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SOME PROBLEMATIC ISSUES OF USING RESULTS OF CONTROL OVER COMMISSION OF CRIME

Abstract. ***Purpose.*** The purpose of the article is to study and analyse the legal and practical aspects of using the results of covert investigative (search) actions in criminal proceedings. The purpose of the study is to identify and analyse the existing problems and contradictions related to the use of the results of covert investigative (search) actions, to assess their impact on the fairness of the trial and the rights of suspects, and to develop recommendations for improving the legislation and law enforcement practice with a view to ensuring an appropriate balance between the effectiveness of combating crime and protection of human rights. ***Results.*** The article considers topical issues related to the use of the results of control over the commission of a crime in criminal proceedings. The author analyses the main problems that arise when collecting, preserving and using evidence obtained during controlled deliveries, operational purchases and other methods of such control. A special emphasis is placed on the legal aspects of the admissibility of evidence obtained as a result of relevant covert investigative (search) actions in court proceedings, as well as their impact on the rights and freedoms of suspects and accused persons. Recommendations are made to improve the legislation and practice of law enforcement bodies. Based on the analysis of international experience, the author suggests ways to increase the effectiveness and legality of the use of control measures in combating crime, emphasising the need to respect the principles of justice and human rights. ***Conclusions.*** The legal basis for the use of the results of control over the commission of a crime is determined by criminal procedure legislation and special regulations. This framework regulates the procedures for collecting, recording, preserving and using evidence obtained as a result of operational and investigative measures. The main provisions are focused on ensuring the legality and observance of the rights and freedoms of persons subject to such measures. To improve the legislation, the legal limits and conditions of control over the commission of a crime, as well as procedural guarantees for the protection of individual rights, should be more clearly defined. Recommendations include strengthening supervision of law enforcement officers, improving mechanisms for judicial control over the use of collected evidence, and ensuring that law enforcement officers are properly trained and educated on ethics and human rights.

Key words: covert investigative (search) actions, control over commission of crime, admissibility of evidence, human rights.

1. Introduction

The use of the results of control over the commission of a crime raises a number of complex issues that require in-depth analysis and informed decisions. One of the key issues is the legality and admissibility of evidence obtained as a result of such covert investigative (search) actions. In many cases, doubts arise as to the observance of the rights and freedoms of persons engaged in controlled actions, which may cast doubt on the legality of the evidence obtained.

The second significant problem is the ethical aspects of using provocation as a method of combating crime. Provocation can lead to the artificial creation of conditions for committing a crime that would not have been committed under normal circumstances. This raises the question of the limits of admissible interference by law enforcement bodies in the private life of citizens and the possibility of abuse of power.

An additional difficulty is the procedural aspects of documenting and using the results

of control measures in court proceedings. There are often difficulties with recording and submitting evidence obtained as a result of controlled deliveries or other covert investigative (search) actions. This may lead to problems with their interpretation in court and affect the fairness of the trial.

Therefore, the issue of using the results of control over the commission of a crime requires a comprehensive approach that includes legal, ethical, procedural and international aspects. Solving these problems can improve the effectiveness of law enforcement and ensure the observance of the rights and freedoms of citizens.

The purpose of the article is to study and analyse the legal and practical aspects of using the results of covert investigative (search) actions in criminal proceedings. The purpose of the study is to identify and analyse the existing problems and contradictions related to the use of the results of covert investigative (search) actions, to assess their impact on the fairness of the trial and the rights of suspects, and to develop recommendations for improving the legislation and law enforcement practice with a view to ensuring an appropriate balance between the effectiveness of combating crime and protection of human rights.

The purposes of the article are to analyse the legal framework for the use of the results of control over the commission of a crime; to assess the practical implications of the use of the results of control over the commission of a crime; and to provide recommendations for improving the legislation and practice of using the results of control over the commission of a crime.

2. Regulatory framework for covert actions

The introduction of the institution of covert investigative (search) actions (hereinafter - CISA) into the national criminal procedure legislation has necessitated the consolidation of a scientifically sound mechanism for implementing their results in criminal proceedings and, in particular, in criminal procedural proving (Teliichuk, Fedchenko, Moroz, Kozar, 2016, p. 5). However, a number of problematic aspects arise when conducting these covert investigative (search) actions. A significant percentage of information obtained in the course of covert investigative (search) actions is recognised by the court as inadmissible evidence due to the inconsistency of the recorded results with the requirements set out in the CPC of Ukraine (Kostyuk, 2021, p. 267). M. Pohoretskyi emphasises that, in contrast to the Ukrainian judicial system, the US case law shows that more than 95% of the materials provided under the CISA are admissible as a result of provocation of a crime and other violations (Pohoretskyi, 2016, p. 33). Instead, the analysis of the practice of national judicial authorities indicates that it is the results of control over the commission of, for example, crimes related to drug trafficking that are used as evidence in criminal proceedings when prosecuting a perpetrator (Holovin, 2021).

Moreover, in our opinion, M. Pogoretskyi fails to focus on the judicial system, leaving without assessment the correctness of obtaining these materials, as well as the doctrinal and practical level of development and use of relevant investigative methods.

The legal category of provocation of a crime has been studied in sufficient detail in international court practice, in particular, by the European Court of Human Rights, and is reflected in its legal positions set out in judgments on the relevant category of cases (Kononenko, 2011).

Legislation currently distinguishes between two procedures for conducting covert actions: the one defined by the criminal procedure legislation (covert investigative (search) actions) and the Law of Ukraine "On Operative and Search Activities" (operative and search actions). Moreover, in some respects, they compete, which indicates the need for legislative harmonisation of existing conflicts. There are opinions that the use of the CPC institutions to combat crime is more effective than conducting the OSA. According to D. Holovin, one can agree with this thesis to a certain extent. Therefore, when it comes to documenting individual episodes of criminal offences committed by single criminals or groups of persons in a simple form of complicity, limiting the arsenal of law enforcement bodies to the possibilities of the CPC is justified (Holovin, 2021). However, if the goal of law enforcement is to expose criminal networks with transnational ties, organised criminal groups with a hierarchical structure, a significant degree of secrecy, corruption, etc., the development of an operative investigation case is more effective. For example, according to the CPC of Ukraine, Article 99, part 2, the materials of the OSA collected by the operational units in compliance with the Law of Ukraine "On Operative and Search Activities", provided they meet the requirements of this article, may be used as evidence in criminal proceedings. Failure to comply with these requirements under Part 1 of Article 88 of the CPC of Ukraine is grounds for inadmissibility of evidence, which leads to the impossibility of its use in making procedural decisions. Moreover, it cannot be relied upon by the court when making a judgement. Therefore, compliance with the procedural rules governing the procedure for obtaining and recording data

in the course of conducting investigative operations and the competence of persons authorised to make decisions on their conduct is essential for achieving the goal of criminal proceedings (Babikov, Sokolkin, 2014).

These legal regulations are important in terms of ensuring the evidentiary nature of the results obtained in the process of controlling the commission of criminal offences involving psychotropic and narcotic substances. D. Holovin emphasises that in accordance with the CPC of Ukraine, Article 99, Part 2, para. 6, materials containing factual data on unlawful acts of individuals and groups of individuals collected by operational units in compliance with the requirements of the Law of Ukraine "On Operative and Search Activities", subject to compliance with the requirements of this article, are documents and may be used in criminal proceedings as evidence (Criminal Procedure Code of Ukraine, 2012). He makes the following conclusions. First, the materials obtained by specially authorised actors in the course of conducting operative and search activities are referred to as procedural sources of evidence as documents containing duly recorded information that can be used to confirm/refute facts and/or circumstances that need to be clarified in the course of criminal proceedings.

Second, to acquire the "quality" of evidence, such materials must meet the requirements of Article 99 of the CPC of Ukraine. In this context, part 7 of Article 99 of the CPC of Ukraine should be emphasised, as it provides that a party is obliged to enable the other party to inspect or copy the original documents, the content of which was proved in the manner prescribed by this Article (Holovin, 2021).

Third, in order to acquire the "quality" of evidence, such materials shall be collected by operational units in compliance with the requirements contained in the Law of Ukraine "On Operative and Search Activities" (Holovin, 2021).

3. Case law of the European Court of Human Rights

It should be noted that according to parts 11 and 12 of Article 290 of the CPC of Ukraine, the parties to criminal proceedings shall disclose to each other additional materials received before or during the trial. If a party to the criminal proceedings fails to disclose such materials in accordance with the provisions of this article, the court is not entitled to admit the information contained therein as evidence (Criminal Procedure Code of Ukraine, 2012). It is evident that these legal provisions are imperative, and therefore their non-compliance entails relevant procedural consequences, in particular, non-recognition of materials obtained in the course of control over the commission of crimes as evidence, which negates the work of law enforcement officers and in most cases leads to the non-conviction of a person actually due to improper procedural activities of state bodies. For example, in its Resolution of 29 April 2020 in case No. 428/8931/15-к, the Supreme Court composed of the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation stated the following: "The court regards as inadmissible the protocol on the results of the covert investigative (search) action - removal of information from transport telecommunication networks of 09 June 2015 and a copy of CD-R disc No. 373 of 10 May 2015, as the investigator's request for permission to conduct covert investigative (search) actions of 06 May 2015 and the ruling of the investigating judge of the Court of Appeal of Kharkiv region of 07 May 2015 on granting permission to interfere with private communication, namely the removal of information from transport telecommunication networks, were not disclosed to the defence during the pre-trial investigation in accordance with the provisions of Article 290 of the Criminal Procedure Code of Ukraine. In this regard, the court also declared inadmissible derivative evidence, namely the inspection report of 23 June 2018, the report on the results of the covert investigative (search) action of 09 June 2015 with transcripts of telephone conversations and the inspection report of 23 June 2015 of a copy of CD-R disc No. 373 of 10 May 2015" (Resolution of the Criminal Court of Cassation of the Supreme Court, 2020).

The court declared inadmissible not only the protocol based on the results of the covert investigative (detective) action, but also the derived evidence, which is quite logical given the doctrine of "fruit of the poisonous tree": a poisonous tree produces the same fruit, so evidence obtained from an improper evidence cannot be considered as evidence.

This doctrine was formulated by the European Court of Human Rights, which considers cases of violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (which is part of national legislation) (Kononenko, 2004, p. 97) in a number of cases, among which it is worth mentioning the cases against Ukraine - Balytskyi v. Ukraine (Balitskiy v. Ukraine) (Case of Balitskiy v. Ukraine. Application no. 12793/03, 2011), "Nechiporuk and Yonkalo v. Ukraine (Case of Nechiporuk and Yonkalo v. Ukraine. Application no. 42310/04, 2011), "Shabelnik v. Ukraine" (Case of Shabelnik v. Ukraine. Application no. 16404/03, 2009), "Yaremenko v. Ukraine" (Yaremenko v. Ukraine) (Case of Yaremenko v. Ukraine. Application no. 32092/02, 2008).

According to Yu. Tsyhaniuk, "the doctrine of 'fruit of the poisonous tree' is of great procedural importance due to the absence of one of the properties of evidence in criminal proceedings (Tsyhaniuk, 2019, p. 64).

It should also be noted that there is a positive practice of national courts regarding the use of the results of crime control as evidence in criminal proceedings. For example, the Supreme Court composed of the panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation in its decision of 9 September 2021 (case No. 467/1476/19) noted the following: "the criminal proceedings show that the accusation against PERSON_1 of illegal acquisition, storage, transportation with intent to sell and illegal sale of particularly dangerous drugs, as well as repeated illegal acquisition, storage, and transportation with intent to sell and illegal sale of drugs to the alleged person "PERSON_2" was based, in particular, on the data of the prosecutor's resolutions on control over the crimes, transportation with intent to sell and illegal sale of narcotic drugs to the alleged person "PERSON_2" were based, in particular, on the data of the prosecutor's decisions on control over the commission of crimes and the data of the protocols on the results of this CISA, which recorded in detail the course of operational purchases ... " (Resolution of the Criminal Court of Cassation of the Supreme Court, 2021).

4. Conclusions

The legal basis for the use of the results of control over the commission of a crime is determined by criminal procedure legislation and special regulations. This framework regulates the procedures for collecting, recording, preserving and using evidence obtained as a result of operational and investigative measures. The main provisions are focused on ensuring the legality and observance of the rights and freedoms of persons subject to such measures.

The practical effects of the control over the commission of a crime include both positive and negative aspects. On the one hand, the results of the control often allow for the successful detection of crimes and the prosecution of perpetrators. On the other hand, improper use of these results can lead to violations of human rights.

To improve the legislation, the legal limits and conditions of control over the commission of a crime, as well as procedural guarantees for the protection of individual rights, should be more clearly defined. Recommendations include strengthening supervision of law enforcement officers, improving mechanisms for judicial control over the use of collected evidence, and ensuring that law enforcement officers are properly trained and educated on ethics and human rights.

References:

Babikov, O., Sokolkin, V. (2014). Vykorystannia u kryminalnomu provadzhenni yak dokaziv materialiv, otrymanykh operatyvnymy pidrozdilamy u zdiisnenni ORD [Use in criminal proceedings as evidence of materials obtained by operative units in the implementation of ORD]. (2014). *gp.gov.ua*. Retrieved from https://khar.gp.gov.ua/ua/xarzmi.html?_m=publications&_t=rec&id=148568&fp=90&s=print (in Ukrainian).

Case of Balitskiy v. Ukraine. Application no. 12793/03. 3 November 2011. URL: http://hudoc.echr.coe.int/eng?i=001-107185 (in English).

Case of Nechiporuk and Yonkalo v. Ukraine. Application no. 42310/04. 21 April 2011. URL: http://hudoc.echr.coe.int/eng?i=001-104613 (in English).

Case of Shabelnik v. Ukraine. Application no. 16404/03. 19 February 2009. URL: http://hudoc.echr.coe.int/eng?i=001-91401 (in English).

Case of Yaremenko v. Ukraine. Application no. 32092/02. 12 June 2008. URL: http://hudoc.echr.coe.int/eng?i=001-86885 (in English).

Holovin, D.V. (2021). Provedennia kontroliu za vchynenniam zlochyniv u sferi obihu narkotychnykh zasobiv, psykhotropnykh rechovyn, yikh analohiv abo prekursoriv [Conducting control over the commission of crimes in the sphere of circulation of narcotic drugs, psychotropic substances, their analogues or precursors]. *Candidate's thesis*. Odesa (in Ukrainian).

Kononenko, V.P. (2004). Zakonodavstvo chy zakon? [Legislation or law?]. Pravo Ukrainy. 2004. № 4. pp. 96-98 (in Ukrainian).

Kononenko, V.P. (2011). Otsenka Evropeiskym sudom po pravam cheloveka sposobov poluchenyia dokazatelstv po delam o nezakonnom oborote narkotykov [Evaluation by the European Court of Human Rights of methods of obtaining evidence in cases of illegal drug trafficking]. Dosudove slidstvo, farmatsevtychne i medychne pravo, yak skladovi derzhavnoi polityky Ukrainy u protydii narkozlochynnosti ta poshyrenniu narkomanii: vid politseiskoi khimii i sudovoi farmatsii do farmatsevtychnoho i medychnoho zakonodavstva, no. 2, pp. 170-172 (in Ukrainian).

Kostiuk, V.I. (2021). Problemni aspekty provedennia nehlasnykh slidchykh (rozshukovykh) dii [Problematic aspects of conducting covert investigative (search) actions]. Ternopil (in Ukrainian).

Kryminalnyi protsesualnyi kodeks Ukrainy vid 13 kvitnia 2012 roku [Criminal Procedure Code of Ukraine dated April 13, 2012]. (2012). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text (in Ukrainian).

Pohoretskyi, M.A. (2016). Zastosuvannia provokatsii v khodi nehlasnykh rozsliduvan: pytannia pravomirnosti [The use of provocation in the course of secret investigations: the question of legality]. Visnyk kryminalnoho sudochynstva, no. 1, pp. 33-42 (in Ukrainian).

Postanova Kasatsiinoho kryminalnoho sudu VS vid 29 kvitnia 2020 roku u spravi № 428/8931/15-k [Resolution of the Criminal Court of Cassation

of the Supreme Court of April 29, 2020 in case No. 428/8931/15-k]. (2020). *court.gov.ua*. Retrieved from https://reyestr.court.gov.ua/Review/89082817 (in Ukrainian).

Postanova Kasatsiinoho kryminalnoho sudu VS vid 9 veresnia 2021 roku u sprava № 467/1476/19 [Resolution of the Criminal Court of Cassation of the Supreme Court dated September 9, 2021 in case No. 467/1476/19]. (2021). *court.gov.ua*. Retrieved from https://reyestr.court.gov.ua/Review/99613011 (in Ukrainian).

Teliichuk, V.H., Fedchenko, V.M., Moroz, S.M., Kozar, O.S. (2016). Deiaki pytannia shchodo oformlennia rezultativ provedennia nehlasnykh slidchykh (rozshukovykh) dii: Metodychni rekomendatsii : navchalno-metodychne vydannia [Some questions regarding the registration of the results of clandestine investigative (research) actions: Methodological recommendations: educational and methodical publication]. Dnipro : Dnipropetrovskyi derzhavnyi universytet vnutrishnikh sprav (in Ukrainian).

Tsyhaniuk, Yu.V. (2019). Doktryna «plodiv otruinoho dereva» u kryminalnomu protsesualnomu zakonodavstvi Ukrainy [The doctrine of "fruits of the poisonous tree" in the criminal procedural legislation of Ukraine]. Visnyk kryminalnoho sudochynstva, no. 2, pp 54-67. (in Ukrainian).

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ДЕЯКІ ПРОБЛЕМИ ВИКОРИСТАННЯ РЕЗУЛЬТАТІВ ПРОВЕДЕННЯ КОНТРОЛЮ ЗА ВЧИНЕННЯМ ЗЛОЧИНУ

Анотація. ***Мета.*** Метою статті є дослідження і аналіз правових та практичних аспектів застосування результатів негласних слідчих (розшукових) дій у кримінальному провадженні. Виявлення та аналіз існуючих проблем та суперечностей, пов'язаних з використанням результатів негласних слідчих (розшукових) дій, оцінку їх впливу на справедливість судового розгляду та права підозрюваних, а також на розробку рекомендацій для вдосконалення законодавства і практики правоохоронної діяльності з метою забезпечення належного балансу між ефективністю боротьби зі злочинністю та захистом прав людини. ***Результати.*** У статті розглядаються актуальні питання, пов'язані з використанням результатів контролю за вчиненням злочину у кримінальному провадженні. Автор аналізує основні проблеми, що виникають при збиранні, збереженні та використанні доказів, отриманих під час проведення контрольованих поставок, оперативних закупок та інших методів такого контролю. Особлива увага приділяється правовим аспектам допустимості доказів, отриманих у результаті здійснення відповідних негласних слідчих (розшукових) дій у судовому процесі, а також їх впливу на права і свободи підозрюваних та обвинувачених. Пропонуються рекомендації щодо вдосконалення законодавства і практики правоохоронних органів. На основі аналізу міжнародного досвіду автор пропонує шляхи підвищення ефективності та законності застосування контрольних заходів у боротьбі зі злочинністю, підкреслюючи необхідність дотримання принципів справедливості і прав людини. ***Висновки.*** Правові основи використання результатів контролю за вчиненням злочину визначаються кримінально-процесуальним законодавством та спеціальними нормативно-правовими актами. Ці основи регулюють процедури збору, фіксації, збереження та використання доказів, отриманих внаслідок проведення оперативно-розшукових заходів. Основні положення зосереджені на забезпеченні законності та дотриманні прав і свобод осіб, щодо яких проводяться такі заходи. Для вдосконалення законодавства слід чіткіше визначити правові межі та умови проведення контролю за вчиненням злочину, а також процедурні гарантії захисту прав особи. Рекомендації включають посилення нагляду за діями правоохоронців, удосконалення механізмів судового контролю за використанням зібраних доказів, а також забезпечення належної підготовки та підвищення кваліфікації співробітників правоохоронних органів з питань етики та прав людини.

Ключові слова: негласні слідчі (розшукової) дії, контроль за вчиненням злочину, допустимість доказів, права людини.