

## QUALITY OF THE LAW PROVIDING FOR THE USE OF SPECIAL (SECRET) INVESTIGATION TECHNIQUES<sup>1</sup>

### ЯКІСТЬ ЗАКОНУ, ЩО ПЕРЕДБАЧАЄ ВИКОРИСТАННЯ ОСОБЛИВИХ (НЕГЛАСНИХ) МЕТОДІВ РОЗСЛІДУВАННЯ

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The use of special (secret) investigation techniques in criminal proceedings significantly limits the rights, freedoms and interests of the persons against whom they apply. Therefore, in order to comply with the relevant rights, freedoms and interests of a person in connection with the use of special (secret) investigation techniques, a number of requirements have been formulated that must be met by legislation providing for the use of such methods.

These requirements are formulated in the form of certain standards, in particular, in international legal documents and practice of the European Court of Human Rights. In this regard, it is relevant to study the compliance of the criminal procedural legislation of Ukraine, which involves the use of special (secret) investigation techniques, given standards.

The conducted analysis made it possible to formulate the basic standards that the law, which provides for the use of special (secret) investigation techniques, must comply with. Such standards (along with the existence of an accessible and clear law that outlines the rules for the use of special (secret) investigation techniques) include, in particular, those prescribed by law: 1) categories of persons for whom special (secret) investigation techniques apply; 2) the nature of offenses that could serve as the basis for deciding on the use of special (secret) investigation techniques; 3) duration of application of special (secret) investigation techniques; 4) the procedure for using special (secret) investigation techniques; 5) precautions to be taken in connection with the use of special (secret) investigation techniques; 6) circumstances in which the results of the use of special (secret) investigation techniques should be destroyed; 7) supervision of the use of special (secret) investigation techniques; 8) sufficient clarity regarding the scope and method of exercising the discretion of the authorities to use special (secret) investigation techniques; 9) sufficient grounds that may justify the use of special (secret) investigation techniques; 10) requirement of compliance with the principle of necessity.

In turn, the study of the quality of the criminal procedural legislation of Ukraine allows us to conclude that the relevant legislation providing for the use of special (secret) investigation techniques, as a whole, complies with the standards formulated in international documents and case law of the European Court of Human Rights.

**Key words:** criminal proceedings, right to respect for private and family life, special (secret) investigation techniques, criminal procedure legislation.

Використання особливих (негласних) методів розслідування у кримінальному судочинстві суттєво обмежує права, свободи та інтереси осіб, щодо яких вони застосовуються. Тому для дотримання відповідних прав, свобод та інтересів особи у зв'язку із використанням особливих (негласних) методів розслідування було сформульовано низку вимог, яким має відповідати законодавство, що передбачає застосування таких методів.

Вказані вимоги сформульовано у вигляді певних стандартів, зокрема, у міжнародних правових документах та практиці Європейського суду з прав людини. У зв'язку із зазначеним актуальним є дослідження відповідності кримінального процесуального законодавства України, що передбачає використання особливих (негласних) методів розслідування, наведеним стандартам.

Проведений аналіз дозволив сформулювати основні стандарти, яким має відповідати закон, що передбачає використання особливих (негласних) методів розслідування. До таких стандартів (разом із наявністю доступного та чіткого закону, що передбачає правила використання особливих (негласних) методів розслідування, зокрема, належать передбачені законом: 1) категорії осіб, стосовно яких застосовуються особливі (негласні) методи розслідування; 2) характер правопорушень, які могли стати підставою для прийняття рішення про застосування особливих (негласних) методів розслідування; 3) тривалість застосування особливих (негласних) методів розслідування; 4) порядок застосування особливих (негласних) методів розслідування; 5) запобіжні заходи, які мають бути застосовані у зв'язку із використанням особливих (негласних) методів розслідування; 6) обставини, за яких результати використання особливих (негласних) методів розслідування повинні бути знищені; 7) нагляд за використанням особливих (негласних) методів розслідування; 8) достатня ясність стосовно обсягу та способу реалізації розсуду влади із використання особливих (негласних) методів розслідування; 9) достатні підстави, що можуть виправдовувати використання особливих (негласних) методів розслідування; 10) вимога дотримання принципу необхідності.

У свою чергу, дослідження якості кримінального процесуального законодавства України, дозволяє зробити висновок про те, що відповідне законодавство, що передбачає використання особливих (негласних) методів розслідування, в цілому відповідає стандартам, сформульованим у міжнародних документах та прецедентній практиці Європейського суду з прав людини.

**Ключові слова:** кримінальне провадження, право на повагу до приватного і сімейного життя, особливі (негласні) методи розслідування, кримінальне процесуальне законодавство.

According to Clause 1, Article 8 of the European Convention on Human Rights (hereinafter – Convention), everyone has the right to respect for his private and family life, his home and correspondence.

As a general rule, public authorities cannot interfere with the exercise of this right. At the same time, Clause 2 of Article 8 of the Convention provides for conditions under which the state may interfere with the exercise of a protected right. In particular, restrictions are permissible if they are carried out in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The interpretation of these provisions of the Convention is carried out by the European Court of Human Rights (hereinafter referred to as the ECHR), which usually assesses the state's compliance with these conditions, examining categories such as "legality," "legitimate purpose" and "necessity".

#### *Legality (provided by law)*

In case of *Malone v. The United Kingdom* ECHR pointed out that according to this wording, the state should at least refer to a specific legal norm or regime, which is the basis for the intervention that the state intends to justify [1].

In connection with this, it should be recalled the criteria that a rule of law must meet in order to be considered "law" (they are given in the well-known case of *Sunday Times v.*

<sup>1</sup> The article was prepared within the framework of the EURIZON H2020 project, funded by the European Union under grant agreement No. 871072.

United Kingdom (No. 1): First, the rule of law must be properly accessible: individuals must have the appropriate ability to navigate what legal rules apply in a particular case; secondly, a rule of law cannot be considered a law if it is not formulated with a sufficient degree of accuracy that allows a person to coordinate his behavior with it [2].

At the same time, the first criterion (accessibility) provides for the possibility of familiarization with the texts of acts containing the relevant norms [3]. Regarding the second criterion (a sufficient degree of accuracy), it should be noted that ECHR in its practice pays considerable attention to the legislation governing the use of special (secret) investigation techniques. In particular, in case of *Kruslin v. France* ECHR agreed that secret wiretapping by police had a basis defined in state law. At the same time, the ECHR was not satisfied with the quality of the relevant law, noting that the installation of listening devices and other forms of wiretapping are a significant interference with private life, and therefore should be based on a law that is particularly clear. It is important that there are clear, detailed rules in this regard, given that the technologies used are becoming more and more advanced [4]. At the same time, in this case ECHR noted that the law did not establish the circle of persons whose telephone conversations could be listened to, as well as any restrictions on the duration of listening. In this case, it is obviously necessary to define the limits of the discretionary powers of public authorities in the law.

In the classic case of *Klass and Others v. Germany*, the first to be examined by ECHR in this area, ECHR agreed that the existence of legislation granting tacit surveillance powers is, under exceptional conditions, necessary in a democratic society. However, there must be adequate and effective safeguards against abuse [5].

In another case of *Malone v. United Kingdom* wiretapping was regulated only administratively, information on which was not published. ECHR pointed out that in this case there was not enough clarity regarding the scope or manner in which the discretion of the authorities to covert wiretapping was exercised [1].

In general, in order to comply with the above quality standard, the law on wiretapping should specify, in particular, the following: categories of persons whose phones are subject to wiretapping; the nature of the offenses that could become the basis for the decision to wiretap; duration of wiretapping; procedure for wiretapping; precautions to be taken; circumstances in which telephone records must be destroyed; listening supervision [6]. In general, these requirements, in our opinion, apply to all types of special (secret) investigation techniques.

#### *Legitimate purpose*

In accordance with this requirement, the state must determine the purpose of its intervention in the implementation of the law stipulated by the Convention. The law must specify sufficient grounds that can justify the use of special (secret) investigation techniques, such as law enforcement, crime prevention and prosecution. At the same time, since each specified goal is formulated quite abstractly, in specific cases it is necessary to detail what the purpose of using special (secret) investigation techniques is.

#### *Necessity in a democratic society*

The law must require compliance with the principle of necessity in accordance with the following rules: (1) special (secret) investigation techniques must be necessary, which means that interference with the rights of suspects must adequately meet the goals of these "sufficient grounds" and not go further than necessary to achieve these goals; (2) special (secret) investigation techniques should be justified only as a last resort, that is, when there is no other means of obtaining evidence; (3) special (secret) investigation techniques should be designed to avoid, as far as possible, targeting individuals or organizations unrelated to the alleged crimes; (4) an operation must be terminated immediately if it no longer meets the objectives of said "sufficient grounds" [7, p. 349].

In addition, this criterion implies that the intervention must meet an urgent social need and, in particular, be proportional to the legitimate goal pursued [8]. In assessing whether the intervention was proportionate to the aim pursued, ECHR refers to the doctrine of the "field of discretion of the state" (a state-recognized authority) [9].

The conducted analysis allows to formulate the basic standards that the law must comply with, providing for the use of special (secret) investigation techniques. Such standards (along with the existence of an accessible and clear law that outlines the rules for the use of special (secret) investigation techniques) include, in particular, those prescribed by law: 1) categories of persons for whom special (secret) investigation techniques apply; 2) the nature of offenses that could serve as the basis for deciding on the use of special (secret) investigation techniques; 3) duration of application of special (secret) investigation techniques; 4) the procedure for using special (secret) investigation techniques; 5) precautions to be taken in connection with the use of special (secret) investigation techniques; 6) circumstances in which the results of the use of special (secret) investigation techniques should be destroyed; 7) supervision of the use of special (secret) investigation techniques; 8) sufficient clarity regarding the scope and method of exercising the discretion of the authorities to use special (secret) investigation techniques; 9) sufficient grounds that may justify the use of special (secret) investigation techniques; 10) requirement of compliance with the principle of necessity.

Further it is appropriate to analyze how the legislation of Ukraine meets the specified standards for the use of special (secret) investigation techniques.

In the beginning, it should be noted that the general requirement is the availability of an accessible and clear law providing for the rules for the use of special (secret) investigation techniques. Thus, the main law in this area is The Criminal Procedural Code of Ukraine (hereinafter – CPC), a codified act that clearly defines the general provisions on covert investigative (detective) actions (hereinafter – CI (D) A), as well as the general procedure for their implementation. It should also be noted that until 2012, when the CPC was adopted, the main law that provided for the rules for the use of special (secret) investigation techniques was the Law of Ukraine "On Operational-Search Activities" (which is valid at the moment, however, mainly regulates the procedure for conducting special (secret) investigation techniques outside boundaries of criminal proceedings).

#### *1) Categories of persons for whom special (secret) investigation techniques apply.*

The general rules regarding the categories of persons to whom special (secret) investigation techniques apply are not clearly established, as some CI(D)A provide for the recording of certain publicly accessible places, communications with an unlimited circle of persons, etc.

At the same time, CPC establishes as a mandatory requirement for the application for permission to conduct CI(D) A the necessity to specify information about the person(s), the location, or the item in relation to which CI(D)A is to be conducted (Clause 4, Part 2 of Article 248 of the CPC). These requirements also apply to the ruling of the investigating judge regarding the permission to conduct CI(D)A (Clause 3, Part 4 of Article 248 of the CPC), as well as the circumstances that provide grounds for suspecting an individual of committing a criminal offense (Clause 5, Part 2 of Article 248 of CPC).

Along with this, the CPC contains prohibitions on conducting CI(D)A in relation to and with the participation of certain categories of persons. Thus, interference with the private communication of the defender, clergyman with the suspect, accused, convicted, acquitted is prohibited (Part 5 of Article 258 of the CPC). In addition, it is forbidden to involve in confidential cooperation during CI(D)A lawyers, notaries, medical workers, clergy, journalists, if such cooperation is associated with the disclosure of confidential information of a professional nature (Part 2 of Article 275 of the CPC).

2) *The nature of offenses that could serve as the basis for deciding on the use of special (secret) investigation techniques.*

The CPC establishes categories of criminal offenses for which CI(D)A may be conducted in criminal proceedings. Thus, CI(D)A, provided by Articles 260, 261, 262, 263, 264 (in terms of actions carried out on the basis of the ruling investigating judge), 267, 269, 269-1, 270, 271, 272, 274 of the CPC, are conducted exclusively in criminal proceedings for serious or especially serious crimes.

It should also be noted that the category of criminal offenses is crucial for the decision to conduct CI(D)A. In particular, the investigating judge decides on the permission to conduct CI(D)A, if the public prosecutor, investigator proves that there are sufficient reasons to believe that a criminal offense of respective gravity has been committed (Part 3 of Article 248 of the CPC).

Besides, the CPC also specifies for certain CI(D)A that they are conducted in criminal proceedings related to serious or especially serious crimes (for example, Clause 1 and 3 Part 1 of Article 267, Part 1 of Article 271 of the CPC).

3) *Duration of special (secret) investigation techniques.*

The CPC establishes that, as a general rule, the decision to conduct CI(D)A specifies the duration of its implementation (Part 5 of Article 246 of the CPC). These legislative provisions are also specified in relation to certain procedural decisions regarding the conduct of CI(D)A (Clause 5, Part 4 of Article 248, Clause 4, Part 1 of Article 251 of the CPC).

With respect to individual procedural decisions regarding the conduct of CI(D)A, the CPC explicitly sets procedural deadlines. Thus, the term of the investigation judge's permission to conduct CI(D)A cannot exceed two months (Part 1 of Article 249 of the CPC). In addition, the execution of a special task cannot exceed six months, and if necessary, the period for its execution is extended by the investigator in agreement with the chief officer of the pre-trial investigation agency or public prosecutor for a period that does not exceed the period of pre-trial investigation (Part 4 of Article 272 of the CPC).

At the same time, the CPC provides for the possibility of extending the term of CI(D)A (Part 5 of Article 246 and Article 249 of the CPC).

4) *Procedure for applying special (secret) investigation techniques.*

CPC regulates the general provisions regarding the procedure for conducting CI(D)A in sufficient detail. In particular, the subjects authorized to make decisions on the conduct of CI(D)A (Part 3, 4 of Article 246 of the CPC) and the procedure for initiating such a decision (Article 248 of the CPC) are determined, as well as the subjects authorized to conduct CI(D)A directly (Part 6 of Article 246 of the CPC). In addition, the CPC defines the requirements for procedural documents for conducting CI(D)A and fixing its course and results (Part 2 and 4 of Article 248, Article 251 and Article 252 of the CPC). The procedure for conducting individual CI(D)A (Articles 260–274 of the CPC) and using their results in proof (Article 256 CPC) and for other purposes (Article 257 CPC) is also determined.

5) *Precautions to be taken in connection with the use of special (secret) investigation techniques.*

Among the preventive measures that should be applied to protect the rights, freedoms and interests of persons in criminal proceedings in connection with the conduct of CI(D)A, CPC, in particular, provides for departmental control, prosecutorial supervision and judicial control; procedure for notifying persons in respect of whom CI(D)A (Article 253 of the CPC) was conducted; measures to protect information obtained as a result of CI(D)A (Articles 254 and 259 of the CPC); measures to protect information that is not used in criminal proceedings (Article 255 of the CPC); rules on the use of CI(D)A results in proof (Article 256 of the CPC) and other purposes (Article 257 of the CPC); opening of materials obtained during CI(D)A to the other party (Article 290 of the CPC); prohibition

of provocation during CI(D)A (Part 3 of Article 271 of the CPC); prohibition of CI(D)A (control of the commission of a crime) in case of danger to human life and health and the environment (Part 2 of Article 271 of the CPC), etc.

6) *Circumstances in which the results of the use of special (secret) investigation techniques should be destroyed.*

The CPC provides that information, items and documents obtained as a result of conducting CI(D)A, which the public prosecutor does not recognize as necessary for further conducting of pre-trial investigation, should be immediately destroyed on the basis of its decision, except in cases provided for by Part 3 of that Article and Article 256 of the CPC (Part 1 of Article 255 of the CPC). The destruction of information, things and documents is carried out under the control of public prosecutor (Part 4 of Article 255 of the CPC).

In addition, information obtained as a result of conducting CI(D)A is also subject to destruction before the ruling of investigating judge if the investigating judge decides to refuse to grant permission to conduct CI(D)A (Part 3 of Article 250 of the CPC).

7) *Supervision of the use of special (secret) investigation techniques.*

As noted, the CPC provides for departmental control, prosecutorial supervision and judicial control during the conduct of CI(D)A. In particular, the investigator's decision to conduct CI(D)A must be agreed with the chief officer of the pre-trial investigation agency (Part 2 of Article 272 of the CPC), and the investigator's application for permission to conduct CI(D)A must be agreed with public prosecutor.

Besides, Article 246 of the CPC provides that the decision to conduct CI(D)A is made by the investigator, public prosecutor, and in cases provided for by the CPC, by the investigating judge at the request of the public prosecutor or at the request of the investigator, agreed with public prosecutor. The investigator is obliged to notify the public prosecutor of the decision to conduct certain CI(D)A and the results obtained (Part 3 of Article 246 of the CPC).

The vast majority of CI(D)A is carried out by the decision of the investigating judge, which provides for judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings. At the same time, permission to conduct CI(D)A provides an investigating judge a high instance level. Thus, the consideration of applications for CI(D)A is carried out by the investigating judge of the appellate court within whose territorial jurisdiction the pre-trial investigation agency is located, and in criminal proceedings concerning criminal offences it shall be conducted by the investigating judge of the High Anti-Corruption Court (Part 1 of Article 247 of the CPC).

8) *Sufficient clarity on the scope and manner in which the discretion of the authorities to use special (secret) investigation techniques is exercised.*

The CPC establishes the need for an application for permission to conduct CI(D)A to justify the possibility of obtaining evidence during the conduct of CI(D)A, which alone or in conjunction with other evidence may be essential to clarify the circumstances of a criminal offense or identify the persons who committed it (Clause 9, Part 2 of Article 248 of the CPC). In turn, the investigating judge issues a ruling to permit the conduct of CI(D)A if the public prosecutor or investigator demonstrates sufficient grounds to believe that evidence may be obtained during the conduct of CI(D)A, which alone or in combination with other evidence could be significant for clarifying the circumstances of the criminal offense or identifying the individuals who committed the criminal offense (Part 3 of Article 248 of the CPC).

The reasons and purpose for conducting individual CI(D)A are defined in Articles 260-274 of the CPC and are also to be specified in the motion (Clause 6, Part 2 of Article 248 of the CPC).

In certain cases, the CPC establishes the exclusive authority of pre-trial investigation agencies to conduct certain types



of CI(D)A. Thus, bank accounts are monitored in criminal proceedings referred to the jurisdiction of the National Anti-Corruption Bureau of Ukraine, Economic Security Bureau of Ukraine (Part 1 of Article 269-1 of the CPC).

9) *Sufficient grounds that may justify the use of special (secret) investigation techniques.*

As a general rule, the vast majority of CI(D)A is conducted in criminal proceedings for serious or especially serious crimes. In addition, in some cases, the CPC additionally specifies the purpose of CI(D)A (regarding inspecting publicly accessible places, home or any other property of a person in Clause 1 and 3 Part 1 of Article 267 of the CPC; regarding surveillance of an individual, an object or a place in Part 1 of Article 269 of the CPC; regarding control of the commission of a crime in Part 1 of Article 271 of the CPC, etc.).

In addition, the CPC determines the special grounds for conducting CI(D)A before the determination of investigating judge (Article 250 of the CPC).

10) *Requirement of compliance with the principle of necessity.*

One of the fundamental reasons for using special (secret) investigation techniques is the inability to obtain important information in another way. Thus, the CPC establishes that CI(D)A are conducted in cases where information about a criminal offense and the person who committed it cannot be obtained otherwise (Part 2 of Article 246 of the CPC). This

circumstance must be proved in the application for permission to conduct CI(D)A (Clause 7, Part 2 of Article 248 of the CPC) and the decision of investigator, public prosecutor to conduct CI(D)A (Clause 6, Part 1 of Article 251 of the CPC). In addition, for certain types of CI(D)A, the CPC also specifies the above requirement (Part 1 of Article 274 of the CPC).

Another important guarantee of respect for the rights, freedoms and interests of persons in criminal proceedings is the requirement to terminate the conduct of CI(D)A in case of further inexpediency. Thus, in accordance with Part 3 of Article 246 of the CPC public prosecutor has the right to prohibit or stop the further conduct of CI(D)A. In turn, the public prosecutor is obligated to decide to terminate the further conduct of CI(D)A if there is no longer a necessity for it (Part 5 of Article 249 of the CPC).

As a result, the analysis leads to the conclusion that the criminal procedural legislation of Ukraine, which provides for the use of special (secret) investigation techniques, generally complies with the standards formulated in international documents and ECHR practice. At the same time, further enforcement with awareness of these standards and the development of judicial practice on the use of special (secret) investigation techniques seems to contribute to the strict observance of the rights, freedoms and interests of persons in connection with their use.

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