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DISTINCTION BETWEEN COVERT INVESTIGATIVE (SEARCH) ACTIONS AND OPERATIONAL-TECHNICAL MEASURES AND SEARCH OPERATIONS (PART 2)

Abstract. The *purpose of the article* is to study the essence of the organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures, i. e., SO, OTM and CI(S)A.

Results. The second part of research studies the issues of using material media, subjects, documents and samples obtained during search operations, operational and technical measures, intelligence and counter-intelligence operations in criminal proceedings. Different approaches to evaluating such information, conditions and grounds for their use as evidence are identified; the reasons of finding these materials of operative-search, intelligence and counter-intelligence activities inadmissible are stated. For example, according to the Supreme Court's evaluation of the admissibility of evidence of the materials of an operative-search case, the materials lack data that an operative-search case has been instituted against a convicted person (it is a prerequisite for SO and OTM). The OSC, from which the prosecutor has presented materials, was to close based on article 9-2, para. 7 of the Law of Ukraine "On OSA", owing to the lack of evidence which indicate signs of crime in the actions of the person within relevant time, while materials have been destroyed in the manner provided by law. The rulings of investigative judges of the Court of Appeal that have resolute operational-technical measures against this person have not been available to the defence and court. These became a ground for finding the documents provided by the prosecution resulting from OSA as inadmissible evidence. Common features and differences of operational-technical, search operations and counter-intelligence activities are analysed, considering the case law of the ECHR and the Supreme Court; criteria for the use of information from such measures in criminal proceedings are identified. The focus is on the statutory gaps that prevent the use of counterintelligence materials to prove the guilt of a person in committing criminal offenses, as well as on the ways to eliminate them. The study considers issues of the possibility of using a factual data from operative-search activities based on an evaluation by the Constitutional Court of Ukraine.

Conclusions. It is concluded that organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures mentioned above vary significantly. On the one hand, this eliminates their equation and, on the other hand, underlines the need to streamline and further regulate operative-search, intelligence and counter-intelligence activities at the legislative level.

Key words: covert investigative (search) actions, search operations, operational-technical measures, documents in criminal proceedings, evidence, admissibility of evidence, investigative actions.

1. Introduction

In the first part of our study, the focus was on the grounds for OSA, counter-intelligence activities as a form of operative-search activities, and the classification of these procedural measures, aimed at obtaining evidence in criminal proceedings, etc. In this case, we would like to start with a certain feature of the organization of counter-intelligence activities. Furthermore,

in our study, we focus on the use of covert methods and means in counter-intelligence activities, including the use of operational, operational and technical, special forces and means, *defined by the by-laws of the SSU* (Law of Ukraine "On Counterintelligence Activities", 2020).

In fact, sometimes operational, operational and technical measures in counter-intelligence activities are large-scale, mass inter-

ception (monitoring) of telecommunications and the acquisition of communication data (billing information) from operators and providers of telecommunications without applying for permission from the investigating judge, the court. Intercepted telecommunications messages using real-time filters to determine the significance of intercepted information, in the absence of a decision by the investigating judge to authorize such measures in respect of a particular person, the material selected and preserved shall be referred for analysis. In terms of criminal procedure, the implementation of such measures is considered a violation of fundamental human and civil rights and freedoms due to insufficient judicial control over such activities (Judgment of the European Court of Human Rights “Big Brother Watch and others v. The United Kingdom”, 2018).

The *purpose of the article* is to study the essence of the organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures such as SO, OTM and CI(S)A.

2. The regulatory framework for using the results of operative-search, counter-intelligence activities as evidence in criminal proceedings

In the ECtHR’s legal opinion in respect of operational and technical measures, in the absence of information on the personal data of the person whose rights are restricted by such measures in the decision on their conduct, such actions are not in conformity with the requirements of article 8 of the Convention (Judgment of the European Court of Human Rights “Azer Ahmadov v. Azerbaijan”, 2021).

The issue of whether results of operative-search and counter-intelligence activities can be used as evidence in criminal proceedings is still under discussion.

The Criminal Procedure Law clearly establishes that CI(S)A are a form of investigative actions, their results recorded in the investigation reports, media, documents obtained during their conduct, objects, belongings and samples shall be used as evidence in criminal proceedings.

With regard to materials of operative-search activities, the use of investigation reports drawn up on the basis of operational and technical measures, records, belongings and objects received as evidence in criminal proceedings, either in the Criminal Procedure Code or in the Law of Ukraine “On operative-search activities” are not decided.

To a certain extent, the Supreme Court has made a point of discussion on this issue, concluding in Judgement of 12 May 2021 in case № 750/10362/17 (proceedings 51-5319 km 20)

that the materials, which contain factual data on unlawful actions of individuals and groups of persons, collected by operational units in compliance with the requirements of the Law of Ukraine “On operative-search activities”, subject to the requirements of article 99 of the CPC of Ukraine, are documents and can be used as evidence in criminal proceedings. Declassifying and making available to the defence the investigation reports on OTM and the Court of Appeal’s ruling to conduct them, if warranted, is sufficient for them to be examined during proceedings and to grant appropriate assessment. At the same time, it should be borne in mind that the materials of the OSC, in particular, the investigation reports of the operational and technical measures, are not sufficient to find the information contained in them evidence in criminal proceedings. This is due to the fact that the defence shall be given the opportunity to check the admissibility of such evidence, in particular, regarding compliance by the operational unit with the requirements of the Law of Ukraine “On operative-search activities” on the grounds and procedure for the introduction of the OSC, the conduct of operational and technical measures, including the availability of appropriate judicial authorization when such measures involve interference in private communication.

According to the Supreme Court’s evaluation of the admissibility of evidence of the materials of an operative-search case, the materials lack data that an operative-search case has been instituted against a convicted person (it is a prerequisite for SO and OTM). The OSC, from which prosecutor has presented materials, was to close based on article 9-2, para. 7 of the Law of Ukraine on OSA, owing to the lack of evidence which indicate signs of crime in the actions of the person within relevant time, while materials have been destroyed in the manner provided by law. The rulings of investigative judges of the Court of Appeal that have allowed operational-technical measures against this person have not been available to the defence and court (Resolution of the Supreme Court, 2019). These became a ground for finding the documents provided by the prosecution resulting from OSA as inadmissible evidence.

With regard to the option of using a factual data from operative-search activities the Constitutional Court of Ukraine stated, in its decision 12рп/2011 as of 20 October 2011 (case № 1-31/2011) that the interpretation of the provisions of article 62 of the Constitution of Ukraine leads to the conclusion that an accusation shall not be based on evidence obtained by unlawful means, including factual evidence obtained as a result of opera-

tive-search activities by an authorized person without respect for constitutional provisions or in violation of the procedure established by law.

These legal perspectives point at two key aspects:

1. Materials obtained in the course of operative-search activities can be used as evidence – documents (only in cases when the information recorded in them has been obtained in a manner prescribed by the Law of Ukraine “On the OSA” and when fixing and writing such documents by the operating unit have complied with the requirements of the Law of Ukraine “On OSA” and Chapter 21 of the CPC of Ukraine.

2. Compliance with the requirements of the Law of Ukraine “On OSA” and Chapter 21 of the CPC of Ukraine may be verified by the parties to the criminal proceedings by examining the causes and grounds for the introduction of the OSC, the progress of OTM and compliance with the requirements for the preparation of such documents, compliance with the legal regulations governing such activities.

The possibility of verifying admissibility of evidence is a fundamental guarantee of human and civil rights and freedoms in criminal proceedings and the adoption of a lawful and fair decision.

The issue of whether counter-intelligence materials could be used as evidence in criminal proceedings remained a matter of debate.

Proponents of the use of CIA results argue that, in counter-intelligence searches, authorized operational units have the right to conduct search operations using operational, operational and technical forces and means. In cases where the results of counter-intelligence activities are recorded in accordance with the requirements established by law for investigation reports of OTM, which are drawn up during operative-search activities, the parties can verify their propriety and admissibility, such material can be used as a basis for initiating a pre-trial investigation and as evidence in criminal proceedings – a document.

In addition, courts (Judgment of the Ordzhonikidze District Court of the city of Mariupol, 2017) have, in some cases, find such investigation reports as inadmissible evidence. This legal position is based on the fact that an investigation report on the results of a covert search operation is drawn up on the basis of article 7, part 2, para. 6 of the Law of Ukraine “On counter-intelligence activities”, article 8, part 3 of the Law of Ukraine “On operative-search activities”. The above provisions of the laws authorize appropriate measures for the prevention, timely detection and termination

of intelligence, terrorist and other attacks on the security of the State of Ukraine, obtaining information for the purposes of counterintelligence. However, according to the provisions of articles 223 and 246 of the CPC of Ukraine, investigative (search) actions are actions aimed at gathering (collecting) evidence or verifying evidence already collected in a particular criminal proceeding. From the perspective of the court, the purpose and focus of the measure are decisive for assessing its results and the possibility of using them as evidence. If the CIA's target is other than that of criminal proceedings, the documents drawn up in the course of the CIA cannot be used in criminal proceedings.

In addition, the results of the CIA were found inadmissible because the prosecution did not provide the parties to the criminal proceedings and the court with an appropriate ruling that had authorised such measures (Judgment of the Selidovo City Court of the Donetsk Region, 2017), or because such results were used in criminal proceedings without a permission of the Court of Appeal (Judgment of the Kramatorsk City Court, 2017).

Ratio decidendi by the Supreme Court (Resolution of the Supreme Court, 2018) is somewhat different. The Panel of Judges concluded that since counter-intelligence activities had been conducted on the basis of article 5 of the Law of Ukraine “On combating terrorism”, articles 1, 7 of the Law of Ukraine “On counterintelligence activities” and the Determination of the Head of the Court of Appeal, the information collected can be used in criminal proceedings.

Therefore, the court admits the use of the results of counter-intelligence activities in cases when such results are drawn up in compliance with the requirements of Law of Ukraine “On OSA”, in presence of the permission of the judge of the Court of Appeal to take such measure.

3. Relevance and admissibility of using the results of operative-search, counter-intelligence activities as evidence in criminal proceedings

There is currently no clear answer to the possibility of using the results of CIA in criminal proceedings. However, it should be noted why the use of counter-intelligence materials as evidence in criminal proceedings is questionable in terms of propriety and admissibility:

1) the objective of counter-intelligence activities is not to seek and record evidence in criminal proceedings or to safeguard the interests of criminal proceedings;

2) the procedure for counter-intelligence activities is determined by by-laws of the SSU

and not by the CPC or other law, which considerably reduces guarantees of human rights and freedoms and especially when it comes to interference in private personal communication;

3) some counter-intelligence search measures, similar to those in CI(S)A, as opposed to the latter, may be carried out without the authorization of the investigating judge or court;

4) unlike operative-search activities or criminal proceedings, the grounds for counter-intelligence activities may be information or data obtained illegally, in violation of the procedure established for OSA or criminal proceedings;

5) the identification of the elements of a criminal offence, including the preparation or attempted commission thereof, constitutes grounds for entering the URPI and the initiation of a pre-trial investigation, consequently, the continuation of counter-intelligence searches in such cases may lead to the substitution of a criminal proceedings, which provide certain safeguards to parties to proceedings; for the quasi-intelligence process that does not contain such guarantees;

6) by regulating activities in which fundamental human rights and freedoms are restricted (violated), including interference in private communication, violation of the inviolability of housing, the legislator has provided that such actions by the State (its authorized bodies) are permitted as an exception, for the purpose of detecting, terminating, under certain conditions and in a clearly regulated manner, in order to ensure proper judicial control of the observance of human rights and freedoms, as well as the possibility of verifying the evidence collected in such manner to be proper and admissible.

The specificity of intelligence and counter-intelligence activities, in my view, precludes the possibility of carefully and sufficiently developing the sources and manner of recording evidence obtained. The exclusivity and peculiarity of the conditions for conducting CI(S)A are ensured by the possibility to use their results in other criminal proceedings, *inter alia*, to prove a person's guilt in the commission of an offence, the investigation thereof is not related to obtaining the permission of the investigating judge to conduct CI(S)A. This function is performed by the investigating judge of the Court of Appeal, who shall determine and evaluate the interests of criminal procedure and the safeguarding of human and civil rights and freedoms. In such cases, the investigating judge evaluates the "exceptional" conditions under which information about another crime is obtained, its gravity, the manner in which information is obtained, the interests of the criminal

proceedings in the course of which such information was obtained, and in other proceedings in which the prosecution proposes to use such confirming.

Even so, the very fact that the investigating judge has been asked to authorize the use of the results of CIA is questionable, since the only ground for the permission may be the prosecutor's request invoked in the criminal proceedings. The mechanism for making a similar application during intelligence, counter-intelligence measures (in the course of intelligence cases and counter-intelligence searches) is not provided for by law.

The totality of these arguments, in my view, rule out the possibility of using counter-intelligence materials in criminal proceedings as evidence. However, the information collected from such activities may be grounds for entering the URPI and the initiation of a pre-trial investigation.

4. Distinction between the sources of legal regulation for the conduct of CI(S)A, operative-search, intelligence and counter-intelligence activities

The distinction between CI(S)A and search operations, intelligence, and counter-intelligence measures is also based on the sources of the legal regulatory framework for their conduct and implementation.

The CPC of Ukraine and the Instruction on the organization of covert investigative (search) actions and the use of their results in criminal proceedings, approved by Order № 114/1042/516/1199/936/1687/5 as of 16 November 2012, hereinafter – the Instruction) define the procedure for CI(S)A.

It should be borne in mind that according to article 9 of the CPC of Ukraine, the legal basis for criminal proceedings is the Constitution, the CPC, international treaties and other legislation. At the same time, laws and other legal regulations of Ukraine, the provisions thereof relate to criminal proceedings, shall be in compliance with the CPC, while legal regulations, which contradict it, are not applicable.

The Constitution of Ukraine, the Law of Ukraine "On OSA", the CC, the CPC, the Tax and Customs Codes, Laws of Ukraine regulating the activities of State law enforcement bodies, other legal regulations and international treaties are the legal framework for operative-search activities.

While article 8 of the Law of Ukraine "On OSA" refers to the relevant articles of Chapter 21 of the CPC of Ukraine governing the procedure for operational and operational-technical measures, the detailed regulatory mechanism for the forms and methods of operative-search activities is provided by the relevant depart-

mental orders drawn up by each law enforcement body independently.

The legal basis for the conduct of intelligence and counter-intelligence activities is the Constitution of Ukraine, international treaties in force, the laws of Ukraine “On intelligence”, “On counter-intelligence activities”, “On OSA” etc., and by-laws.

However, contrasting CI(S)A and OTM, the procedure for intelligence and counter-intelligence measures is not governed by laws, but by-laws drawn up by the SSU and other bodies authorized to conduct them.

For example, the regulatory mechanism for the performance of a special assignment has its specificities.

The procedure for the performance of special assignments in the course of operative-search activities, in accordance with article 8, part 1, para. 8 of the Law of Ukraine “On OSA”, is defined by the provisions of article 272 of the CPC of Ukraine.

However, the procedure for the organization and conduct of intelligence (special) tasks by personnel and persons involved in confidential cooperation, including during their mem-

bership in terrorist or other criminal organizations, transnational criminal groups and other organizations that pose external threats to the national security of Ukraine are defined by-laws of the intelligence agencies (Law of Ukraine “On Intelligence”, 2020).

In such context, the development and institutionalization in law of general requirements for the conduct of CI(S)A, SO, OTM, intelligence and counter-intelligence activities, taking into account fundamental guarantees of human and civil rights and freedoms, will allow equating these forms of collecting covert information and using them in criminal proceedings.

5. Conclusions

The key distinctions between CI(S)A and SO, OTM, intelligence and counter-intelligence measures make it possible to conclude that the organizational basis, grounds and procedure for conducting, requirements for recording and use of the above-mentioned measures vary significantly. On the one hand, this eliminates their equation and, on the other hand, underlines the need to streamline and further regulate operative-search, intelligence and counter-intelligence activities at the legislative level.

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ВІДМІННІСТЬ НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ ВІД ОПЕРАТИВНО-ТЕХНІЧНИХ ТА ОПЕРАТИВНО-РОЗШУКОВИХ ЗАХОДІВ (ЧАСТИНА 2)

Анотація. *Метою статті* є дослідження сутності організаційних засад, підстав і порядку проведення, вимог до фіксації та використання таких заходів, як оперативно-розшукові заходи, оперативно-технічні заходи та негласні слідчі (розшукові) дії.

Результати. Другу частину дослідження присвячено питанням використання матеріальних носіїв інформації, предметів, документів і зразків, що одержані під час оперативно-розшукових, оперативно-технічних, розвідувальних та контррозвідувальних заходів у кримінальному судочинстві. Окреслено різні підходи до оцінки таких відомостей, умови та підстави використання їх як доказів; наведено причини, через які матеріали оперативно-розшукової, розвідувальної та контррозвідувальної діяльності визнавалися недопустимими. Так, наприклад, під час оцінювання матеріалів оперативно-розшукової справи щодо допустимості доказів Верховний Суд звернув увагу на те, що в наданих матеріалах відсутні дані про те, що оперативно-розшукова справа була заведена стосовно засудженої особи (це є обов'язковою умовою для проведення оперативно-розшукових та оперативно-технічних заходів). Оперативно-розшукову справу, з якої прокурором надано матеріали, було закрито на підставі п. 7 ст. 9-2 Закону України «Про оперативно-розшукову діяльність» у зв'язку з невстановленням у передбачені законом строки даних, які вказують на ознаки злочину в діях особи, а самі матеріали були знищено у встановленому законом порядку. Ухвали слідчих судів апеляційного суду, які містили дозволи на проведення оперативно-технічних заходів щодо цієї особи, стороні захисту не відкривалися та не були надані суду. Зазначені обставини стали підставою для визнання наданих стороною обвинувачення документів, складених за результатами оперативно-розшукової діяльності, недопустимими доказами. Проаналізовано спільні риси та відмінності оперативно-розшукових, розвідувальних і контррозвідувальних заходів, з урахуванням судової практики Європейського суду з прав людини та Верховного Суду визначено критерії, за яких одержану під час проведення таких заходів інформацію можна використовувати у кримінальному процесі. Особливу увагу приділено прогалинам у законодавстві, які перешкоджають використанню матеріалів контррозвідувальної діяльності для доведення вини особи у вчиненні кримінальних правопорушень, окреслено шляхи їх усунення. Розглянуто питання можливості використання фактичних даних, одержаних у результаті оперативно-розшукової діяльності, з огляду на оцінку, яку надав у своєму рішенні Конституційний Суд України.

Висновки. Зроблено висновок, що організаційні засади, підстави та порядок проведення, вимоги до фіксації і використання вищезазначених заходів суттєво відрізняються. З одного боку, це виключає їх ототожнення, а з іншого – вказує на необхідність упорядкування й додаткової регламентації оперативно-розшукової, розвідувальної та контррозвідувальної діяльності на рівні законів.

Ключові слова: негласні слідчі (розшукові) дії, оперативно-розшукова діяльність, оперативно-технічні заходи, документи у кримінальному провадженні, докази, допустимість доказів, слідчі дії.

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