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SOME ASPECTS OF ACTIVITIES OF THE HEAD OF A PRE-TRIAL INVESTIGATION BODY DURING COVERT INVESTIGATION

Abstract. ***Purpose.*** The purpose of the article is to study the problematic issues of exercising the full powers of the head of a pre-trial investigation body during covert investigative (search) actions and, allowing for the practice of pre-trial investigation bodies, to propose ways to resolve them. ***Results.*** The author emphasises that today the issues of conducting covert investigative (search) actions with respect to victims (or persons against whom a crime is being prepared) with their consent are particularly relevant. This practice is not only an effective means of collecting evidence, but also contributes to the timely suppression of unlawful acts and ensures the safety of persons involved in criminal proceedings. There are many reasons why covert investigative (search) actions have not yet become an effective remedy against crime. Meanwhile, the main ones are related to legislative gaps, vividly illustrated by the practice of applying Article 273 of the Criminal Procedure Code of Ukraine that regulates the manufacture and use of identified (marked) and bogus (imitation) means for specific covert investigative (search) actions. The author identifies the need to impose on the head of the pre-trial investigation body the duty to approve the investigator's decision to terminate further covert investigative (search) action, if this is no longer necessary, and subsequently inform the investigating judge who authorised the covert investigative (search) action of the decision to terminate this investigative action. The head of the pre-trial investigation body and prosecutor (as authorised decision-makers on the use of pre-identified (marked) or bogus (imitation) means) should entrust operational units to manufacture pre-identified (marked) or bogus (imitation) means, which in turn should record in separate investigative reports the fact of identification and delivery of the relevant means to the person. ***Conclusions.*** It is concluded that despite the positive experience of implementing the provisions of the Criminal Procedure Code of Ukraine, some issues of the regulatory framework for the full powers of the head of a pre-trial investigation body have not been fully resolved and require the development of legislative provisions with due regard to the need to ensure rights and freedoms and increase the efficiency of criminal proceedings.

Key words: head of a pre-trial investigation body, covert investigative (search) actions, operational or controlled procurement, controlled supply.

1. Introduction

The head of a pre-trial investigation body is one of the main participants in criminal procedural relations on the part of the prosecution. The criminal procedure law entrusts the head of the pre-trial investigation body with resolving fundamental issues of ensuring the proper level of legality, timeliness and efficiency of the procedural activities of investigators, for the implementation thereof he or she is vested with the relevant full powers.

Despite the fact that the procedural figure of the head of the pre-trial investigation body is of significance in the science of criminal procedure and law application, there are still numerous problems that complicate or reduce the effectiveness of the procedural activities of this participant in pre-trial proceedings. In addition, it should be considered that the presence of the head of a pre-trial investigation body as an independent participant in criminal procedural legal relations in criminal proceedings has led to heated academic debate. In the modern science of criminal procedure, the full powers of this participant, their content, scope, functions and other issues are almost the central focus of research.

Improving the procedural and organisational forms of exercising full powers by

the head of a pre-trial investigation body has been under the focus in the studies by many domestic and foreign procedural scholars (V.P. Ashytko, E.I. Voronin, Yu.V. Derishev, V.V. Kalnytskyi, P.I. Miniukov, M.A. Pogoretskyi, V.A. Sementsov, O.Yu. Tatarov, L.D. Udalova, V.I. Farynnyk, M.M. Cherniakov, H.P. Khimicheva), who have contributed to making reasonable proposals for improving the national criminal justice system. However, some issues, in particular in the course of covert investigative (search) actions, still remain unresolved.

The purpose of the article is to study the problematic issues of exercising the full powers of the head of a pre-trial investigation body during covert investigative (search) actions and, allowing for the practice of pre-trial investigation bodies, to propose ways to resolve them.

2. Role of the head of the pre-trial investigation body during covert investigation

The analysis of practice reveals that during the pre-trial investigation, situations often arise when, in order to prevent the commission of a grave crime or crime of special gravity or to stop it, it becomes necessary to immediately remove information from transport telecommunication networks, examine a publicly inaccessible place, dwelling or other property of a person, conduct audio and video monitoring of the place, etc. We fully advocate the perspective of those scholars who propose to formulate the relevant provisions of the CPC of Ukraine in this way as to clearly regulate the possibility of conducting any covert investigative (search) action before the ruling of the investigating judge is issued (Bahrii, M.V. (2015, p. 88; Kerevych, Klymchuk, 2015, pp. 243–244; Luk'ianchykov, 2015, pp. 5–6).

A comprehensive analysis of the provisions of Chapter 21 of the CPC of Ukraine gives grounds to assert that the possibility of conducting a covert investigative (search) action before the ruling of the investigating judge is issued is provided only for the observation of a person, thing or place and for establishing the location of a radio electronic device.

According to the CPC of Ukraine, Article 250, part 1, the legislator emphasises that covert investigative (search) actions may be conducted before the ruling of the investigating judge is issued only in cases provided for by this Code. However, the possibility of using the provisions of Article 250 of the CPC of Ukraine is only mentioned in Articles 268 and 269. Therefore, O.I. Poliukhovych's perspective seems to be well-reasoned, because under the current regulatory framework, the application of the provisions of Article 250 of the CPC of Ukraine for the immediate commencement of all other covert investigative (search) actions (except for establishing the location of an electronic device and surveillance of a person, thing or place) is unlawful. Therefore, evidence obtained in this manner should be declared inadmissible (Poliukhovych, 2017, pp. 106–113).

Moreover, with the purpose of preventing possible violations of the criminal procedure law, when an investigator decides to conduct covert investigative (search) actions, including in exceptional urgent cases as defined in Article 250 of the CPC of Ukraine: observation of a place or thing, and in urgent cases – of a person (Article 269 of the CPC of Ukraine); obtaining data from electronic information systems or a part thereof, access to which is not restricted by its owner, holder or keeper or is not related to overcoming the logical protection system (part 2 of Article 264 of the CPC of Ukraine); establishing the location of a radio electronic device (Article 268 of the CPC of Ukraine), we consider it a correct practice to approve such decisions by the head of the pre-trial investigation body.

In addition, according to the Instruction on the organisation of covert investigative (search) actions and the use of their results in criminal proceedings, depending on the crime under investigation and the status of the person in respect of whom the covert investigative (search) action is being conducted, and other factors, the head of the pre-trial investigation body is authorised to approve the investigator's instruction to conduct a covert investigative (search) action to the head of another law enforcement body, including one under jurisdiction thereof the site of the criminal offence is not located, justifying such necessity.

Nevertheless, the relevant powers are provided only at the regulatory level. However, considering the positive practice, they should be reflected in the provisions of the CPC of Ukraine, and therefore it is proposed to supplement the CPC of Ukraine, Article 246, part 6, with the following provision: "In order to ensure the effectiveness of the pre-trial investigation, the investigator conducting the pre-trial investigation of a criminal offence may entrust, with the consent of the head of the pre-trial investigation body, the authorised operational units of another law enforcement body, including one under jurisdiction thereof the site of the criminal offence is not located, to conduct covert investigative (search) actions, justifying such necessity"

It should be noted that today the issues of conducting covert investigative (search) actions with respect to victims (or persons against whom a crime is being prepared) with their consent are particularly relevant. This

practice is not only an effective means of collecting evidence, but also contributes to the timely suppression of unlawful acts and ensures the safety of persons involved in criminal proceedings.

For example, visual surveillance of a person who is being threatened with murder, forced to fulfil or fail to fulfil civil law duties, or extorted money, allows to detain the perpetrators at the time of the attempted crime and prevent it from being committed; visual surveillance of the place allows to record the actions of the perpetrators of the attempted robbery, theft, etc; visual surveillance of a thing allows to prevent the illegal seizure of a motor vehicle, to obtain evidence of an attempt to commit this criminal offence by a particular person or group of persons. Similarly, locating a radio electronic device belonging to the victim (or a person against whose life, health or property, according to information entered in the URPI, a crime is being prepared) greatly simplifies the organisation of visual surveillance. Monitoring a person's mobile and/or landline phone enables to identify the communication devices used by the perpetrators and determine their current location, obtain the necessary materials for conducting a phonoscopic examination, as well as information important for making and justifying the necessary procedural decisions.

Unfortunately, the provisions of the CPC of Ukraine do not allow such covert investigative (search) actions to be carried out without a ruling of the investigating judge, even if the victim consents and initiates them. Social relations ensuring the security of persons involved in criminal proceedings should be regulated not by a special law, but by a separate chapter of the CPC of Ukraine.

In our opinion, Article 246 of the CPC of Ukraine should provide that covert investigative (search) actions under Articles 260-264, 267-270 of the CPC of Ukraine in respect of a person and property in his/her possession may be conducted with his/her consent on the basis of the decision of the investigator approved by the head of the pre-trial investigation body or the prosecutor. Moreover, the factual data obtained as a result of these actions may be used as evidence in criminal proceedings on the grounds and in the manner prescribed by the CPC of Ukraine.

According to D. Serhieieva, more than 85% of the world grave crimes or crimes of special gravity are solved due to covert investigative means, and the results of most covert means are recognised as judicial evidence by the courts of Western countries (Serhieieva, 2016, p. 487). However, an analysis of the practice of using the institution of covert investigative (search) actions shows that only 7% of their results are recognised as evidence by domestic courts.

There are many reasons why covert investigative (search) actions have not yet become an effective remedy against crime. Meanwhile, the main ones are related to legislative gaps, vividly illustrated by the practice of applying Article 273 of the Criminal Procedure Code of Ukraine that regulates the manufacture and use of identified (marked) and bogus (imitation) means for specific covert investigative (search) actions.

Some scholars propose to use in the context of Article 273 of the CPC a much wider list of means, such as, in addition to the already listed, means of disguise (material tools for changing the appearance of participants in covert investigative (search) actions, their devices, equipment, premises and transport), means of cover-up (written and oral disinformation (including documents) with respect to the participants in covert investigative (search) actions, their devices, equipment, premises and transport, etc.

This provision does not provide a clear definition of the procedure for the production, creation of identified (marked) or bogus (imitation) means for conducting specific covert investigative (search) actions, recording, which in practice gives rise to ambiguous interpretation of this provision and contradictory decisions by the courts in such cases.

The Instruction on the procedure for conducting controlled supply, controlled and operational procurement of goods, items, things, services, documents, means and substances, including those prohibited for circulation, from individuals and legal entities, regardless of ownership specifies that during a controlled supply, controlled and operational procurement, the use of pre-identified (marked) and bogus (imitation) means shall be recorded in the proper manner (Order of the Ministry of Internal Affairs, the Security Service of Ukraine and the Ministry of Finance of Ukraine on the approval of the Instructions on the procedure for the controlled supply, controlled and operational procurement of goods, objects, things, services, documents, means and substances, including those prohibited for circulation, from individuals and legal entities regardless from forms of ownership, 2017).

In general, identification (marking) of means (things, documents, substances) is a measure related to the covert addition or application of specially manufactured means, including chemical and technical means, to objects or substances in order to track the movement of marked objects and substances, their traces and to clarify other circumstances relevant to the performance of operative-search activities.

In addition, the production and use of bogus (imitation) means should be defined as a set of measures that consists in the production, storage and use of things and documents with full or partial change of basic data about a person and fictitious attributes of the documentary registration of an enterprise or organisation, separate premises, vehicle and a story about their purpose and activities in order to ensure non-disclosure of the actual information about the persons conducting or involved in the conduct.

In practice, there are different perspectives on these things, even in criminal proceedings that have been subject to review by the Supreme Court of Ukraine and the Supreme Court.

For example, while the CPC of Ukraine, Article 273, part 2, stipulates that the manufacture and production of bogus (imitation) means shall be documented in a relevant manner, in compliance with the requirements of Articles 104, 106, 252 of the CPC, this provision does not mention the procedure for documenting identified (marked) means at all. Moreover, the mechanism of transferring bogus (imitation) means (things, documents, etc. or marked material objects) to a person for use in a specific covert investigative (search) action is not regulated.

For example, in one case, the actions of the prosecution, which were formalised in single records on the course and results of a covert investigative (search) action, such as control over the commission of a crime as the process of identifying funds and their delivery to a person for further transfer to a person (case No. 727/6661/15-k), were recognised as justified and lawful. In other cases, the process of identification of banknotes by the prosecution was carried out by separate records of inspection and separate records of handing over to the person for further transfer to the person (cases No. 127/23772/16-k and No. 715/1591/17-k).

In our opinion, it is the head of the pre-trial investigation body and the prosecutor (as authorised decision-makers on the use of pre-identified (marked) or bogus (imitation) means) should instruct operational units to manufacture pre-identified (marked) or bogus (imitation) means, which in turn should record in separate investigative reports the fact of identification and delivery of the relevant means to the person.

In addition, the full powers of the head of the pre-trial investigation body (defined in Article 39 of the CPC of Ukraine) should be supplemented by the right to entrust operational units to manufacture and use identified (marked) or bogus (imitation) means.

3. Problematic issues of the regulatory framework for the activities of the head of the pre-trial investigation body during covert investigation

As practice reveals, the issue of initiating the question of the need to conduct a covert investigative (search) action such as control over the commission of a crime before the prosecutor remains problematic (Article 271 of the CPC of Ukraine).

We advocate O. Tatarov's perspective that situations are common when the investigator orally or in writing (providing a certificate with appropriate justification) proves to the prosecutor that he needs to make a decision to control the commission of a crime. However, this does not contribute to saving procedural time and ensuring the fulfilment of the tasks of criminal proceedings, as it creates additional obstacles to urgent actions in terms of operational or controlled procurement, controlled supply, special investigative experiment, and simulation of the crime scene. These forms of control over the commission of a crime do not involve interference with private communication or other restrictions on the constitutional rights and freedoms of a person, and therefore should be carried out by analogy with the performance of a special task to uncover the criminal activities of an organised group or criminal organisation (Tatarov, 2016, pp.72–73). In this regard, the scholar's perspective regarding the decision to control the commission of a crime by analogy with Article 272 of the CPC of Ukraine, i.e. on the basis of the investigator's resolution with the consent of the head of the pre-trial investigation body or the prosecutor's resolution, is quite correct.

Moreover, inconsistencies and some shortcomings in the procedure for completing covert investigative (search) actions do not contribute to ensuring constitutional guarantees of rights and freedoms. For example, the CPC of Ukraine, Article 249, part 5, stipulates that it is the prosecutor's duty to decide to terminate further covert investigative (search) actions if they are no longer necessary. However, by mentioning only this duty of the prosecutor in the provisions of the CPC, the legislator has not fully protected the rights of persons subject to covert investigative (search) actions (Kyrpa, 2013, p. 218).

In this case, there is no control (including judicial control) over the implementation of such actions in the course of covert investigative (search) action. In particular, there are no guarantees of termination of further interference with a person's private communication after the result of a covert investigative (search) action has been achieved, but the investigating judge's ruling has not expired.

The Ministry of Internal Affairs took some measures to unify the practice of early termination of covert investigative (search) actions and agreed with the Prosecutor General's Office (Letter No. 04/2/1-2665 outgoing No. 13 of 27 December 2013) the perspective that early termination is the completion of covert investigative (search) actions by the decision of the prosecutor before the expiry of the investigating judge's decision in the presence of circumstances that prevent the achievement of the purpose of the investigation. Moreover, an intrusion with inspection of the object, during which the purpose is achieved (Article 267 of the CPC), establishment of the location of a radio electronic device and its seizure (Article 268 of the CPC), detention of a person subject to audio or video surveillance (Article 260 of the CPC), confinement of a suspect in relation to whom information was taken from transport communication channels (Article 263 of the CPC), surveillance of a person (Article 269 of the CPC) do not require a separate the prosecutor's decision on early termination of a covert investigative (search) action due to the achievement of the purpose of the action.

In our opinion, it would be correct to impose on the head of the pre-trial investigation body the duty to approve the investigator's decision to terminate further covert investigative (search) action, if this is no longer necessary, and subsequently inform the investigating judge who authorised the covert investigative (search) action of the decision to terminate this investigative action.

The novelty proposed will regulate the practice of completing covert investigative (search) actions and will optimise the activities related to early termination of covert investigative (search) actions, in case of its termination before the expiry of the investigating judge's ruling due to the achievement of the purpose of the investigation, for example, establishing the location of a mobile terminal, searching for a person who evaded the investigation, recording the fact of obtaining an unlawful benefit with the detention of a person, etc.

4. Conclusions

Therefore, despite the positive experience of implementing the provisions of the CPC of Ukraine, some issues of the regulatory framework for the full powers of the head of a pre-trial investigation body have not been fully resolved and require the development of legislative provisions with due regard to the need to ensure rights and freedoms and increase the efficiency of criminal proceedings.

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ОКРЕМІ АСПЕКТИ ДІЯЛЬНОСТІ КЕРІВНИКА ОРГАНУ ДОСУДОВОГО РОЗСЛІДУВАННЯ ПІД ЧАС НЕГЛАСНОГО РОЗСЛІДУВАННЯ

Анотація. ***Мета.*** Метою статті є дослідження проблемних питань реалізації повноважень керівника органу досудового розслідування під час проведення негласних слідчих (розшукових) дій та з урахуванням практики діяльності органів досудового розслідування запропонування шляхів їх вирішення. ***Результати.*** Наголошено, що на сьогодні особливо актуальними є питання проведення стосовно потерпілих (або осіб, щодо яких готують учинення злочину) за їх згодою негласних слідчих (розшукових) дій. Така практика є не лише ефективним засобом збирання доказів, а і сприяє своєчасному припиненню протиправних дій, забезпеченню безпеки осіб, які беруть участь у кримінальному судочинстві. Причин того, що негласні слідчі (розшукові) дії ще не стали дієвим засобом у протидії злочинності, можна назвати багато. Водночас основні з них пов'язані з прогалинами законодавства, яскравим прикладом чого є практика застосування ст. 273 Кримінального процесуального кодексу України, яка регламентує виготовлення і використання ідентифікованих (помічених) та несправжніх (імітаційних) засобів для проведення конкретних негласних слідчих (розшукових) дій. Визначена необхідність покласти на керівника органу досудового розслідування обов'язок погоджувати рішення слідчого про припинення подальшого проведення негласної слідчої (розшукової) дії, якщо в цьому відпала необхідність, та у подальшому повідомляти слідчому судді, який надав дозвіл на проведення негласної слідчої (розшукової) дії, про прийняте рішення припинити таку слідчу дію. Керівник органу досудового розслідування та прокурор (як суб'єкти, уповноважені на прийняття рішення про використання заздалегідь ідентифікованих (помічених) або несправжніх (імітаційних) засобів) повинні доручати оперативним підрозділам виготовлення заздалегідь ідентифікованих (помічених) або несправжніх (імітаційних) засобів, які своєю чергою мають фіксувати в окремих протоколах слідчих дій факт ідентифікації та вручення особі відповідних засобів. ***Висновки.*** Зроблено висновок, що, незважаючи на позитивний досвід реалізації норм Кримінального процесуального кодексу України, окремі питання правової регламентації повноважень керівника органу досудового розслідування є не до кінця вирішеними і потребують розроблення законодавчих норм з урахуванням необхідності забезпечення прав і свобод та підвищення ефективності кримінального провадження.

Ключові слова: керівник органу досудового розслідування, негласні слідчі (розшукові) дії, оперативна чи контрольована закупка, контрольована поставка.

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