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PARTICULARITIES OF OBTAINING AND POTENTIALS OF USING COVERTLY OBTAINED INFORMATION IN CRIMINAL PROCEEDINGS

Abstract. ***Purpose.*** The purpose of the article is to determine the ways of legal justification for the use of covertly obtained information in criminal proceedings. ***Results.*** The article reveals that the search and cognitive capabilities of covert investigative (search) actions are important for establishing the circumstances of criminal offences and solving other tasks of criminal proceedings, however, since the introduction of this institution in criminal proceedings, a number of problematic issues have emerged regarding the use of information obtained as a result of covert investigative (search) actions (which is actually covertly obtained information) in criminal proceedings. There is an ambiguous attitude towards the legislator's interpretation of the equivalence of the results of covert investigative (search) actions to the results of investigative (search) actions. The investigating judge shall consider the motion in accordance with the requirements of Articles 247 and 248 of this Code and shall reject it unless the prosecutor, inter alia, proves the legality of obtaining the information and the existence of sufficient grounds to believe that it indicates the detection of signs of a criminal offence. ***Conclusions.*** It is proved that the results of covert investigative (search) actions shall be verified and confirmed by public investigative (search) actions. The procedural form of public investigative (search) actions, during which information confirming the results of covert investigative (search) actions is obtained, will compensate for vagueness of the procedural form of covert investigative (search) actions, which is objectively necessary for the effective conduct of covert investigative (search) actions. Therefore, the final assessment of the results of covert investigative (search) actions to decide whether to use them as evidence in the pre-trial investigation is possible only after their verification and confirmation based on the results of other procedural actions (covert investigative (search) actions, investigative (search) actions, etc.) A specific and mandatory condition for the use of information obtained during a covert investigative (search) action as evidence in adversarial criminal proceedings is the removal of the secrecy stamp from its protocol and annexes thereto, as well as from the petition and procedural decision on its conduct.

Key words: criminal proceedings, covert investigative (search) actions, information, covert obtaining, use.

1. Introduction

One of the key structural changes in the pre-trial investigation of crimes that had a significant impact on the transformation of the criminal proceedings paradigm was the inclusion of covert investigative (search) actions (CISA) in its structure, which almost completely replaced operative-search activities from the pre-trial investigation stage. This was made possible primarily due to the growing global awareness of the problem of determining the most effective means of criminal prosecution for grave and exceptionally grave crimes. The modern toolkit of procedural activities of investigators has been significantly expanded by CISA, as operative-search activities, relatively speaking, have become part of criminal procedural activities for pre-trial investigation of crimes, and therefore, the following terms have been introduced: investigative (search) and covert investigative (search) actions. The search and cognitive capabilities of CISA are important for establishing the circumstances of criminal offences and solving other tasks of criminal proceedings. However, since the introduction of this institution in criminal proceedings, a number of problematic issues have emerged regarding the use of information

obtained as a result of CISA (which is actually covertly obtained information) in criminal proceedings.

According to M.A. Pohoretskyi, covert investigative means are key in the world practice of law enforcement bodies, as they are responsible for solving and investigating more than 85% of grave and exceptionally grave crimes (Pohoretskyi, 2016). D.B. Serheieva argues that: covert investigative (search) actions, on the one hand, have the same epistemological nature and algorithm of implementation as eponymous search operations, since they are carried out using identical methods of cognition of the crime event, under the same secrecy regime. However, covert investigative (search) actions and search operations differ significantly in terms of their scope and legal regime by: the purpose and objectives of the conduct; the factual and legal grounds for the conduct; the legal status of the actors of their conduct (even if conducted by operational officers, they enjoy the rights of an investigator), and accordingly, the nature of legal relations arising in the course of their implementation; the procedural significance of the results obtained; the object, forms and methods of departmental control and prosecutorial supervision over their implementation (Serheieva, Pohoretskyi, 2014).

M. Shumylo believes that the current CPC of Ukraine lacks effective mechanisms to ensure that reliable results are obtained in the course of CISA (Shumylo, 2013).

Therefore, it can be stated that the problematic issues of using the results of CISA in criminal proceedings are not sufficiently developed, do not lose their relevance and are of interest for research.

The purpose of the article is to determine the ways of legal justification for the use of information obtained covertly in criminal proceedings.

2. General principles of covertly obtained information in criminal proceedings

When considering the informational capability of CISA in criminal proceedings, it is necessary to highlight a number of problematic issues related to both the conduct of CISA and the use of its results in criminal proceedings.

When investigating a crime, the investigator and the prosecutor, who is the procedural supervisor in criminal proceedings, should allow for that in practice there is an ambiguous attitude towards the legislator's interpretation of the equivalence of the results of CISA to the results of investigative (search) actions. M. Shumylo argues that, unfortunately, the new law, in addition to the good intentions of its makers, provides *volens nolens* for the possibility of very real abuses, for example, the potential criminality «inherent» in the procedures for inspecting inaccessible places, housing or other property of a person, exercising control over the commission of a crime, etc. This poses a serious threat to the rights and freedoms of individuals, the legitimacy and fairness of justice, so in our realities, the role of the procedural form should not be underestimated, especially where there are significant risks of human rights violations and falsification of evidence (Shumylo, 2013). It should be noted that similarly D.B. Serheieva (2014) underlines this in the context of identifying and analysing the content of problematic aspects of using the results of information retrieval from transport telecommunication networks as evidence in criminal proceedings, and N.V. Hlynska, L.M. Loboiko and O.H. Shylo (2015) highlight corruption factors of the criminal procedural legislation of Ukraine. Developing his perspective, M. Shumylo proposes to enshrine in Article 256 of the CPC of Ukraine the rule that the results of CISA may be recognised as evidence if they are confirmed by a sufficient set of evidence obtained from independent sources during public investigative (search) actions (Shumylo, 2013). In general, we agree with M. Shumylo that it would be advisable to clarify the provisions of Article 256 of the CPC in terms of strengthening the guarantees of protection of rights and freedoms of a person during covert investigative (search) actions, but we cannot support his proposal to introduce the term «interdependent source of evidence» because we expect that if it is introduced into the CPC of Ukraine in the absence of its definition in the current CPC of Ukraine and in the theory of evidence, the question will raise in practice regarding the correlation between the interdependence of sources of evidence and the legislator's requirement in the CPC of Ukraine, Article 94, part 1, to assess the totality of the evidence collected in terms of their interconnection. Through information about the circumstances of the criminal offence and the persons involved, which are mutually confirmed from different sources, the relationship between these sources of evidence is formed. In this regard, the Plenum of the Higher Specialised Court of Ukraine in its Resolution No. 3 of June 03, 2016 «On review of the practice of consideration of criminal proceedings regarding crimes against life and health of a person» states that evidence should be based on a set of signs or irrefutable presumptions that are sufficiently weighty, clear and consistent with each other, and in the absence of such signs, it cannot be stated that the guilt of the accused has been proved beyond reasonable doubt. Reasonable doubt is a doubt that is based on certain circumstances and common sense, arises from

a fair and balanced consideration of all relevant and admissible information recognised as evidence, or from the absence of such information, and is such that it would make a person abstain from making a decision in matters of importance to him or her (Resolution of the Plenum of the Higher Specialized Court of Ukraine on consideration of civil and criminal cases «On review of the practice of consideration of criminal proceedings regarding crimes against life and health of a person», 2016).

We believe that the results of CISA shall be verified and confirmed by public investigative (search) actions. The procedural form of public investigative (search) actions, during which information confirming the results of covert investigative (search) actions is obtained, will compensate for the lack of clarity of the procedural form of covert investigative (search) actions, which is objectively necessary for the effective conduct of CISA.

We argue that such a statutory requirement will not reduce the evidentiary value of the records of CISA, audio or video recordings, photographs, and other results obtained through the use of technical means, objects and documents seized during such actions or copies thereof, but on the contrary, will deepen the level of public trust in CISA and significantly reduce the risks of abuse by persons carrying out such procedural actions. The exceptional nature of CISA as a means of collecting evidence also requires special requirements for verification of their results. To resolve this issue, it would be possible to go another way: to detail the legal regulatory framework for the procedural form of conducting certain CISA by enshrining the methods of their conduct in the CPC of Ukraine. However, this will significantly reduce the effectiveness of the use of these exceptional means of collecting evidence, as well as search operations identical to them in terms of their epistemological nature, which, in turn, will have an extremely negative impact not only on the ability of law enforcement bodies to detect and stop crimes, but also on ensuring the national security of our State.

Therefore, we propose to make the following amendments and additions to the CPC, Article 256, part 1: *«1. Records on covert investigative (search) actions, audio or video recordings, photographs, other results obtained through the use of technical means objects and documents seized during such actions or copies thereof, may be used in proving, provided that they are confirmed by a sufficient set of evidence obtained in the course of investigative (search) actions and the procedure for conducting covert investigative (search) actions complies with the requirements of this Code.»*

3. Prospects for improving the regulatory framework for using the results of covert investigative (search) actions

The title of Article 257 of the CPC of Ukraine states that the results of CISA may be used for purposes other than those provided for in Article 256 of the CPC of Ukraine. The analysis of the text of this article shows that one of the purposes is to use information on signs of a criminal offence obtained as a result of conducting a criminal investigation only in another criminal proceeding (which is not being investigated in this criminal proceeding) (the CPC, Article 257, part 1). Such information transmitted to another criminal proceeding, in accordance with the procedure set out in the CPC of Ukraine, Article 257, paragraphs 1, 2, in turn, is used in this criminal proceeding in accordance with the provisions of Article 256 of the CPC of Ukraine. In other words, the legislator has actually determined that the results of CISA can only be used in proving. Article 257 of the CPC does not contain any direct regulatory provisions on the use of information obtained in the course of CISA: to search for a person or to establish the location of objects, money, valuables. Although such a possibility can be seen from the provisions of the CPC, Article 249, part 4, which states that for the purpose of CISA, which is conducted to establish the location of a person hiding from the pre-trial investigation authorities, investigating judge or court, and is declared wanted, it may continue until the person's whereabouts are established, as well as the CPC, Article 269-1, part 1, which states that bank account monitoring is conducted to find property subject to confiscation or special confiscation in criminal proceedings under the jurisdiction of the NABU.

Since these actions coincide with the objectives of criminal proceedings, and moreover, their conduct, allowing for the information already obtained, is much more effective (and in some cases, even necessary) for the search for a person, objects, etc., the question of an appropriate regulatory framework arises.

We propose to amend and supplement the CPC, Article 257, paragraphs 1 and 2, and to set it out in the following wording:

«1. *The results of covert investigative (search) actions may be used to search for persons or property subject to confiscation or special confiscation in criminal proceedings in the course thereof they are conducted.*

2. If the conduct of a covert investigative (detective) action resulted in finding signs of a criminal offence which is not the subject of the criminal proceedings concerned, *or in obtaining data on a wanted person or property*

subject to confiscation or special confiscation in another criminal proceeding, the information obtained may be used in another criminal proceeding only on the basis of a ruling of the investigating judge, made on a motion of the public prosecutor.

The investigating judge shall consider the motion in accordance with the requirements of Articles 247 and 248 of this Code and shall reject it unless the prosecutor, inter alia, proves the legality of obtaining the information and the existence of sufficient grounds to believe that it indicates the detection of signs of a criminal offence.

3. The information obtained as a result of covert investigative (search) actions is transmitted only through the prosecutor» (Shevchyshen, 2016).

To sum up, the final assessment of the results of CISA for use as evidence in criminal proceedings is possible only after their verification and confirmation based on the results of other procedural actions (Shevchyshen, 2016). Furthermore, prosecutors and investigators should do so on the basis of not only the provisions of the CPC of Ukraine, but also the decisions of the European Court of Human Rights in specific cases on these issues.

4. Conclusions

The results of CISA shall be verified and confirmed by public investigative (search) actions. The procedural form of public investigative (search) actions, during which information confirming the results is obtained, will compensate for the lack of clarity of the procedural form of covert investigative (search) actions, which is objectively necessary for the effective conduct of CISA.

The procedural form of public investigative (search) actions, during which information confirming the results of CISA is obtained, will compensate for vagueness of the procedural form of covert investigative (search) actions, which is objectively necessary for the effective conduct of CISA. Therefore, the final assessment of the results of covert investigative (search) actions to decide whether to use them as evidence in the pre-trial investigation is possible only after their verification and confirmation based on the results of other procedural actions (covert investigative (search) actions, investigative (search) actions, etc.) A specific and mandatory condition for the use of information obtained during a covert investigative (search) action as evidence in adversarial criminal proceedings is the removal of the status of classified information from its records and annexes thereto, as well as from the motion and procedural decision on its conduct.

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ОСОБЛИВОСТІ ОДЕРЖАННЯ ТА МОЖЛИВОСТІ ВИКОРИСТАННЯ НЕГЛАСНО ОДЕРЖАНОЇ ІНФОРМАЦІЇ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Анотація. ***Мета.*** Метою статті є визначення способів правового обґрунтування використання інформації, отриманої негласним шляхом, у кримінальному провадженні. ***Результати.*** У статті зазначено, що пошуково-пізнавальні можливості негласних слідчих (розшукових) дій мають велике значення для встановлення обставин події кримінальних правопорушень та вирішення інших завдань кримінального провадження, але за період від уведення зазначеного інституту у кримінальний процес виокремилася низка проблемних питань стосовно використання інформації, отриманої у результаті проведення негласних слідчих (розшукових) дій (яка, власне, й є негласно одержаною інформацією) у кримінальному провадженні. Спостерігається неоднозначне ставлення щодо визначення законодавцем рівнозначності результатів негласних слідчих (розшукових) дій до результатів слідчих (розшукових) дій. Слідчий суддя розглядає клопотання згідно з вимогами статей 247 та 248 цього Кодексу і відмовляє у його задоволенні, якщо прокурор, окрім іншого, не доведе законність отримання інформації та наявність достатніх підстав уважати, що вона свідчить про виявлення ознак кримінального правопорушення. ***Висновки.*** Доведено, що результати негласних слідчих (розшукових) дій повинні бути обов'язково перевірені та підтверджені гласними слідчими (розшуковими) діями. Процесуальна форма гласних слідчих (розшукових) дій, під час яких отримуються відомості, котрі підтверджують результати негласних слідчих (розшукових) дій, компенсуватиме об'єктивно необхідну для ефективного проведення негласних слідчих (розшукових) дій нечіткість процесуальної форми їх проведення. Тому кінцева оцінка результатів здійснення негласних слідчих (розшукових) дій для прийняття рішення щодо використання їх у доказуванні під час досудового розслідування можлива лише після їх перевірки та підтвердження за підсумками інших процесуальних дій (негласних слідчих (розшукових), слідчих (розшукових) дій тощо). Специфічною та обов'язковою умовою для використання відомостей, одержаних під час негласної слідчої (розшукової) дії, у доказуванні у змагальному кримінальному провадженні є зняття з її протоколу та додатків до нього грифу таємності, а також із клопотання та процесуального рішення щодо його проведення.

Ключові слова: кримінальне провадження, негласні слідчі (розшукові) дії, інформація, негласне одержання, використання.

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