

UDC 343.132

Mark Makarov – Ph.D in Law,
Researcher of the Department
of Criminal Proceedings of the
National Academy of Internal Affairs

AUTHORIZATION OF COVERT INVESTIGATIVE (DETECTIVE) ACTIONS BY THE INVESTIGATING JUDGE

The procedure of authorization of covert investigative (detective) actions by the investigating judge was studied.

Keywords: covert investigative (detective) actions; petition; investigating judge; authorization; decision.

Part 1 of Article 246 of the Code of Criminal Proceedings of Ukraine (hereinafter – the CCP) provides that the covert investigative (detective) actions are kinds of investigative (detective) actions, the information on facts and methods of which shall not be disclosed, with the exception of the cases fixed in the above mentioned Code. The list of these actions is contained in Chapter 21 of the CCP.

The procedure of covert investigative (detective) actions and the usage of their results in criminal proceedings were studied by scientists: B. I. Baranenko, O. A. Bilichak, O. V. Bochkovyi, V. O. Hlushkov, M. L. Hribov, K. A. Huseva, S. O. Hrynenko, O. M. Drozdov, S. V. Yeskov, S. S. Kudinov, Y. V. Lysiuk, Y. D. Lukianchikov, D. Y. Nykyforchuk, D. B. Serhiieva, Y. D. Skulysh, M. A. Pohoretskyi, R. M. Shehavtsovet al.

The purpose of this article is to study some issues associated with governance of the procedure of authorizing the covert investigative (detective) actions by the investigating judge.

Part 3 of Art. 246 of CCP specifies that in cases stipulated by this Code the decision to conduct the covert investigative (detective) action shall be made by the investigating judge in accordance with the petition of the prosecutor or the investigator agreed with the prosecutor.

This «legislator's demand», as V. A. Kolesnyk says, should be understood in the sense of the authorization by investigating judge the covert investigative (detective) actions and includes such a point that he does not make a decision about conduction of the same one since the procedural document containing this decision of the investigating judge which is entitled «Decision of the investigating judge, authorizing the covert investigative (detective) actions» is not made [1, p. 80].

The investigating judge shall authorize the following covert investigative (detective) actions: audio, video surveillance of a person (Art. 260 of the CCP); seizure of correspondence (Art. 261 of the CCP); interception of telecommunications transport networks (Art. 263 of the CCP); interception of electronic information systems (Art. 264 of the CCP); inspection of places inaccessible to public, housing or other property (Art. 267 of the CCP); establishment of electronic device location (Art. 268 of the CCP); surveillance of a person (Art. 269 of the CCP); monitoring of bank accounts (Art. 269–1 of the CPC); audio and video surveillance of a place (Art. 270 of the CCP); covert obtaining of samples required for comparative studies (Art. 274 of the CCP).

An exception of this list is Part 2 of Art. 264 of the CCP which specifies that obtaining of information from electronic information systems or parts of them to which the access is not restricted by its owner, possessor or holder, or is not related to overcoming of the security system logic, does not require authorization of the investigating judge. Based on decision of the investigating judge under Part 8 of Art. 271 of the CCP, the crime shall be controlled, provided that it requires a temporary restriction of the person's constitutional rights.

The subject of the judicial review regarding the covert investigative (detective) actions is, as noted by S. V. Yeskov and V. O. Cherkov, «legality and validity of decisions and actions of the investigator (prosecutor), the implementation or execution of which is accompanied by limitation of constitutional rights. Meanwhile, the check of legality and reasonableness of the decision involves comparing of certain situations, which arose during the preliminary investigation, to the conditions with which the law associates certain possibility of conducting covert investigative (detective) actions» [2, p. 285].

Before applying to the investigating judge with a petition for authorization of covert investigative (detective) actions, the investigator must have it approved by the prosecutor. The procedure of approval is governed by Instruction «On organization of covert investigative (detective) actions and use of their results in the criminal proceedings», approved by the Prosecutor General of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the State Border Service of Ukraine, Ministry of Finance of Ukraine, and Ministry of Justice of Ukraine on November 16, 2012 No. 114/1042/516/1199/936/1687/5 [3].

Para. 2.4 of this Instruction states that the prosecutor shall review and approve the investigator's petition for authorization of covert investigative (detective) actions immediately upon request. The prosecutor shall review the materials of the criminal proceedings, which shall form the basis for a decision on granting the petition. Its dismissal shall be recorded in the form of decision and does not prevent the repeated application of the investigator after collection of additional evidence or elimination of deficiencies specified by the prosecutor in the process of making his decision.

According to Art. 247 of the CCP, the investigating judge is authorized to consider a petition for authorization of covert investigative (detective) actions where the head must be he himself or another judge appointed by the Court of Appeal of the Autonomous Republic of Crimea, regional courts of appeal, Kyiv and Sevastopol courts of appeal territorial jurisdiction of which cover the prejudicial inquiry body.

When it is required to conduct the covert investigative (detective) actions against judges, employees of the court and law enforcement bodies, as well as in the cases of the other judicial and law enforcement authorities, the petition may be considered by the investigating judge outside the territorial jurisdiction of the court where the crime takes place and the investigation is carried out.

In this case the investigator or the prosecutor shall file a petition for authorization of covert investigative (detective) actions to the investigating judge of the Court of Appeal, which is the nearest to the court of appeal geographically, within the territorial jurisdiction of which the prejudicial inquiry is carried out.

While considering the petition, the investigating judge shall verify whether it complies with Part 2 of Article 248 of CCP. It must include 1) a name and a registration number of the criminal proceedings; 2) a summary of circumstances of the crime, in connection with investigation of which the petition is filed; 3) legal qualification of the crime indicating the article (a part thereof) of the Criminal Code of Ukraine; 4) information on the person(s), place or thing in respect of which it is required to carry out a covert investigative (detective) action; 5) circumstances which give reason to suspect a person of committing a crime; 6) types of covert investigative (detective) actions and the information about periods of their provision; 7) justification of failure to obtain information about a crime and the person who committed the same otherwise; 8) information depending on the type of covert investigative action on credentials allowing to identify the subscriber, telecommunications network, terminal equipment, etc. subject to surveillance; 9) justification of an opportunity to obtain the evidence during performances of covert investigative (detective) actions, which alone or in total with the other evidence may be essential to clarify the circumstances of the crime or identify the persons who committed the same. This petition shall have an attached extract from the Uniform Registry of Prejudicial Inquiries in respect of the criminal proceedings under which it is submitted.

Part 2 of Article 248 of the CCP contains provisions of the duty of the investigator and prosecutor to enclose the materials of the criminal proceedings, to issue petitions for authorization of covert investigative (detective) actions. We must agree with the view expressed in legal literature, that the said petition shall have such materials enclosed [4, p.106]. Their submission of the request of the investigating judge is mentioned for some reasons not in CCP, but in para. 2.2 of the above mentioned Instruction.

The first sentence of Part 1 of Article 248 of the CCP stipulates that the investigating judge is obliged to consider the request for authorization of covert investigative (detective) actions within six hours of its receiving.

We share the proposal of V.V.Shum to clarify the terms for consideration of the petition by the investigating judge, i.e.

immediately, but not later than on the date of its request by the court. «The proposed addition, as the scientist notes, is quite significant and essential; first, when determining the term for the petition consideration. It is required to indicate a deadline which is not defined as a certain period in hourly terms; however, this period may be shorter due to the use of the term «immediately» in CCP of Ukraine; secondly, the time of petition by the investigating judge request and the time of its receipt by the court and registration at the automated court workflow system under paragraph 2 of Article 35 of the CCP of Ukraine are absolutely different. Therefore, the term for petition consideration by the investigating judge should begin after registration in the court...» [5, p. 10–11].

The second sentence of part 1 of Article 248 of the CCP fixed the rule that the trial of the said petition shall involve the person who filed the one. That person is the investigator or the prosecutor. At the request of the investigating judge, it shall provide an explanation on the circumstances set out in the request *in medias res*, and the criminal proceedings materials to confirm the need for covert investigative (detective) actions.

Attention is drawn to the fact that the CCP does not clearly define the circle of persons whom the investigating judge may authorize to conduct covert investigative (detective) actions.

Having investigated this matter, R. I. Blahuta, M. P. Klymchuk, V. M. Sakal, and M. S. Tsutskiridze concluded that «the covert investigative (detective) actions may be carried out in respect of any person provided the presentation of some reasonable grounds in the petition, that it may result in obtaining of information about crime or persons who committed the same» [6, p. 167].

S. B. Fomin and S. O. Hrynenko noted that the CCP does not relate the circle of persons in respect of which the covert investigative (detective) actions may be carried out according to their procedural status. That is, they «may be carried out not only in respect of the suspect, but also of the other persons who may not have the same procedural status in the particular criminal proceedings...» [7, p. 420].

V. A. Kolesnyk notes that the persons in respect of which the covert investigative (detective) actions can be carried out «may be both the suspects having a clearly defined procedural status and being

informed of the data available in the prejudicial inquiry bodies which may indicate their involvement in the crime for which the criminal proceedings were started and other persons not having the status of suspects, but in respect of whom the appropriate procedures are carried out by the prejudicial inquiry bodies in connection with the prejudicial inquiry» [8, p. 34].

S. R. Tahiyeu writes that logically, the concept of «suspect» in paragraph 5 of Part 2 of Article 248 of the CCP should be identical to the status of the person who was reported a suspicion or who was detained on suspicion of commitment of a criminal offense. In fact, this option allows the investigator or the prosecutor, in the presence of certain information, to initiate the covert investigative (detective) actions «in respect of any person who comes in view during the criminal proceedings. Therefore, the law should accurately reflect the concept of the «suspect» or work out a clear judicial practice» [9, p. 44].

In our opinion, the legislator shall clearly identify whom the investigating judge may authorize these actions to. A tentative list of such persons is set forth in the compilation of the judicial practice of considering applications for authorization of covert investigative (detective) actions carried out by the judges of the Kyiv Court of Appeal [10]. It is noted that these actions can be carried out regarding to the suspect, to the persons with whom the suspect contacted or other persons who are aware about a crime or the person who committed it, if there is a reasonable ground to assume that the procedural action may result in clues, that will be essential to clarify the circumstances of the crime, and that it is impossible to receive this information in a particular criminal proceeding otherwise.

Pursuant to part 3 of Article 248 of the CCP, the investigating judge shall make a decision as to the authorization of covert investigative (detective) actions if the investigator or the prosecutor proves that there are sufficient grounds to believe that: 1) the severe crime was committed; 2) the covert investigative (detective) actions may result in clues, which alone or in total with the other evidence will be essential to clarify the circumstances of the crime or to identify the persons who committed the one.

The decision of the investigating judge on authorization of covert investigative (detective) actions must meet the general

requirements for judicial decisions provided for in the CCP. Besides, under Part 4 of Article 248 of the said Code, it should contain information about: 1) the prosecutor or the investigator who filed a petition; 2) the offense in respect of prejudicial inquiry of which the decision is made; 3) the person(s), the place or the thing in respect of which it is required to carry out a covert investigative (detective) action; 4) the type of the covert investigative (detective) action and information depending on the type of this action on credentials, which allow a unique identification of the subscriber, telecommunication network, terminal equipment, etc. subject to surveillance; 5) the validity of the decision.

If there is no sufficient evidence to make the above mentioned decision which has been established during the trial, the investigating judge shall decide to dismiss a petition for authorization of covert investigative (detective) actions. Such a decision does not prevent the investigator or the prosecutor to file a new petition for such permission (Part 5 of Article 248 of the CCP).

The validity of the decision of the investigating judge to authorize the covert investigative (detective) action is set forth in Part 1 of Article 249 of the CCP. This period may not exceed two months. It shall start from the next calendar day after the decision. This conclusion is based on the content of Part 5 of Article 115 of the CCP.

If the investigator or the prosecutor believes that the covert investigative (detective) actions should continue, then the investigator together with the prosecutor, or the prosecutor alone may, according to §§ 2, 3 of Article 249 of the CCP shall apply to the investigating judge with a petition to make a decision under Article 248 of this Code. In addition to the information given in Article 248 of the CCP, the investigator or the prosecutor must provide additional information justifying the continuation of covert investigative (detective) actions.

Legal practice shows that while filing such a petition to the investigating judge, the investigators and the prosecutors shall refer to the same circumstances as contained in the previous petition and shall not present additional information, which would show the feasibility of covert investigative (detective) actions. Neither shall they submit the data which may prevent the achievement of the purpose for which

these actions were carried out during the validity of the previous decision. Thereby the persons who file a petition shall not justify the circumstances in accordance to which the covert investigation (search) actions will result in obtaining the evidence needed by the criminal proceedings [10].

The issue of admissibility of certain covert investigative (detective) actions prior to the authorization by the investigating judge also deserves attention. Parts 1 and 2 of Article 250 of the CCP provide that in exceptional urgent cases related to preservation of human life and prevention of commitment of a serious or especially serious crime under Sections I, II, VI, VII (Articles 201 and 209), IX, XIII, XIV, XV, XVII of the Special Section of the Criminal Code of Ukraine, a covert investigative (detective) action can be initiated before an investigating judge makes a decision in the cases provided for by the abovementioned Code, by decision of the investigator agreed with the prosecutor, or by the prosecutor. In this case, the prosecutor shall file a relevant petition to the investigating judge immediately after commencement of such a covert investigative (detective) action. The investigating judge shall examine the request according to the requirements of Article 248 of the CCP.

One of the scientific comments to CCP provides that in exceptional cases under Article 250 of this Code, the covert investigative (detective) actions, such as audio, video surveillance of a person, correspondence seizure, interception of transport telecommunications networks, interception of electronic information systems, audio and video surveillance of a place, covert obtaining of samples required for comparative studies [11, p. 526–527, 530–531, 538, 543] may be carried out prior to decision of the investigating judge.

We cannot agree with this comment. Part 1 of Article 250 of the CCP stressed that a covert investigative (detective) action can be initiated before decision of an investigating judge by decision of the investigator agreed with the prosecutor or decision of the prosecutor in the cases provided by this Code. These cases are referred to only in Part 4 of Article 268 and of Part 3 of Article 269 of the CCP. These rules specify that by virtue of the investigator's or prosecutor's

decision, before the decision of the investigating judge, the actions such as establishment of an electronic device location and surveillance of a person, thing or place can be initiated.

REFERENCES

1. Kolesnyk V. A. Issues of the covert investigative (detective) actions and their participants / V. A. Kolesnyk // Criminal proceedings: procedural theory and criminological practice innovations: proceedings of the international scientific conference, April 18–19, 2013; Taurida National V. I. Vernadskyi University. – Simferopol : DIAYPI, 2013. – P. 80–82.
2. Covert investigative (detective) actions and peculiarities of their conduct by operational units of the boldies of Internal Affairs : [manual] / B. I. Baranenko, O. V. Bochkovyi, K. A. Husyeva etc.; MIA of Ukraine, E. O. Didorenko State University of Internal Affairs of Luhansk. – Luhansk : E. O. Didorenko RVVSUIAL, 2014. – 416 p.
3. On approval of Instruction on Conduct of Covert Investigative (Detective) Actions and Use of Their Results in Criminal Proceedings: order of the Prosecutor General's Office of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, State Border Service of Ukraine, Ministry of Finance of Ukraine, Ministry of Justice of Ukraine dated November 16, 2012 No. 114/1042/516/1199/936/1687/5 [electronic resource]. – Access mode:<http://zakon4.rada.gov.ua/laws/show/v0114900-12>.
4. Udalova L. D. The function of judicial review in criminal proceedings : [monograph] / L. D. Udalova, D. O. Savytskyi, V. V. Rozhnova, T. H. Ilyeva. – Kiev : «Center of educational literature», 2015. – 176 p.
5. Shum V. V. Seizure of correspondence in the criminal proceedings in Ukraine: Thesis for PhD in Law : specialty 12.00.09 «Criminal Procedure and Criminalistics; Forensics; Operative-Search Activity» / V. V. Shum. – Kiev, 2014. – 20 p.
6. Interaction of investigative and operational units during the preliminary investigation : [manual] / R. I. Blahuta, M. P. Klymchuk,

V. M. Sakal, M. S. Tsutskiridze. – Kiev : NVP Interservice LLC, 2014. – 216 p.

7. Criminal process : [manual] / Y. M. Hroshevyi, V. Y. Tatsiy, A. R. Tumanyants etc.; ed. by V. Y. Tatsiy, Y. M. Hroshevyi, O. V. Kaplina, O. H. Shylo. – Kharkiv : Law. – 2013. – 824 p.

8. Kolesnyk V. A. Covert investigative (detective) actions: criminal-procedural and criminological aspects of their preparation and conduct : [manual] / V. A. Kolesnyk ; Academy of Advocacy of Ukraine. – Kiev : Precedent, 2014. – 135 p.

9. Tahiiev S. R. Some issues of covert investigative (detective) actions /S.R.Tahiiev // Bulletin of the Supreme Court of Ukraine. – 2014. – No. 10. – P. 40–47.

10. Chernushenko A. V. Compilation of court practice of considering the petitions for authorization of covert investigative (detective) actions by the investigating judge / A. V. Chernushenko, M. V. Pryndyuk [Electronic resource]. – Access mode: <http://kia.court.gov.ua/sud2690/uzah/2/>.

11. Code of Criminal Procedure of Ukraine: Scientific and practical comment / Resp. ed. S. V. Kivalov, S. M. Mischenko, V. Y. Zaharchenko. – Kharkiv : Odysseus, 2013. – 1104 p.
