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SAFEGUARDING HUMAN RIGHTS DURING JUDICIAL REVIEW OF COVERT INVESTIGATIVE ACTIONS

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Abstract

This article examines the protection of human rights and freedoms within the context of an investigating judge's review of applications for covert investigative actions. As judicial oversight becomes increasingly critical in balancing state security interests with individual rights, this study delves into the procedural safeguards and judicial standards that ensure human rights are upheld during the approval process for covert searches and surveillance. Through a detailed analysis of legal frameworks and case studies, the article identifies key areas where the guarantees of privacy, due process, and legal representation must be fortified. It also explores the role of the investigating judge in mitigating potential abuses of power and maintaining transparency. The findings highlight best practices for judicial review, offering recommendations for enhancing the protection of constitutional rights in the realm of covert operations. This research contributes to the ongoing discourse on judicial accountability and the ethical dimensions of investigative practices, advocating for a balanced approach that respects both security needs and fundamental freedoms.

Key words: covert investigative (search) actions, petition, permission to conduct an emergency (P), judicial control, interference in private communication.

1. Introduction

Judicial control over the observance of human and civil rights and freedoms, and, above all, in such a sensitive area as conducting covert investigative (investigative) actions related to interference in private communication, is extremely important in today's conditions, especially given the significant increase efficiency of technical means of removing and fixing information, digitalization of public relations and informatization of information exchange processes, performance of managerial functions, etc.

The scope of judicial control over the emergency (S)A includes:

- control at the stage of consideration by the investigating judge of the application for permission to conduct an emergency (S)A;

- control during the consideration of applications for permission to conduct an emergency (S) A initiated before obtaining the permission of the investigating judge, on the basis of Art. 250 of the Criminal Procedure Code of Ukraine;

- control during the consideration of applications for extension of the term of the

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emergency (S)A, granting permission for the emergency (S) A after the expiration of the previous emergency (S)A;

- control during the consideration of the prosecutor's motions in accordance with Art. 257 of the CPC of Ukraine on permission to use the results of the NA (S) A in other criminal proceedings.

The court oversees the review of applications for authorization to conduct emergency (S)A measures by investigating judges from appellate courts and the High Anti-Corruption Court. These applications, requested by an investigator and approved by the prosecutor, involve decisions on whether to grant or deny permission for:

• audio and video surveillance of individuals;

• seizure, inspection, and confiscation of correspondence;

• extraction of information from telecommunications networks;

• removal of data from electronic information systems without the owner's or possessor's knowledge, or overcoming logical protection systems if necessary;

• inspection of inaccessible public places, private residences, or other personal property;

• determination of the location of electronic devices;

• surveillance of individuals;

• monitoring of bank accounts;

• audio and video surveillance of specific locations.

• secret receipt of samples required for comparative research) (Mykhaylenko, 2020).

At the same time, the vast majority of requests from the authorized entities contain requests for permission to conduct a complex of emergency (S)A, which includes various combinations of these measures. Typically, emergency (S)A measures encompass the following actions: extraction of information from telecommunications networks, retrieval of data from electronic information systems, surveillance of individuals, audio and video monitoring of individuals and locations, and tracking of electronic devices. Less frequently, requests are made for the inspection of inaccessible locations, private residences, or other personal property. It is also common for an authorized entity to seek an investigating judge's approval for emergency (S)A as part of another covert investigative action, such as crime control or a special operation aimed at uncovering criminal activities of organized crime groups or criminal organizations. There are applications for permission to carry out CI(S)A within the framework of international legal assistance (Supreme Anti-Corruption Court, 2021).

Consideration of applications for a permit to conduct an emergency (S)A as a form of judicial control is carried out in the following stages:

-Determining the jurisdiction of petitions. The powers of investigative judges to consider petitions are delimited taking into account territorial, substantive features and depending on the subject of the CI(S)A.

- Investigative judges of appellate courts are authorized to consider petitions within the territorial jurisdiction of which the pre-trial investigation body is located.

- investigative judges of the High Anti-Corruption Court - in criminal proceedings under investigation by NABU. It should be noted that this definition of the High Anti-Corruption Court jurisdiction is perceived ambiguously (Zhuk, 2020).

This is not about criminal proceedings investigated by NABU detectives, but about proceedings under their jurisdiction, in accordance with the criteria set out in Part 5 of Art. 216 of the Criminal Procedure Code of Ukraine. It should be borne in mind that in accordance with Part 5 of Art. 36 of the CPC of Ukraine, the prosecutor is prohibited from entrusting the pre-trial investigation of a criminal offense within the NABU's jurisdiction to another pre-trial investigation body. Investigation by other law enforcement agencies of criminal offenses under investigation by NABU is carried out in cases when it is initiated by such a body, and in accordance with Part 2 of Art. 218 of the CPC of Ukraine, is conducted until the prosecutor determines another jurisdiction. It should also be borne in mind that the prosecutor of the Specialized Anti-Corruption Prosecutor's Office (hereinafter – SAP) on the basis of para. 3 item 3 part 5 of Art. 216 of the CPC of Ukraine has the right to include in the jurisdiction of NABU and other criminal offenses that meet certain criteria, prominent in Part 5 of Art. 216 of the CPC.

Thus, High Anti-Corruption Court investigative judges exercise judicial control over the observance of human and civil rights and freedoms in the field of CI(S)A depending on the category of crimes, their recognition by NABU investigators and may extend to criminal proceedings investigated by other law enforcement agencies.

Requests for authorization to carry out covert investigative (search) actions targeting judges, court and law enforcement officers, or their premises are handled on a case-by-case basis. To reduce the risk of information leaks and prevent conflicts of interest, such requests are reviewed by an investigating judge from the relevant appellate court outside the jurisdiction of the pre-trial investigation body conducting the investigation. The petitions are submitted to the appellate court located as close as possible to the site of the pre-trial investigation.

In comparable cases involving criminal offenses under the jurisdiction of the High Anti-Corruption Court, petitions are reviewed by an investigating judge from the High Anti-Corruption Court. However, if it is necessary to obtain permission to conduct an emergency (S) a against a judge or an employee of the High Anti-Corruption Court staff, such a decision is made by the investigating judge of the Court of Appeal, whose jurisdiction extends to the city of Kyiv.

The purpose of the article is to determine the general principles of guaranteeing human rights and freedoms during the examination by the investigating judge of motions of pre-trial investigation bodies and prosecutors for permission to conduct covert investigative (investigative) actions.

Based on the analysis of the practice of consideration by investigative judges of motions in the field of covert receipt and recording of evidence in criminal proceedings, the grounds for granting such permission and the reasons why investigative judges refused to conduct covert measures to outline general conditions and requirements for such motions cooperation of investigators, prosecutors and investigating judges, to suggest ways to improve criminal procedural legislation in this area.

2. Materials and Methods

In general, the initial stage, stage or step in any study is the development of methodological tools in the context of such a study, as it depends on the strategy of the basic concept of ensuring human rights and freedoms during the investigating judge's applications for permission to conduct covert investigative (search) actions, and hence the effectiveness of scientific achievements, the formulation of theoretical and applied conclusions and recommendations. Since the problem of methodology in any science, including and in the criminal procedure, is one of the most important, complex and relevant, then in its selection should take into account the specifics of the object and subject of research, discussed above. At the same time, it should be noted that in modern science there is an insufficient level of mastery by researchers of the system of methodological

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and methodological knowledge, which can lead to errors. In addition, the success of scientific research depends on the availability and degree of development of certain methodological prerequisites, in the absence of which the applied action is useless or even dangerous, generating results that do not meet certain goals and objectives.

Thus, in the process of scientific research of guarantees of human rights and freedoms during the examination of applications for permission to conduct covert investigative (investigative) actions, we have chosen the following methods:

1) dialectical (this method is central among philosophical methods of scientific knowledge, since it allows us to consider the relevant criminal procedure phenomenon in the development and taking into account the basic laws of dialectics);

2) comparative law. This method involves identifying the unknown by comparing it with the known; clarifying the characteristics (properties) of a phenomenon through comparison with its other characteristics or with those of a different phenomenon; and establishing patterns by comparing objects across different times, examining how their characteristics have changed from the past to the present to identify trends. This approach will assist in understanding the content and essence of legislative and theoretical provisions related to the protection of human rights and freedoms during the examination of applications for covert investigative (search) actions by an investigating judge.

3) dogmatic (alternative titles: formal-dogmatic, formal-logical, logical-legal, legal, etc.). This method establishes the content of the studied legal norms and regulations, reveals the laws of law through the rules of legal logic. Thus both external, and internal forms of the legal phenomenon (or its «dogma») are investigated. It is based on the laws of logic and syntax, providing commentary on the provisions on guarantees of human rights and freedoms during the examination of the investigating judge's applications for permission to conduct covert investigative (search) actions and practices, as well as serving to systematize criminal procedure, setting deadlines. disclosure of concepts, construction of legal constructions, clarification of the true content of certain norms through their interpretation. With the help of this method, it is also possible to analyze the norm of the criminal procedure law in view of the observance of the rules of legislative technique of constructing articles in the CPC. Thus, as a result, it is possible to identify shortcomings and gaps in the norms of the CPC of Ukraine, which regulate our criminal procedure;

4) systemic. This method focuses research on the disclosure of the integrity of the object and the mechanisms that provide it, to identify different types of relationships of a complex object and bring them into a single theoretical picture. Using a systems approach, complex dynamic entities are investigated, the internal mechanism of action of its individual components is clarified, their interaction at different levels is traced, and so on.

The study draws upon a diverse range of materials, including international treaties, national legislation from various countries (such as Ukraine, the United Kingdom, Italy, Germany, and Finland), scholarly works, court decision registries, and records from Ukraine's pre-trial investigation bodies and criminal proceedings. The research employs both general scientific and specialized methods to facilitate a comprehensive scientific inquiry. Notably, it utilizes comparative law methods to analyze the substantive and procedural aspects of international and Ukrainian legislation, as well as that of other jurisdictions, and to examine scientific categories, definitions, and approaches. Additionally, formal-dogmatic (legal) methods are used to elucidate the legislative provisions of Ukraine's Criminal Code regarding the confidentiality of telephone communications and to propose improvements to both the Criminal Code and the Criminal Procedure Code.

3. Results and Discussion

The study of the legal nature and importance of the judicial control function of investigative judges authorized to consider motions of the prosecution for permission to conduct covert investigative (investigative) actions provides an opportunity to determine the main directions and ways to improve criminal procedure law, ensure the legal regime bring as close as possible to the standards set out in international acts ratified by Ukraine. The issues of the effectiveness of judicial control over the results of covert investigative (investigative) measures, the effectiveness of their application and the justification of restrictions on human and civil rights and freedoms during the pre-trial investigation were considered and assessed separately.

Simplified procedure of judicial control proceedings during the consideration of applications for permission to conduct CI(S)A the request or another person who took part in the consideration of the request, information on the existence of reasons and grounds for granting permission to conduct an emergency (S)A indicate the formality of this procedure and the urgent need to improve it. The activities of investigators and prosecutors who take part in the examination of the petition or prepare a procedural document to substantiate his arguments (analytical, report notes, reports), in particular, the fact that they are not responsible for providing inaccurate information and explanations to the investigating judge. concealment of circumstances that are essential for making a lawful decision.

3.1. Consideration of the petition and attached materials

Investigating judge, in accordance with Part 1 of Art. 248 of the CPC of Ukraine, is obliged to consider the application for permission to conduct a covert investigative (search) action within six hours from the date of its receipt. Such consideration is carried out with the participation of the person who submitted the application.

During the examination, the existence of grounds for an emergency (S)A is clarified: 1) whether a criminal offense of appropriate gravity has been committed; 2) whether evidence can be obtained during the CI(S)A, which alone or in combination with other evidence may be essential to clarify the circumstances of the criminal offense or to establish the perpetrators of the criminal offense.

The investigating judge, who received the petition, may get acquainted with the materials of the criminal proceedings, get acquainted with the evidence obtained as a result of investigative and covert investigative (investigative) actions. Prior to the examination of the merits of the petition, the investigating judge shall determine compliance with the requirements of the jurisdiction of the petition and the existence of the authority of the subject of the application. The powers of the investigator and prosecutor are confirmed by an extract from the Unified register of pre-trial investigations, which is an appendix to the petition and contains up-to-date information on investigators and prosecutors authorized to conduct pre-trial investigations and conduct procedural guidance. In addition, in cases where the application raises the issue of granting permission to conduct an emergency (S) A for a special entity: a lawyer, judge, MP, the authority to submit such a request must be confirmed by relevant additional documents.

The investigating judge, carrying out on the basis of item 18 h. 1 Art. 3 of the CPC of Ukraine, judicial control over the observance of the rights and freedoms and interests of persons in criminal proceedings, assessing the materials provided to him criminal proceedings and explanations of the petitioner, must take into account a number of key circumstances, justice and human rights and freedoms, correspondence of qualification of the act of gravity to the crime and the circumstances of the proceedings. Since the emergency (S) (except for the location of electronic means and removal of information from electronic information systems, access to which is not limited by logical protection, as well as with the permission of the owner, owner or user of such electronic information system or part thereof) criminal proceedings on the commission of serious and especially serious crimes, the correctness of the qualification is decisive during the consideration and decision on the application for permission to conduct an emergency (S)A.

According to paragraphs 3-7 of Article 12 of the Criminal Code of Ukraine, a felony is defined as an offense specified by this Code, where the primary penalty is either a fine of up to twenty-five thousand non-taxable minimum incomes or imprisonment for a term not exceeding ten years. An especially serious crime, on the other hand, is an offense for which the primary penalty involves a fine exceeding twenty-five thousand non-taxable minimum incomes, imprisonment for more than ten years, or life imprisonment. The classification of the crime's severity, which determines the type of punishment—whether a fine or imprisonment—is based on the length of the imprisonment term stipulated for the offense.

In this regard, the investigating judge is obliged to check, and the investigator, the prosecutor to prove that the crime was committed of appropriate gravity, the facts established during the pre-trial investigation correspond to the legal qualification. Otherwise - refusal to satisfy the petition on the basis of Part 2 of Art. 246, part 3 of Art. 248 of the Criminal Procedure Code of Ukraine.

In 2021, the Supreme Anti-Corruption Court summarized the state of judicial control during the consideration of the prosecution's applications for permission to conduct an emergency (S)A and identified the typical and most common grounds for refusal to grant a permit (Supreme Anti-Corruption Court, 2021):

- the provided materials of criminal proceedings do not confirm especially big size of the stolen property, as a qualifying sign of h. 5 Art. 191 of the Criminal Code of Ukraine;

- the materials of the proceedings do not contain accurate information about the qualification of the criminal offense, the content of the petition does not correspond to the explanations of the detective provided in court, not submitted for review of suspicion, which according to the detective presented to the person;

- a reference to obtaining information from intelligence sources on the artificial delay of a judge in considering cases of administrative offenses, in the absence of information on the artificial nature of such actions, can not be considered a proper justification for preparing to commit a crime under Part 3 of Art. 368 of the Criminal Code of Ukraine;

-The CPC does not provide for the issuance of a permit to conduct an emergency (R) D to clarify the circumstances of a possible criminal offense or to identify persons who may have committed a criminal offense;

- the lack of calculations of the waste, the inability to establish the amount of such waste, which deprives the investigating judge of the opportunity to verify the gravity of the crime for which the pre-trial investigation is carried out;

-Lack of sufficient grounds to believe that a criminal offense has actually been committed or is being prepared to be committed.

3.2. Duration of pre-trial investigation of criminal proceedings

1) If the investigation lasts several years, its effectiveness, completeness and focus, the seriousness of the reasons for the lengthy investigation and the observance of reasonable

time shall be taken into account. After all, if within a few years no evidence of guilt or the fact of committing a crime has been collected in the proceedings, further restriction of human and civil rights will not be justified. Prolonged investigations can be justified when it comes to documenting the activities of an organized group or branched criminal organization, persons with professional skills of conspiracy, the activities of transnational corporations, which necessitates requests for international legal assistance.

2) Taking measures by the prosecution to obtain evidence of the circumstances of the criminal offense and the guilt of certain persons by investigation, the impossibility of obtaining such evidence without conducting an emergency (S)A.

3)The investigating judge must assess: what investigative actions have been carried out and what can be found out without conducting an emergency (S)A. The completeness of such investigative actions is evaluative, however, in some cases investigators and prosecutors apply for permission to conduct CI(S)A in criminal proceedings in which investigative actions were not conducted at all, or limited to interrogation of the applicant and information obtained from electronic information systems. on the address, position, means of communication used by the person in respect of whom the application for a permit to conduct an emergency (S)A was submitted. In each case, the investigating judge must weigh all the circumstances and make a decision that takes into account the urgent need to conduct an emergency, the sufficiency of information about the illegal activities of such a person, the impossibility or inexpediency due to the risk of information leakage by others to obtain evidence. Interference with human rights and freedoms must be justified in accordance with the purpose of the CI(S)A and the tasks of criminal proceedings, which include the impossibility of unjustified procedural coercion and the application of proper legal procedure to each participant in criminal proceedings. Permission to conduct an emergency (S)A is not allowed if the prosecutor or investigator has not provided objective information about the fact of commission (preparation for the commission) of the crime and the purpose of the emergency (S)A is to "experiment", "activate", battle. In such circumstances, the restriction of the constitutional rights of citizens in the case of permission to conduct an emergency (S)A is unjustified, borders on provocation of the crime and further the results of such emergency (S)A may be declared inadmissible evidence by the court.

3.3. Terms of the emergency (S)A

When deciding on permission to conduct them, the investigating judge must take into account the general terms of pre-trial investigation in criminal proceedings. The term for which the authorization to conduct an emergency (S) A should be exceeded should not exceed the pre-trial investigation, but in any circumstances the validity of the decision in the criminal proceedings under investigation may not exceed 2 months.

1) Duration of a person's stay under the control of a law enforcement agency. «Factual» cases in which no person has been identified (no announcement or suspicion has been issued) can be investigated for years. In such circumstances, sometimes for a long time, six months, a year, or even more, an emergency (S)A can be conducted with the recording of his telephone conversations, correspondence, audio, video surveillance, etc. In such cases, after or before the expiration of the permit for the CI(S)A investigator, the prosecutor re-applies to the investigating judge for permission to «additional» CI(S)A for this person or group of persons. In such circumstances, the main condition for issuing a lawful decision to grant permission to conduct an emergency (S)A is to clarify the results of previous similar activities, information obtained during their implementation, the reasons for the absence of any information relevant to criminal proceedings . In some cases, it is the acquaintance with the results of the previous CI(S)A that provides grounds for establishing the fact of provocative actions by the prosecution, the inaccuracy of the

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information provided by the applicant, refutation of other data obtained during the pre-trial investigation. The study of preliminary results and evidence obtained during the previous CI(S)A, their analysis, gives the investigating judge the opportunity to assess the feasibility of further restriction of human rights and freedoms and the prospects of criminal proceedings. In addition, the circumstances of the proceedings and information about the person - the subject of development, group of persons or organization must be taken into account. If the issue concerns intelligence, counterintelligence, actions of a person professionally versed in the skills of conspiracy, who has a method of detecting and stopping crimes, has knowledge and experience in law enforcement or close ties in the law enforcement environment, the inability to obtain information in the first months. proceedings, may have its own objective explanation.

Granting permission to conduct an emergency (S)A in such cases may be justified. On the other hand, there is sufficient evidence in criminal proceedings to expose, detain and declare a person suspicious, and the prosecution intends to further establish certain circumstances or document several additional episodes of illegal activity. In such cases, the long-term development may be due to the need to identify the entire «chain» of relationships in the commission of criminal acts, identify supply channels or distribution networks, establish corruption links of a criminal group or organization in government or law enforcement agencies. However, the prolonged emergency (S)A may also be associated with abuse by law enforcement officials who are developing and aiming to «improve statistics» or to effectively cover up and control criminal activity under the guise of developing and investigating criminal proceedings. In this case, the refusal to grant permission to continue the emergency (S)A will force the law enforcement agency to "implement" the proceedings and move to an active phase of exposing and bringing the perpetrators to justice.

The availability of information about a person's involvement in the commission of a criminal offense is one of the key issues when deciding on an emergency (S)A against a person. One of the features of the CI(S)A, which distinguishes them from operational and technical measures in operational and investigative cases, is that HTAs are conducted exclusively for persons who are registered and developed within the OSC (operational search case). CI(S)A an allows the law to be conducted against any person, regardless of the availability of a procedural decision on his possible involvement in the commission of a criminal offense. Although paragraph 5 of Part 2 of Art. 248 of the CPC of Ukraine stipulates that the application for a permit to conduct an emergency (S) A, among other things, states the circumstances that give grounds to suspect a person of committing a crime, such «suspicion» does not give a person the status of a suspect in criminal proceedings. procedural decision on the emergence of such a suspicion. Therefore, any person, including a suspect, witness, victim, etc., is a person against whom it is possible to submit a request to conduct an emergency. The wording in paragraph 5 of Part 2 of Art. 248 of the CPC of Ukraine, according to which "circumstances that give grounds to suspect a person of committing a criminal offense" taking into account the definition in paragraph 2 of Part 1 of Art. 276 of the CPC of Ukraine, according to which the notification of suspicion is carried out in cases of «sufficient evidence to suspect a person of committing a criminal offense», is only a failure of the legislator and is not grounds for concluding that in such cases in respect of a person who has acquired the status of a suspect in criminal proceedings. Therefore, the grounds for suspecting a person of committing a criminal offense can be any information, but they must also be assessed for appropriateness and admissibility, reliability. Such information can be contained in various sources, but it is important first of all its accuracy and reliability, especially when it comes to identifying the subscriber, terminal equipment - means of communication, personal data about the person subject to emergency (S A, the exact address residence or stay, etc.

At the same time, in practice, especially when it is related to counterintelligence and anti-terrorist measures, there are facts of conducting an emergency (S)A on impersonal entities. However, the ECtHR found this practice to be contrary to Art. 8 of the Convention. Thus, the judgment in Azer Ahmadov v. Azerbaijan (application no. 3409/10) stated that the observation permit did not contain information about him as a specific person to whom such an event was to take place, but only information about his colleague. In the case of Big Brother Watch and Others v. The United Kingdom (applications 158170/13, 62322/14, and 24960/15), the court examined various aspects of surveillance and determined that the national legislation failed to meet the standards of «quality of law.» Specifically, the court found that certain stages of surveillance, including the mass interception of communications through telecommunications channels, the use of real-time filters to assess the relevance of intercepted data, and the subsequent analysis of selected and stored material by analysts, did not comply with legal requirements.

From the above decisions of the ECtHR it can be concluded that the monitoring of telecommunications (mass interception of communication data of citizens), when information (calls, SMS and e-mail, billing communication) in real time on certain filters (keywords) is selected from telecommunications networks for further analysis (The case law of the European Court of Human Rights: Ukrainian aspect, 2018), as well as failure to reflect in the decision to conduct an emergency (S) A personal data of the person in respect of whom they are conducted (The case law of the European Court of Human Rights: Ukrainian aspect, 2021) – does not meet the requirements of Art. Art. 8, 10 of the Convention

Peculiarities of consideration of the issue of granting a permit to conduct an emergency (S)A in relation to the applicant. In most cases, the reliability of the information and the applicant's participation are crucial for the formation of the evidence base. As the applicant has information, has certain relations, contacts with persons whose illegal activities are investigated, his involvement in the CI (S) A will facilitate faster and more effective documentation of illegal activities. Procedural registration of the applicant's involvement, as well as that of another person, including on the terms of confidential cooperation, formalization of his participation in criminal proceedings must meet the requirements of the CPC of Ukraine and other legislation of Ukraine.

The investigating judge must pay attention to the observance by the pre-trial investigation body, the prosecutor of the requirements during the acceptance of the application, the notification of the commission of a crime. The documents must contain information about the warning of the applicant about criminal liability for knowingly false reporting of a crime. Information about such an explanation, warning, can be contained both in the statement (message) and in the transcript of the interrogation of a witness or victim. The main thing is that their content provides an opportunity to conclude that the applicant is aware of the essence and content of the information provided by him, and detail and specification exclude the possibility of double interpretation and avoidance of liability in case of knowingly false information about the crime. In addition, the voluntary consent of such a person to participate in the CI(S)A must be confirmed by written consent to such participation and / or confidential cooperation, explaining his rights and responsibilities, including the inadmissibility of actions aimed at to provoke a crime. These circumstances may also be recorded in the relevant protocol. It is allowed when the consent to confidential cooperation, participation in the CI(S)A, clarification of the rights and obligations of the confidant and warning about non-disclosure of information constituting the secret of the pre-trial investigation and other data that will become known to him during such cooperation one protocol.

There are grounds to claim that it is impossible to otherwise obtain information about the crime and the person who committed it or is preparing to commit it. Given the exclusivity, exclusivity of the CI(S)A, due to restrictions on constitutional human

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rights and freedoms during their conduct, this necessitates the investigation by the investigating judge when considering the request of the circumstances and conditions of the crime, person, etc., to come to the inner conviction it is impossible to obtain relevant evidence in criminal proceedings. In itself, the presence of objective evidence of the fact of committing or preparing to commit a crime, the involvement of a person in it, is insufficient to consent to an emergency (S)A and, in the absence of grounds, to consider otherwise than conducting an emergency CI(S)A, it is impossible to obtain relevant evidence, there are no grounds for granting permission. The inability to gather evidence other than in the event of an emergency CI(S)A may be associated with the risk of leakage and disclosure of information in the event of a public investigation, the ability of those involved to conceal evidence or hide from the pre-trial investigation and court, distortion and concealment of information, pressure on witnesses, victims or other participants in the process, including accomplices. In addition to the above circumstances, during the consideration of each application for a permit to conduct an emergency (S)A, the investigative judge must also check the compliance of the content of the application with the plot of the criminal offense and the correctness of the qualification. requirements of jurisdiction and requirements of jurisdiction, depending on whether the investigated crime falls under the jurisdiction of NABU, and in cases of appeal to another court closest to the location of the pre-trial investigation body – the correctness of the election of the appellate court.

Thus, the Supreme Anti-Corruption Court of Ukraine among the grounds for refusing to grant permission to conduct an emergency (S)A stated: «Detectives' arguments that the commission of a criminal offense under Part 5 of Art. 191 of the Criminal Code of Ukraine, confirmed by the results of the CI(S)A in the form of printouts, have the character of assumptions. In addition, the detective did not prove in court that the request for permission to conduct an emergency (S) A in the criminal proceedings are subject to the Supreme Anti-Corruption Court of Ukraine, given the existence of statutory conditions under paragraphs 1-3 of Art. 216 of the CPC of Ukraine, in particular on the amount of damage caused by the crime of five hundred times or more than the subsistence level for able-bodied persons, established at the time of the crime» (Ability to uniquely identify the person in question for permission to conduct covert activities: generalization of the WACS, 2021).

In summary, conducted by the Supreme Anti-Corruption Court of Ukraine (The need for covert measures in conjunction with the impossibility of obtaining information in another way: generalization of WACS, 2021), the most typical cases of declaring petitions unfounded and refusal to grant permission to investigators to conduct CI(S)A are as follows:

1) Emergencies have already been conducted against the defendant, but no information about his involvement has been received. This decision of the investigating judge is justified by the fact that "in circumstances where the CI(S)A is provided for a person in relation to events that took place six years ago, in criminal proceedings lasting five and a half years, and it conducted the whole complex Investigative (investigative) actions, which according to the pre-trial investigation 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) CI(S)A may not be used to update criminal proceedings. The investigating judge concluded that " CI(S)A 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 in accordance with the purpose of the CI(S)A and the tasks of criminal proceedings, which include, in particular, the impossibility of unjustified procedural coercion and the application of 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, are not good and sufficient grounds for granting permission to conduct an emergency (S) A. After all, in such circumstances, the prosecution forms the evidence base, not receives it. « In such circumstances, the investigating judge came to the conclusion that the conduct of the CI(S)A did not meet their purpose and did not contribute to the implementation of tasks in criminal proceedings.

3) Conducting an emergency (S) A in order to simplify procedural activities will not meet the requirements of Art. 8 of the Convention. Refusing to grant permission for the CI(S)A, the investigating judge noted: "The very idea, procedure and grounds for the CI(S)A indicate that they are an extreme measure of interference with human rights and only in cases where it is impossible to obtain information that has probative value in criminal proceedings. Given the nature of the CI(S)A, it is not allowed to use the CI(S)A as the original or only procedural action aimed at obtaining evidence. Of course, conducting an emergency (S)A on a person, although it requires significant technical resources, is simpler and more effective in terms of the content and accuracy of the information received.»

4) Attempts to «legalize» previous actions to obtain information in criminal proceedings - does not comply with the principles of criminal proceedings. Based on the results of the application for permission to conduct an emergency (R) D, the investigating judge found that in a criminal case in which 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. In justification of the need to access these boxes, the detective said that the presence of information in these e-mail boxes, which is important for criminal proceedings, was promptly established. Considering this position of the detective unconvincing, 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 the fact that information is available in cloud storage services is operative is a matter of concern. As the only criminal way to obtain relevant information is to withdraw information from transport telecommunication networks and, in some cases, electronic information systems, apply to the investigating judge for permission to conduct an emergency (S) A to obtain information on the availability and content of which is already known to the pre-trial investigation body, suggests «attempts to» legalize «previous actions to obtain information in criminal proceedings.»

The lack of information on the conduct of effective public events and the lack of proper justification for the possibility of obtaining it during the CI(S)A became the basis for refusing to grant permission to hold them. Substantiating the decision, the investigating judge stated: "The prosecutor did not specify what set of evidence is available in the pre-trial investigation body, which became the basis for a single conclusion on the need for such types of emergency (R) trying to reach an investigation. «

5) Inadequate justification of the purpose of the emergency (S)A and the ability to achieve results. Refusing to grant permission to conduct an emergency (S)A, the investigating judge stated: The petition does not contain a convincing substantiation of the possibility of obtaining evidence during the CI(S)A, which may be essential for clarifying the circumstances of the crime. «

6) Incomplete pre-trial investigation as a ground for refusing to issue a permit to conduct an emergency (S)A. The decision to refuse to grant permission to conduct an emergency (S)A by the investigating judge is justified by the fact that the application of

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the CI(S)A is provided for a person in relation to events that took place three years ago and in criminal proceedings in which the whole complex investigative (search) actions, which, according to the pre-trial investigation, give grounds to suspect that the person is involved in the commission of a crime. In such circumstances, holding an CI(S)A would be an excessive interference with human rights and freedoms.

3.4. Unreasonableness and formalism in filing a petition

The investigating judge noted that in the application for permission to conduct an emergency (S)A, the detective allowed standard legal wording, and did not provide any justification why, if there is already information received under covert activities, such measures should be continued. Neither the request nor the detective's examination provided sufficient and substantiated additional information that gives grounds for the continuation of the emergency (S)A, did not specify the circumstances that prevent the pre-trial investigation body to achieve the purpose of criminal proceedings with the information already obtained. In addition, the consideration of the petition did not provide a convincing justification for the possibility of obtaining evidence during the continuation of the CI(S)A, which may be essential for clarifying the circumstances of the crime. Motivation of the need to continue them by the fact that to date not found the full amount of money of illegal gain, and perhaps the suspect in telephone conversations with others will express this information, the investigating judge is not enough to conclude the need and expediency of emergency (S)A , which is under the jurisdiction of the state.

7) The lack of information about the direct or indirect participation of a person in the events referred to in the petition and providing data solely on the assumptions of the detective - excludes the possibility of granting permission to conduct an emergency (S)A. The investigating judge stated that «the investigated materials of the criminal proceedings in terms of evidence do not allow to establish a connection between the offense and the person.» It is also noted that holding a certain managerial position is not a sufficient justification for direct or indirect participation in the commission of a crime.

8) Failure to comply with the requirements of Art. 248 of the Criminal Procedure Code of Ukraine. The reason for the refusal to issue a permit to conduct an emergency (S)A was that "when asking about the permission to withdraw information from transport telecommunications networks, the prosecutor did not provide any data that persons, despite the long period of time crime, transmits or receives information about the crime. However, the prosecutor did not substantiate his conclusions that the suspect is still using a specific channel of communication and that through it a person can actually transmit information relevant to criminal proceedings «,» In addition, noting the systemic nature of criminal activity, the prosecutor does 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 certain e-mail address, which may be owned by a corporation and can be accessed using a login and password, the presence of information in such an electronic information system significance for the pre-trial investigation, the purpose for which such a system is conducted, the fact of its existence at the time of the crime, and whether such information is relevant to the pre-trial investigation.

Along with the typical, in the generalization of the High Anti-Corruption Court there are atypical grounds for refusal to grant permission to conduct an emergency (S)A:

- the subject applies for permission to continue the CI(S)A, which was denied by a previous decision;

- due to the detective's failure to appear in court, although he was duly notified, which deprived the court of the opportunity to investigate the circumstances of the case;

- due to the presence of a valid (valid) permit for emergency (S)A;

- in connection with the provision of information of incomprehensible procedural nature to the investigating judge (all information referred to by the detective was obtained in other criminal proceedings, without the appropriate permission of the investigating judge to use materials of the CI(S)A in other criminal proceedings).

Thus, the need and expediency of granting permission to conduct an emergency (S)Ais assessed by the investigating judge taking into account the circumstances of a particular criminal proceeding and must take into account the circumstances of the crime, duration and duration of pre-trial investigation, results of previous emergency jurisdiction and jurisdiction, completeness, objectivity of the statement in the petition of the essential circumstances of the crime and information about the involvement of a certain person or persons in the commission of the investigated crimes.

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 an emergency (S)A are limited by the impossibility of applying adversarial principles, as the investigating judge clarifies the legal position and analyzes arguments only of the prosecution represented by the investigator or prosecutor. It is the peculiarity of the CI(S)A, their secrecy (secret) excludes the possibility of participation of the defense in their consideration. Accordingly, the independence, impartiality and objectivity of investigative judges, whose powers include the consideration of applications for permission to conduct an emergency (S)A is a major factor in ensuring human and civil rights and freedoms in the consideration of such applications.

Accordingly, the issue of determining the limits of activity and initiative of investigative judges in the study of the evidence provided by the prosecution to substantiate the petition becomes relevant. The court's desire to establish objective truth, awareness of the importance of ensuring the adversarial cognitive activity makes it impossible to treat the investigating judge as an outside observer of the competition, because the investigating judge is responsible for the decision, including incomplete or biased trial. In the case of motions to conduct an emergency, the position of an outside observer for a judge does not guarantee protection of the rights and legitimate interests of victims of crime, as well as protection of a person from unjustified and illegal restriction of his 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).

A number of scientists: A. Plashevska (2016), O. Piyuka (2014), L. Voskobitov (2014), researching this issue, expressed the opinion that it is necessary to clearly define in the legislation cases in which the court has the right to act on its own initiative and influence the collection of evidence, criteria , and establishing the grounds on which the court may perform on its own initiative a procedural action.

In the context of such scientific developments, it seems appropriate to establish in the criminal procedure law the investigating judge considering the application for permission to conduct an emergency (S)A, the right to initiate the provision of additional materials, conduct certain investigative and procedural actions, the results of which will help eliminate incompleteness. pre-trial investigation and will enable the investigating judge to form a complete and objective picture for a lawful decision.

Instead, the current CPC restricts the investigating judge from making one decision - to grant permission or to refuse to grant such permission. When deciding to refuse

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to grant a permit to conduct an emergency, the judge may point out deficiencies or incompleteness of the pre-trial investigation, which prevents the granting of permission to conduct covert activities, however, he is not obliged to do so and may limit himself to general wording, such as , «The prosecution did not provide sufficient objective data on the existence of grounds for an emergency (S)A».

In turn, the investigator and the prosecutor, even without taking measures to eliminate the shortcomings, have the right to re-submit a similar request, hoping that it will be considered by another investigating judge. This state of affairs indicates a certain formalism in the implementation of the function of judicial control and its lack of efficiency. As a result, the percentage of satisfied applications for permission to conduct an emergency (S)A is 80-90% (Supreme Anti-Corruption Court, 2021). The reason for this is that when deciding on such motions, the investigating judge first examines the petition, sometimes - the materials of the criminal proceedings and hears the arguments of the investigator, prosecutor on the circumstances of the criminal offense, evidence and other information relevant to clarify the circumstances of the crime or the identification of the perpetrators.

However, even such a simplified procedure of judicial control proceedings during the consideration of applications for permission to conduct an emergency (S)A is not regulated by law. The investigating judge is not obliged to investigate the materials of the criminal proceedings or to find out from the initiator of the petition or another person who took part in the consideration of the petition information about the reasons and grounds for granting permission to conduct an emergency. In turn, the investigator and prosecutor who participate in the consideration of the petition or prepare a procedural document to substantiate his arguments (analytical, report notes, reports), are not responsible for providing the investigating judge with inaccurate information and explanations or concealment of significant circumstances. importance for making a legitimate decision.

Thus, the investigating judge must «take on faith» any arguments of the prosecution or be guided by his own intuition, taking into account life experience and worldview, which, in our opinion, can not be considered a sufficiently effective basis for human and civil rights and freedoms, especially Considering that CI(S)A in criminal proceedings may be conducted not only against persons suspected of committing a crime, but also against witnesses, victims and other participants in criminal proceedings.

An additional factor that negatively affects the observance of human and civil rights and freedoms in the field of emergency (S)A is the lack of provisions in the CPC of Ukraine that would provide a legal assessment of the results of emergency (S)A. In essence, the function of the investigating judge is limited to deciding whether to grant or refuse a permit to conduct an emergency (S)A, and the consequences of this decision, actual implementation, results, their use in criminal proceedings or establishing the fact of unjustified restrictions on human rights and freedoms. citizen «remain behind the scenes» of the investigating judge, which in fact creates a sense of irresponsibility and impunity among law enforcement officers.

Conclusions

Recognition by the investigating judge of the status of a person who acts as a guarantor of human rights and freedoms during the pre-trial investigation, inability to ensure adversarial principles in the consideration of motions for emergency (R) D, indicates the urgent need for clearer regulation of such motions, and the responsibilities of the investigating judge in the performance of judicial control functions and, above all, in the field of judicial control over the legality of the CI(S)A.

Such measures may be:

1.Regulation of the procedure for consideration by investigative judges of applications for permission to conduct an emergency (S)A, exclusion of requirements for the obligation to consider the application within six hours.

2.Establishing the duty of the investigating judge to objectively and comprehensively investigate the grounds and grounds for conducting an emergency (S)A, giving him the right to request additional information from the investigator or prosecutor during the application, to give mandatory instructions to conduct certain investigative or procedural actions aimed at eliminating the incompleteness of the pre-trial investigation.

3.To envisage in the criminal procedure legislation requirements to warn the initiator of the petition or another representative of the prosecution party who takes part in the consideration of the petition for permission to conduct an emergency, responsibility for providing knowingly unreliable explanations (testimonies) to the investigating judge. providing inaccurate information in oral explanations (testimonies) or written documents.

4.Impose on the subjects authorized to submit a request for permission to conduct an emergency (S)A to inform the investigating judge (court) about the results of covert investigative (investigative) measures, permission for which they received, after their completion and in case of notification of the achievement of the purpose of their holding - additionally after the court has made a decision on the merits of the criminal proceedings.

The application of such measures can positively affect the objectivity of consideration of applications, reduce their number, bring law enforcement practice closer to meeting the requirements of the law on the exclusivity of the CI(S)A and contribute to the real protection of fundamental human and civil rights and freedoms.

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