Procedure Code, as the recodification of the Criminal Procedure Code is unlikely to be implemented in the near future.

The Slovak legislation on the jurisdiction of the court in pre-trial proceedings has been analysed as a possible source of inspiration for the recodification of Czech criminal procedural law. The judicial system in Slovakia is a three-part system compared to the Czech Republic. In pre-trial proceedings, three types of district courts and one specialised court with national jurisdiction are competent to carry out acts in pre-trial proceedings. The division of cases is complicated and the advantages of a three-judge court system, which should minimise jurisdictional disputes, are not actually used. Rather, they increase the risk of jurisdictional disputes. Therefore, the Slovak legislation is not the most appropriate model for a possible judicial reform in the Czech Republic.

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