

Ensuring procedural guarantees and the right to a fair trial during the examination of motions to conduct covert investigations¹

Aseguramiento de las garantías procesales y del derecho a un juicio imparcial durante la revisión de mociones para hacer investigaciones encubiertas

[Artículos]

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Abstract

The article aims to determine the general principles of guaranteeing human rights and freedoms during the the investigating judge's examination of motions of pre-trial investigation bodies and prosecutors for permission to conduct covert investigative actions. The subject of the research is the general principle of guaranteeing human rights and freedoms during the consideration of motions to conduct covert investigative actions by investigating judges and the problems of regulation of these issues within criminal procedure legislation. The article uses general scientific and unique research methods, such as comparative, formal, dogmatic, and dialectical. The study results allowed us to determine the areas of improvement of criminal procedural legislation on motions to conduct covert investigative actions. The need for ensuring human rights and freedoms require such actions. Based on the study results, proposals were made to amend the criminal procedure legislation on the motions for investigative actions. In this regard, the incompleteness of regulations requires appropriate amendments to the Criminal Procedure Code of Ukraine, as proposed by the authors. It is substantiated that implementing these changes will ensure sustainable and effective law enforcement practice in the field of organization and conduct of covert investigations, reduce inconsistencies, and ensure uniformity of approaches to determining sufficient and necessary grounds for interference in private communication.

Keywords: covert investigative actions, motions, human rights and freedoms, judicial control, interference in private communication

Resumen

El artículo tiene por objeto determinar los principios generales de la garantía de los derechos humanos y las libertades durante la revisión por parte del juez de instrucción de las peticiones de los órganos de instrucción y los fiscales para autorizar investigaciones encubiertas. El tema de la investigación son los principios generales de la garantía de los derechos humanos y las libertades durante la revisión de las mociones por parte de los jueces de instrucción para efectuar investigaciones encubiertas y los problemas de reglamentación de estas cuestiones en la legislación sobre procedimiento penal. En el artículo, se utiliza métodos generales de investigación científica y especial, como los dogmáticos comparativos, formales y dialécticos. Los resultados del estudio permitieron determinar las áreas de mejora de la legislación procesal penal respecto de las mociones para hacer investigaciones encubiertas. La necesidad de garantizar los derechos humanos y las libertades requiere, tales acciones. Con base en los resultados del estudio, se hicieron propuestas para modificar la legislación del procedimiento penal sobre las mociones de investigación. A este respecto, el carácter incompleto de la reglamentación exige las modificaciones pertinentes al Código de Procedimiento Penal de Ucrania, propuestas por los autores. Se ha demostrado que la aplicación de esos cambios asegurará una práctica sostenible y eficaz de aplicación de la ley en el ámbito de la organización y la realización de investigaciones encubiertas, reducirá las incoherencias y garantizará la uniformidad de

los enfoques para determinar los motivos suficientes y necesarios de injerencia en la comunicación privada.

Palabras clave: acciones de investigación encubiertas, mociones, derechos humanos y libertades, control judicial, injerencia en la comunicación privada.

Introduction

Judicial control over the observance of human rights and freedoms during covert investigative actions to obtain information, particularly concerning interference in private communication, is crucial given the significant increase in technical means of recording information and digitalizing public relations and information exchange processes, among others.

According to the criminal procedural legislation of Ukraine (Verkhovna Rada of Ukraine, 2013), the scope of judicial control over covert investigative actions includes the following components:

- control at the stage of consideration of the motion to conduct covert investigations by the investigating judge;
- control during the consideration of the motion to conduct covert investigations initiated before the investigating judge issued such a motion;
- the extension of the term of the covert investigation;
- permission to use the results of the covert investigations in other criminal proceedings.

Judicial control over the application of covert measures to obtain information is exerted by investigating judges of the courts of appeal and the High Anti-Corruption Court of Ukraine. Their authority includes granting permission to conduct measures involving the restriction of certain human rights and freedoms, including audio and video surveillance; arrest of the individual's correspondence; wiretapping; obtaining information from electronic devices and systems; secret examination of homes or workplaces; observation of a person; monitoring of banking operations; secret receipt of samples required for comparative research (Mykhaylenko, 2020). This list indicates that judicial control covers almost all areas associated with interference with privacy.

However, the scope of responsibilities of investigators and prosecutors is limited only to making decisions on observing a thing or place, removing information from electronic information systems with the permission of the owner or when the access is not restricted by an access password, conducting control over the commission of a crime, introducing an undercover person into a criminal group, and engaging of a person in confidential cooperation (Verkhovna Rada of Ukraine, 2013).

Having compared the delimitation of spheres of control over the conduct of covert investigative measures for obtaining information in Ukraine and some other countries of the former USSR, it can be claimed that the reform of criminal justice in all these countries was implemented in similar directions (the Republic of Estonia, the Republic of Moldova, and the Republic of Latvia). However, the sphere of judicial control in Ukraine is the widest and covers the vast majority of covert investigative measures entailing the restriction of human rights and freedoms (Criminal Procedure Code of the Republic of Moldova, 2003; Musiienko, 2019).

Moreover, any covert measures to obtain information related to interference with private communication may be implemented only in criminal proceedings on grave and especially grave crimes and can only be subject to prior permission of the judge (Maskaliuk, 2016). This is a rather tough approach to the conditions under which interference with private communication can be carried out, but its justification remains debatable. Hence, there is a need to analyze different approaches to determining the conditions and order of conducting covert investigative actions to obtain audio and video surveillance information.

Therefore, the article aims to determine the general principles of guaranteeing human rights and freedoms during the consideration of motions for permission to conduct covert investigative actions submitted by pre-trial investigation bodies and prosecutors. Based on the analysis of the legal practice concerning the consideration of motions for covert investigations by investigative judges, the grounds for granting such permission and the reasons for denial are analyzed, and ways to improve criminal procedural legislation in this area are suggested.

Regulation of Audio and Video Surveillance in Ukraine and Selected European Countries

Following the Draft Criminal Procedure Code (CPC) of Ukraine (Verkhovna Rada of Ukraine, 2011), the wording of Section 260 provided the possibility of conducting audio and video surveillance of a person in urgent cases before the judge made the decision. However, having examined the grounds and procedure for applying such measures, in the Opinion on the Draft Criminal Procedure Code of Ukraine (, 2011), Venice Commission drew attention to the need for an additional specification of the procedure and conditions for conducting audio and video surveillance of a person in terms of the consent to such control by at least one of the participants and the need for proper justification of such measures in the case it is held before the decision of the investigating judge. Consequently, the Venice Commission (2011) did not object to the possibility of audio and video surveillance before the investigating judge's decision. However, the final version of the

CPC of Ukraine (Verkhovna Rada of Ukraine, 2013) does not provide for the possibility of audio and video surveillance in urgent cases if a judge's permission is absent.

Such a significant limitation of the possibilities of collecting evidence, especially when it is necessary to objectively establish the circumstances of criminal offenses related to corruption and illegal trade of weapons and drugs, was criticized by law enforcement officials:

So, there are situations when an official requires permission by a certain hour of the same day when such a request is submitted. In this case, the prosecutor as a procedural leader does not have enough time to obtain all the relevant permits of the investigating judge to conduct a complex of secret investigative actions... (High Anti-Corruption Court of Ukraine, 2021)

Furthermore, according to the Criminal Procedure Code of Ukraine (2013), after receipt of an application or notification of a crime and before conducting covert investigations, it is necessary to take a series of consistent, mandatory procedural actions. These actions include the registration of an application or report on the commission of a crime in journals and registers, entering data into the electronic Unified Register of Pre-Trial Investigations, their confirmation by the head of the pre-trial investigation body and the prosecutor, the appointment of a prosecutor, and the authorization of an investigator to conduct a pre-trial investigation, which is formalized by entering data into the above Register and drawing up an order or resolution. After these procedural actions, the investigator prepares a motion to the investigating judge, agrees with the prosecutor, and submits it to the secret office of the court of appeal. At the appointed time, the investigating judge shall receive the proceedings materials, and, if necessary, the investigator will participate in considering the motion. In case permission is granted by the investigating judge, the investigator prepares an order for the operational unit based on the judge's decision (Safroniak & Lazarenko, 2013).

This list of necessary procedural actions takes much time, making it impossible to timely record the signs of crimes, which is extremely harmful to the investigation. Nevertheless, it should be noted that the possibility of audio and video surveillance with the suspect's consent before obtaining the court's permission is enshrined in the criminal procedural legislation of the Republic of Latvia. Moreover, the legislation of the Republic of Estonia permits audio and video surveillance upon the written decision of the prosecutor (Musiienko, 2019). In addition, the laws of the Republic of Moldova establish the prosecutor's obligation to inform the judge within 24 hours about the audio and video surveillance results to confirm their legality (Criminal Procedure Code of the Republic of Moldova, 2003).

At the same time, the legislation of these countries, in contrast to the CPC of Ukraine, provides for judicial control over the consequences of covert investigative actions, namely, sending materials on the consequences of the measures taken to court, annual reporting to

the public about the number and effectiveness of secret measures in criminal proceedings, the possibility of a person to familiarize with the materials of the investigation held against them, and in some cases, to appeal against the granted permission to conduct such covert measures.

Another problem for the prosecution when applying audio and video surveillance in criminal proceedings is the unconditional requirement for the severity of the investigated crime, which is provided for in Section 246 of the CPC of Ukraine. This measure can be implemented exclusively while investigating grave and especially grave crimes. For example, they do not include a number of corruption offenses, which are otherwise almost impossible to prove, namely: acceptance of a proposal, promise or receipt of an undue benefit by an official, a request to provide such a benefit for oneself or a third party (Part 1, Section 368 of the Criminal Code of Ukraine), illegal enrichment (Parts 1 and 2, Sections 368-2 and 368-5 of the Criminal Code of Ukraine), commercial bribery (Parts 1, 2, and 3, Section 368-3 of the Criminal Code of Ukraine), bribery of a person providing public services (Parts 1, 2, and 3, Section 368-4 of the Criminal Code of Ukraine), a proposal, promise or provision of an undue benefit to an official (Part 1, Section 369 of the Criminal Code of Ukraine), abuse of influence (Parts 1 and 2 of Section 369-2 of the Criminal Code of Ukraine), unlawful influence on the results of official sports competitions (Part 1, 2, and 3, Section 369-3 of the Criminal Code of Ukraine), and provocation of bribery (Part 1, Section 370 of the Criminal Code of Ukraine; Prosecutor General's Office of Ukraine et al., 2012).

It is necessary to highlight that excessive formalism in the criminal procedure legislation of Ukraine is a significant limitation of the possibility of conducting covert investigative actions to obtain information. In our opinion, this violated the balance of criminal justice interests and human rights and freedoms. As a result, the prosecution resorts to distortion of information on the circumstances of the crime under investigation to obtain the appropriate permission of the investigating judge. Thus, in 2021, the High Anti-Corruption Court of Ukraine (2021) generalized the state of judicial control while considering the prosecution's motions for permission to conduct covert investigative measures. As a result, the Court determined typical grounds for refusing to grant such permissions as follows:

- materials of criminal proceedings do not contain data on qualifying signs of a serious crime;
- there is no exact information about the qualification of a criminal offense in the materials of the proceedings, while the content of the motion does not correspond to the explanations of the detective provided at the hearing;
- there is a lack of information about a specific illegal act committed or being prepared;

- only information the agent receives, without verification, is indicated as the basis for covert investigative actions.

So, at the initial stage of the pre-trial investigation, when covert investigative actions need to be performed without delay, but the investigator and the prosecutor do not have objective data to prove their position before the court, prerequisites are created for an unreliable qualification of the illegal act. This is due to the registration of a more serious offense than actually committed or information about which is available exclusively to the prosecution. On the other hand, if there is a report of a serious crime, the investigating judge is forced to rely on the information provided by the prosecution in the absence of evidence and the inability to verify such information by conducting public investigative actions. In addition, the worst thing is that the legislation of Ukraine does not provide for further control over the results of covert investigative actions by the investigative judge. As a result, judicial control appears to be a formality that cannot ensure human rights and freedoms, establishing justice and proportionality of interference in one's private life and restricting rights and freedoms.

In addition, conducting covert investigative actions to obtain information against impersonal subjects is another problematic issue in ensuring the balance of interests and guarantees of rights and freedoms concerning the protection of public and national security. First, this concerns information transmitted through technical means of communication when the relevant special services intercept and accumulate data without information about subscribers, their illegal activities, etc.

Thus, in the judgment in *Azer Ahmadov v. Azerbaijan* (application no. 3409/10), the court stated that the authorization of surveillance did not contain information about a suspect as a specific person but only information about his colleague (European Court of Human Rights, 2021a). In *Big Brother Watch and Others v. The United Kingdom* (applications 158170/13, 62322/14, and 24960/15), the Court concluded that national legislation did not meet the requirements of the quality of law and the criterion of "Some stages of monitoring, including impersonal (mass) interception of messages transmitted by telecommunications channels, the use of real-time filters to determine the significance of intercepted information, analysis of selected and stored material by the analyst" (European Court of Human Rights, 2021b).

In this regard, the decisions issued by the ECHR allow us to conclude that monitoring telecommunications and inspecting calls, SMS, and e-mails in real-time by certain filters (keywords) is selected from surveillance cameras for further analysis (ECHR: Ukrainian Aspect, 2018). Apart from that, the failure to reflect the personal data of the suspect in the decision to conduct a covert investigation (ECHR: Ukrainian Aspect, 2021) does not meet the requirements of Sections 8 and 10 of the Convention.

Shortcomings of the System of Judicial Control over Covert Investigations in Ukraine

It is necessary to distinguish two critical problems in the field of judicial control over the observance of human rights and freedoms during covert investigations as follows: 1) formalism of judicial control; 2) the actual possibility of the competent authorities to carry out such interference against a particular person in a non-judicial way if there are declared guarantees of interference in private communication solely on the basis of the court decision.

Therefore, in our opinion, the provision of procedural guarantees during the conduct of covert measures in criminal proceedings cannot be achieved only by referring the granting of permission to conduct them to the competence of a particular body and establishing strict requirements for the procedure and grounds for its receipt. In most cases, the definition of judicial control as the most effective and sufficient to ensure human rights and freedoms is unjustified. Hence, a fair, balanced application of covert measures for obtaining information can be achieved only if their regulation harmoniously combines criminal justice interests, including the rapid conduct of investigative actions and the observance of guarantees, human rights, and freedoms through the mechanism for assessing their results.

To single out the main problems associated with the court's consideration of motions for covert investigative actions, it is necessary to consider the materials of the High Anti-Corruption Court (2021) and determine the typical violations that investigators and prosecutors commit when applying to the court.

1. The specific features of considering motions for permission to conduct covert investigative actions against the applicant are related to the information's reliability and the involvement of the applicant, who has some information, certain relationships, or contacts with persons whose illegal activities are being investigated. In this regard, the investigating judge should pay attention to the requirements for the application and the notification of a crime by the pre-trial investigation body. Documents must contain information about the applicant's warning of criminal liability for knowingly false reporting of a crime. Information about such warning may be contained both in the application and in the interrogation protocol of the applicant as a witness or victim. The main thing is that their content ensures the applicant's awareness of the essence and content of the information, and the specification excludes the possibility of double interpretation and avoidance of responsibility in the event of a knowingly false report of a crime. In addition, the voluntary participation of such a person in the covert investigation must be confirmed by written consent to such participation or confidential cooperation, with an explanation of their rights and obligations, including the

inadmissibility of actions aimed at provoking a crime. These circumstances can also be recorded in the protocol. It is allowed when consent to confidential cooperation, involvement in secret events, clarification of the rights and obligations of the applicant, and a warning about the non-disclosure of information constituting the secret of the pre-trial investigation and other data that will become known to them during such cooperation are drawn up in one protocol.

2. There are grounds to assert that obtaining information about the crime and the person who committed it or is preparing to commit it is otherwise impossible. Taking into account the exclusivity of covert measures, owing to the restriction of constitutional rights and freedoms of a person during their conduct, it is necessary for the investigating judge to study the circumstances and conditions of the crime during the consideration of the petition and to reach a conclusion that the prosecution cannot obtain relevant evidence in criminal proceedings otherwise.

In this regard, it is necessary to mention that the objective evidence of committing or preparing to commit a crime and a person's involvement in this act are insufficient to grant permission for conducting covert investigative actions. In addition, the lack of reasons to believe that it is impossible to obtain relevant evidence by public investigative actions other than the holding of unofficial events and the lack of grounds for granting permission is sufficient for the investigating judge to reject the motion. The impossibility of collecting evidence in any other way may be associated with the risk of leakage and disclosure of information in the event of public investigative actions, the possibility of the involved persons hiding evidence from the pre-trial investigation bodies and the court, the risk of distortion and concealment of information, pressure on witnesses, victims or other participants in the process.

Along with the above-mentioned circumstances, during the consideration of each motion for permission to conduct covert investigative actions, the investigating judge must also check the compliance of the content of the motion with the plot of the criminal offense and the correctness of the qualification entered in the Unified Register of Pre-Trial Investigations, regarding the severity of the registered crime, fulfillment of the requirements of jurisdiction, depending on whether the investigated crime belongs to the jurisdiction of the National Anti-Corruption Bureau (Advokat Post, 2021c).

Thus, having assessed the grounds for refusing to grant permission for a covert investigation, the High Anti-Corruption Court of Ukraine noted:

The detective's arguments that the commission of a criminal offense under Part 5, Section 191 of the Criminal Code of Ukraine, confirmed by the results of covert investigative measures in the form of printouts, are assumptions in nature. In addition, the detective did not prove at the

hearing that the motion for permission to take covert measures is necessary for the specified criminal proceedings (ECHR: Ukrainian Aspect, 2021)

Therefore, according to the High Anti-Corruption Court of Ukraine (Advokat Post, 2021a), the most typical cases of declaring petitions to conduct unjustified covert investigative actions are as follows:

1. Investigative actions have already been conducted against the defendant, but no information about their involvement has been received. This decision of the investigating judge is justified in circumstances where covert investigative actions are conducted against a person concerning events that took place six years ago, in criminal proceedings lasting five and a half years. Moreover, having performed the whole complex of investigative actions, which give grounds to suspect a person of committing a crime, there is no objective need for covert measures, so their conduct is an excessive interference with human rights and freedoms.
2. Covert investigative actions cannot be used to update criminal proceedings. The investigating judge concluded that

the covert investigation as a means of obtaining evidence in criminal proceedings is associated with a high degree of interference with human rights and freedoms. Such interference must be justified under the purpose of the investigation and the tasks of criminal proceedings, which include the impossibility of unjustified procedural coercion and the application of the due process to each participant in criminal proceedings. In turn, the intensification of the pre-trial investigation, as a result of which the participants in the criminal proceedings will negotiate the events of concluding and implementing the agreement, is insufficient grounds for granting permission to conduct a covert investigation. After all, in such circumstances, the prosecution forms the evidence base, not receives it.

In such circumstances, the investigating judge concluded that the conduct of the covert investigation did not meet its purpose and did not contribute to completing the tasks of criminal proceedings.

3. Conducting the covert investigation to simplify procedural activities does not meet the requirements of Article 8 of the Convention. Refusing to grant permission for such actions, the investigating judge noted:

The very idea, procedure, and grounds for the covert investigative actions indicate that they are an extreme measure of interference with human rights and only in cases where it is impossible to obtain necessary information otherwise. Given the nature of the covert investigation, it is not allowed to use it as the original or only procedural action to obtain evidence. However, it should be noted that conducting covert investigative actions against a suspect is simpler and more effective in terms

of the content and accuracy of the information received, although it requires significant technical resources.

4. Attempts to “legalize” previous actions conducted to obtain information in criminal proceedings do not follow the principles of criminal proceedings. Based on the results of the application for motions to conduct a covert investigation, the investigating judge found out that in a criminal case where the investigation lasted more than four years during a laptop search (conducted three years after its seizure), the detective found information about e-mail boxes and telephone numbers not previously known to the pre-trial investigation. To justify the need to access these boxes, the detective said that information in these e-mail boxes is important for criminal proceedings, which was promptly established.

Considering this unconvincing position of the detective, the investigating judge noted:

The person has already been suspected of committing a crime (which in procedural terms indicates the sufficiency of data on involvement in a criminal offense). In addition, the detective’s allegation that information available in cloud storage services is operative is a matter of concern. The only legal way to obtain relevant information is to extract it from surveillance cameras and electronic information systems. Therefore, it was necessary to apply to the investigating judge for permission to conduct covert investigative actions to obtain information already known to the pre-trial investigation body, which suggested “attempts to” legalize “previous actions to obtain information in criminal proceedings.

The lack of information on the conduct of an effective public investigation and the lack of proper justification for the possibility of obtaining it during the covert one became the basis for refusing to grant permission to carry them out. Substantiating the decision, the investigating judge stated: “The prosecutor did not specify what set of evidence became available during the pre-trial investigation and became the basis for a conclusion on the need for a covert investigation.”

5. The inadequate justification of the purpose of the covert investigation and the ability to achieve results. Refusing to grant permission, the investigating judge stated:

The detective did not substantiate the need to apply these types of covert measures and the way they will confirm or refute the fact of this person’s involvement in the commission of a crime. The petition does not contain a convincing substantiation of the possibility of obtaining evidence during the covert investigative actions, which may be essential for clarifying the circumstances of the crime.

6. An incomplete pre-trial investigation is grounds for refusing to issue a permit to conduct covert investigative actions. The decision to refuse to grant permission for this type of investigation is justified by the fact that it is applied against a person in relation to events that took place three years ago and taking into account that the

whole complex of investigative actions gave grounds to suspect that the person is involved in the commission of a crime. In such circumstances, the covert investigation would excessively interfere with human rights and freedoms.

7. Unreasonableness and formalism in drafting a motion. The investigating judge noted that when preparing a motion for permission to conduct covert measures, the detective used standard legislative wording, and no justification was given as to why it is necessary to continue such covert measures if information was already obtained as part of the covert investigation. The detective did not provide sufficient and substantiated additional information that gave grounds for the continuation of covert measures and did not indicate the circumstances that prevented the pre-trial investigation authority from achieving the goals of criminal proceedings with the help of information already received. In addition, during the consideration of the motion, no convincing justification was established for the possibility of obtaining evidence during the continuation of the covert measures, which could be essential for clarifying the circumstances of the crime. The reason for continuing them is that, to date, the entire amount of undue benefit funds has not been found, and the suspect may give this information in telephone conversations with other persons. Such justification is not enough for the investigating judge to conclude that it is necessary and advisable to take covert investigative measures against the suspect under the jurisdiction of the state.
8. The lack of information about a person's direct or indirect involvement in the events referred to in the motion and the justification of data solely by the detective's assumptions exclude the possibility of granting permission to conduct covert investigative actions. The investigating judge stated that "the materials of the criminal proceedings in the evidentiary plan do not allow to establish a connection between the committed offense and the person." It is also noted that occupying a particular leadership position is insufficient justification for a person's direct or indirect involvement in a crime.
9. The failure to meet the requirements for the "exclusivity" of covert measures. The reason for refusing to grant permission to conduct a covert investigation was that When asking for permission to extract information from surveillance cameras, the prosecutor did not provide any information that a person transmitted or received about the crime despite a long period of time from the date of the crime. At the same time, the prosecutor did not motivate his conclusions that the suspect was using a specific communication channel to transmit important information for criminal proceedings. In addition, noting the systemic nature of criminal activity, the prosecutor did not provide any evidence to substantiate this circumstance. In another decision, the investigating judge stated that although the detective proved the existence of an electronic information system at a particular electronic address owned by a corporation, the existence of information relevant for pre-trial investigation in this electronic information system, its purpose, and the fact of its existence at the time of the crime remained unproven.

The Role of the Investigating Judge and the Prosecutor in Covert Investigations

The investigating judge should assess the necessity and expediency of granting permission for covert investigative measures in each case, taking into account the circumstances of a particular criminal proceeding. The circumstances of the crime, the length of the pre-trial investigation, the results of previously conducted covert measures and investigative actions, fulfillment of the requirements of jurisdiction, the completeness and the objectivity of the presentation of the essential circumstances of the crime, and the information on the involvement of a specific person in the crime are subject to consideration by the investigating judge (Mykhaylenko, 2020).

The investigating judge noted that in the application for permission to conduct covert investigative actions, the detective allowed standard legal wording and did not provide any justification for covert activities to be continued. The detective's examination did not provide sufficient and substantiated additional information that would give grounds for continuing the covert investigation. The petition did not specify the circumstances preventing the pre-trial investigation body from achieving the purpose of criminal proceedings with the information already obtained. In addition, the request did not provide a convincing justification for the possibility of obtaining evidence during the continuation of the covert investigation, which may be essential for clarifying the circumstances of the crime. The investigating judge considered the motivation insufficient to conclude about the expediency of covert investigative actions (Advokat Post, 2021b).

However, the limits of judicial control, objectivity, and comprehensiveness of the circumstances of criminal proceedings and the availability of legal grounds for granting permission to conduct the covert investigation are limited by the impossibility of applying adversarial principles. Thus, the investigating judge clarifies the legal position and analyzes arguments only of the prosecution represented by the investigator or prosecutor. The specificity of the covert investigation is that its secrecy excludes the possibility of participation of the defense in their consideration. Accordingly, investigative judges' independence, impartiality, and objectivity are significant factors in ensuring human freedoms when considering such applications (Zhuk, 2020).

Accordingly, the issue of determining the limits of activity and initiative of investigative judges when considering the evidence provided by the prosecution to substantiate the petition becomes relevant. The court's desire to establish objective truth makes it impossible to treat the investigating judge as an outside observer of the investigation because they are responsible for the decision. In the case of motions to conduct a covert investigation, the position of a judge does not guarantee the protection of victims' rights and legitimate interests, as well as the protection of a person from the unjustified and illegal

restriction of their rights and freedoms. In such cases, the transformation of an investigating judge into an outside observer should be considered a violation of the state-guaranteed right to judicial protection (Lisovy, 2021).

Therefore, it seems pretty reasonable to establish for the investigating judge the right to initiate the provision of additional materials and the conduct of specific additional investigative and procedural actions, which will help to eliminate the incompleteness of the pre-trial investigation and provide an opportunity for the investigating judge to form a complete and objective picture of the crime and make a legitimate decision. Instead, the current CPC limits the investigating judge to granting or refusing permission. When deciding to refuse such permission, the judge may point out deficiencies or incompleteness of the pre-trial investigation, which prevents them from granting it. However, they are not obliged to do so. They may limit themselves to general wording such as “The prosecution did not provide sufficient objective data on the existence of grounds for covert investigative actions.”

In turn, even without taking measures to eliminate the shortcomings, the investigator and the prosecutor have the right to re-submit a similar request, hoping that another investigating judge will consider it. This state of affairs indicates a particular formalism in implementing the function of judicial control and the lack of its efficiency. As a result, the percentage of satisfied motions to conduct covert investigative actions is 80–90 % (High Anti-Corruption Court of Ukraine, 2021). The reason for this is that the investigating judge first examines the petition. Sometimes, they study the materials of the criminal proceedings and considers the investigator’s arguments on the circumstances of the criminal offense, evidence, and other relevant information to clarify the crime’s circumstances or the perpetrators’ identification.

However, even such a simplified procedure of judicial control when considering such motions is not regulated by law. The investigating judge is not obliged to investigate the materials of the criminal proceedings or to find out the information about the reasons and grounds for granting permission to conduct a covert investigation. In turn, the investigator and prosecutor who participate in the consideration of the petition or prepare a procedural document to substantiate their arguments (analytics, report notes, reports) are not responsible for providing the investigating judge with inaccurate information, explanations, or concealment of significant circumstances for making a legitimate decision.

Thus, the investigating judge must rely on any prosecution arguments or be guided by their own intuition. In our opinion, this cannot be considered a sufficiently compelling basis for ensuring human rights and freedoms, especially considering that covert investigations in criminal proceedings may be conducted not only against persons suspected of committing a crime but also against witnesses, victims, and other participants.

An additional factor that negatively affects the observance of human rights and freedoms when conducting covert investigative actions is the lack of provisions in the CPC of Ukraine that would provide a legal assessment of the results of such actions. In essence, the function of the investigating judge is limited to deciding whether to grant or refuse a permit to conduct covert investigative actions. The consequences of this decision, its actual implementation, the results, their use in criminal proceedings, or establishing unjustified restrictions on human rights and freedoms remain unobserved by the investigating judge, which, in fact, creates a sense of irresponsibility and impunity among law enforcement officers.

Conclusions

The study of the problem of ensuring procedural guarantees and a fair trial when conducting covert investigative actions to obtain information gives grounds for concluding that their practical application is possible only if the interests of the state and human rights and freedoms are harmoniously combined. This goal can be achieved by redistributing authorities to make decisions on the conduct of covert investigations, regulating the precise consideration of such issues by an authorized person, and introducing judicial, departmental, and public control over the results of such measures. Therefore, the following measures may be implemented in the Ukrainian criminal procedural legislation on covert investigations:

1. Grant investigators and prosecutors permission to conduct some covert investigative actions (for example, audio and video surveillance, extracting information from surveillance cameras) before the investigating judge makes the decision. The right to make such a decision may be connected solely with the urgency and impossibility of otherwise obtaining evidence. However, the subsequent control and assessment of the results of such actions shall be obligatory.
2. Expand the scope of covert investigative actions (such as audio and video surveillance of a person or a place, removing information from electronic networks, and observing a person) due to corruption criminal offenses, regardless of their severity.
3. Provide an additional basis for recognizing the evidence as inadmissible in cases where covert measures of obtaining information were taken without identifying a specific person.
4. Require the investigating judge to examine the procedure regulation within six hours to consider a motion for permission to take covert investigative measures.

5. Establish the duty of the investigating judge to objectively and comprehensively examine the existence of pretexts and grounds for conducting covert investigative measures in criminal procedure legislation. In addition, the investigating judge should be granted the right to request additional information from the investigator or prosecutor during the consideration of the motion and to issue obligatory instructions for perform specific investigative or procedural actions aimed at eliminating the incompleteness of the pre-trial investigation.
6. Amend Ukraine's criminal procedural legislation to require a warning of the petition initiator or other prosecution representative about the responsibility for providing knowingly false oral or written explanations to the investigating judge.
7. When filing a petition for permission to conduct covert investigative actions, require the prosecution to inform the investigating judge (the court) about the results of the covert investigation after it has been completed. In case of notification of the achievement of its purpose, the prosecution should additionally inform the court of the result of the criminal proceedings after the court makes a decision.
8. Oblige law enforcement agencies to provide the annual report on the conduct of covert investigations to obtain information for the parliament and the public, including the number of criminal proceedings in which covert measures were taken, categories of criminal offenses investigated, the number of criminal offenses related to organized crime, the number of secret examinations of housing, and costs associated with covert investigative actions.

Hence, only the use of a comprehensive and systematic approach can positively ensure the balance of interests and justice during the covert investigations to obtain information. This will be a prerequisite for reducing their number and will bring law enforcement practice closer to fulfilling the requirements of the law on the exclusivity of covert measures. It will also contribute to the protection of citizens' fundamental rights and freedoms.

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