

MEASURES OF CONCEALED (SECRET) CRIMINAL INVESTIGATION

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Abstract: *Modern criminal justice systems are characterized by the application of a wide range of measures and actions of covert criminal investigation, which is directly related to the specialization of certain investigative techniques for specific offenses. Also noticeable is the tendency of their further expansion in the future, and the multiplication of specific measures of undercover criminal investigation. This paper present an overview of the measures of covert investigations in international law and comparative law.*

Keywords: *Crime investigation, measures of undercover (secret) criminal investigation*

1. INTRODUCTION

Criminal investigation is a constructive process in which forensic investigators, on the basis of certain parts of facts that can be used as evidence, draw conclusions that the suspect is indeed the perpetrator of a crime, i.e. that there are grounds for suspicion that he committed the crime. Accordingly, a secret criminal investigation is defined as a separate activity of criminal justice, which occurs ultima ratio in the case of serious crimes investigations when otherwise it is not possible to obtain evidence or this would prove to be a disproportionate difficulty. [5]

The measures of covert (secret) criminal investigations are not the exclusive result of trends in criminal law and criminology from the late twentieth and early twenty-first century. In fact they have been - in different modalities - applied for a long time in the detection and suppression of crime, as well as collecting the facts of importance for the security of the state or society. In fact, they have until recently belonged to a segment of the secret police work, which according to that time was outside the regulations. Throughout history, the application of measures of undercover investigation was limited and conditioned by a number of factors, which can be classified into two groups:

- traditional and legal impossibility of application - these almost exclusively represented the usual methods of intelligence agencies, that are used to combat political offenses.

In the fight against classical crime their application is considered inadmissible from the moral, human and other reasons and improper for legal, democratically organized state which is why it was, explicitly or implicitly, prohibited by law,

- factual (im)possibilities of application - the development of science and technology, especially electronics was not as high as it is today, which is why the application of certain methods was not possible at all or with a much lower efficiency. The electronic revolution has enabled such a scope of application and with such results that until recently were simply unimaginable. In short, some of these investigative techniques today have become “super-efficient”.

It should also be noted that the measures of covert investigations are present in almost all modern legislation, regardless of whether they are covered in their totality, under one name and grouped in a special chapter or article of the law, or whether they are standardized separately, starting with the title, to the conditions of application.

2. CONCEPTUALISATION OF TERMS

Measures of covert (secret) investigation are specific measures for the purposes of combating complex forms of crime temporarily restrict fundamental rights and freedoms of man. [10] In fact, it is considered that the central problem of politics in democratic societies dilemmas of how to preserve the level of proportionality between security and freedom, especially because in modern society is very difficult to take the necessary measures to ensure security and stability at the same time protect the inalienable rights and fundamental freedoms of the individual.

Given the fact that the measures of covert investigations often delve deep into the zone of protected and guaranteed freedoms and rights of citizens, their application must be precisely entered under the legal standards and in accordance with certain principles. Thus, the resolution handed down by the International Association of Criminal Law at its XVI Congress which took place in 1999, as well as the Recommendation of the Council of Europe Committee of Minister on special investigation techniques in 2005 [8] both point out that the results, i.e. knowledge (facts) reached by application of special investigative measures can be used as evidence in criminal proceedings only if these actions are taken in accordance with the following principles:

- legality; application of special investigative actions must be expressly provided for and precisely standardized by law,
- subsidiarity; their application becomes possible only if milder measures cannot achieve the desired objective, namely the prevention, detection and identification of certain criminal offenses,
- proportionality; there should be proportionality between the breach of civil rights and freedoms implementation of these actions and the gravity of the crimes in which detecting and proving are applied, or their application may be considered only in serious crimes,
- judicial supervision; it is the court that approves the implementation of these measures and actions, carrying out also the control of the legality of their use, because they are often implemented preventive, as in the earliest stages of discovering and proving the crime, dominated proceedings and actions of the public prosecutor and police.

According to some authors, secret investigation involves those police activities that are carried out in secret or in a way that is not obvious from their real purpose, or otherwise concealed circumstances from which the person against whom the undertaking or persons to whom such measures are not aware of official persons or properties sense why the action they take. [7]

So, here we are talking about one specific form of investigation and proving of the criminal acts in the cases when it is not possible to achieve this by using conventional investigative methods such as a dwelling, other premises and persons, temporary confiscation of items, examination of the accused, hearing witnesses and the like. This kind of investigation shows a much higher degree of efficiency but, on the other hand, represents a much greater threat to basic human rights and freedoms which it has committed in today's modern world is one of the basic principles of rule of law, democracy and the rule of law in general. Finally, it should be mentioned that in the 70-ies of the last century in America and 90's of the last century in Europe the target application area rate of covert investigations was organized crime in order, and then, due to its efficiency, it began to be applied in other areas of combating crime, too. [2]

3. REVIEW OF MEASURES OF COVERT INVESTIGATIONS IN INTERNATIONAL LAW

Measures of covert investigations shall be governed by all international conventions, particularly in the area of terrorism, transnational organized crime, corruption, money laundering, etc. In fact, in recent decades in international law appears a special group of investigative techniques in the area of "globalized" crime (illegal trafficking of drugs, weapons and works of art, human trafficking, authorities, nuclear and other hazardous waste, cyber crime, etc.). In addition, the operation of international supranational judicial institutions and the development of institutions of international criminal legal assistance has also resulted in some new forms of special investigative techniques.

There are three sources that form the framework governing the matter in question. The first form consists of multilateral conventions governing a particular area of crime. The other is international conventions in the field of legal aid, and the third is bilateral conventions and agreements, primarily those on police cooperation.

In the first group we should mention the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the European Convention on Laundering, Search, and Seizure of income gained from criminal work in 1990, Greater Europe Agreement on illicit traffic in narcotic drugs from the sea in 1995, the Convention on combating transnational Organised crime Act 2000, the criminal Law Convention on corruption and the Convention on cyber criminal. In the second group there belong examples such as the second Protocol to the Convention on judicial assistance in criminal matters, while the third group is formed through a series of bilateral sources, such as mentioned above, especially those on police cooperation.

Important new criminal actions that are foreseen in these sources are: cross-border surveillance, cross-border monitoring, data exchange (eg. Schengen Information System - SIS) national information sistemi in the member states of the Schengen Agreement (NSIS), control over the financial operations, tokvam movement of money, etc. Very important novelty are related investigations and joint investigation teams without whose operation is hardly possible to efficiently detect and combat the modern, especially organized crime. It

is also important that these methods strongly affect the basic human rights and freedoms. As a rule, they involve the use of sophisticated technical support, and often completely new forms of cooperation between institutions of different countries. [6]

4. REVIEW OF MEASURES OF COVERT INVESTIGATIONS IN COMPARATIVE LAW

In *Austria*, they apply the following methods: computer-data alignment, optical and acoustic surveillance of persons applying technical means, electronic surveillance of telecommunications, the use of undercover agents, simulated bribery and simulated purchase of objects of criminal offenses, police surveillance and long-term police surveillance, controlled delivery of objects of criminal work and other measures.

The reform of criminal procedural legislation in 2004 in addition to observation, undercover investigations, also introduces some new features as well as the conclusion of simulated legal transaction, collected notifications of data related to the location and transfer as well as control over the messages that are transmitted via telecommunications or computer system, an optical and acoustic control of people, and alignment of data with computer support.

Otherwise, the very notion of “organized crime” in the Austrian legislation is mentioned only in Article 16 of the Police Act from 1993, which describes the general risk that occurs: 1) with the occurrence of dangerous attacks, and 2) as soon as three or more persons join for clandestine committing of criminal acts (predatory or organized crime), while Art. 278.a. of Criminal Code of Austria from 1993, uses the term “organized crime” whose content corresponds to the German definition of the term. [1]

In *England* and *Wales* the following methods are applied: long-term police surveillance, secret surveillance using technical means, electronic surveillance of telecommunications in order to acquire the knowledge to conduct other investigative actions (information collected by this measure can not be used in court during the trial), sound room, the use of undercover agents for the detection of criminal offenses related to the abuse of drugs, terrorism and public disorder, simulated purchase of drugs, weapons or explosives, simulated selling drugs, controlled delivery of objects of criminal offenses related to the abuse of drugs, weapons and explosives.

In this regard it should be noted that the police in the British soil applied (until autumn 1999) various covert investigative techniques, and all that according to the principle of freedom of exploration - hence the police during criminal investigations were allowed everything that is not the imposition of (explicite) was prohibited, with the purpose of disclosure and effective fight against organized crime, where the so-called. Preventive police activity was not prescribed by law. However, the Law on Human Rights (The Human Rights Act), which passed the parliamentary procedure at the end of 1998, part of the Act came into force in the autumn of 1999, entirely in British law introduced the “spirit” and the provisions of the European Convention for the protection of human rights and fundamental freedoms. Thus, the British police and law are entered by the principle of legality. [4]

French legislation also provides for the possibility of using special investigative techniques, such as long-term police surveillance, secret surveillance using technical means, electronic surveillance of telecommunications in order to obtain information and evidence needed for criminal proceedings, sound rooms, the use of undercover investigators with the

aim of clarifying criminal offenses in relation to drug abuse, simulated bribery, simulated purchase of certain objects, controlled delivery of objects of criminal offense.

In addition to the above techniques the legislation of this country allows the use of measures that are not common in the criminal practice of other European countries, except partly in Italy. This is the foundation of the so-called simulated front stores, simulated establishment of legal persons for the purpose of detecting and preventing money laundering. It is characteristic that the undercover investigator (and the interlinked and controlled deliveries) in France today can be used to clarify exactly certain criminal offenses of abuse of drugs or precursors necessary for the production of drugs.

It is interesting that the powers of the undercover investigators are restrictively accessed by the French legislation. Into the forefront they put the need to protect the rights of citizens, and when approving such investigative measures they are in compliance with the principle of being appropriate. Therefore, this measure is granted only if some other, simpler measures, with which delves into the less protected zone human rights and freedoms have not yielded the expected results. In this way, at the same time they ensure the rational use of covert investigative measures, only in the most complex and important cases, at a high professional level.

In *Germany* they envisage the following measures: computerized matching of data (*rasterfahndung*), sound bugs of the premises, seizure of postal items, electronic surveillance of telecommunications, secret surveillance using technical means, the use of undercover agents for the purpose of clarification of criminal offenses related to the abuse of drugs, weapons and money counterfeiting and controlled delivery of objects of criminal offenses related to drug abuse. The same goes for identifying incoming and outgoing phone calls with supervised telephone connection (metering), under which the original sense means enabling mail and users of its services to verify the correctness of the calculated price of telephone services. Such special evidentiary action, 'metering' involves the use of 'meter check printer', which records the number of the phone calls and the time and duration of the call. But, it does not record the actual content of the conversation. [3]

Approval for the use of undercover preventive measures in Germany is made in the form of warrants by the provincial leader of crime office (LKA) and the presidency of the department. It is necessary to subsequently notify persons over whom some of these preventive measures were taken for the preventive purpose of the investigation (so it would not jeopardize the mission of the undercover investigator, if the previously established facts immediately continue through investigation proceedings against persons affected). Image and sound recordings that are not related to the measure affected persons must be removed or destroyed at the latest after the second month since the dawn if they are not necessary for the further conduct of the criminal proceedings. [9]

5. CONCLUSION

Undercover investigations, in principle, constitute a valid process, supporting operations carried out by members of law enforcement bodies, i.e. measures that law enforcement (police, etc.) and prosecution (Public Prosecutor) proactively apply against members of organized crime groups and the holders of other forms of serious crime.

Modern criminal justice systems are characterized by the application of a wide range of measures and actions, covert criminal investigation, which is directly related to the specialization of certain investigative techniques for specific offenses. Also noticeable is the ten-

gency of their further expansion in the future, and the multiplication of specific measures undercover criminal investigation.

Today's modern criminal justice systems, with major or minor discrepancies or differences in the name, know the following measures covert (secret) criminal investigation: 1) surveillance and technical recording of telephone conversations, that is, technical devices for distant communication; 2) enter the premises for the purpose of conducting surveillance and technical recording of premises; 3) secret surveillance and technical recording of persons and objects; 4) the use of undercover investigators and informants; 5) simulated purchase and sale of objects of criminal offenses; 6) simulated bribery; 7) providing simulated business services and conclusion of simulated legal affairs; and 8) reconciliations of computer data.

Seen from the point of view of their content, all measures of concealed (secret) investigation can be put into two groups. One group consists of measures of secret observation or surveillance and recording of telephone and other communications (e.g. electronic surveillance of telecommunications, secret photo taking, etc.). While the second group includes measures of infiltration into the criminal milieu (undercover agents, simulated legal affairs, etc.). This applies to all countries in which these measures are applied, as well as in Austria, England and Wales, France, Germany and Italy.

Their basic characteristics is that they are to be taken only in the strictly defined situations, that show significantly better results in preventing and detecting crimes and their perpetrators compared to the traditional investigative approach, but also they significantly threaten or restrict the rights and freedoms guaranteed by international, constitutional and other documents.

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