

ADDITIONAL GUARANTEES OF OBSERVANCE OF THE RIGHTS AND FREEDOMS OF SPECIALLY DESIGNATED SUBJECTS DURING THE CONDUCT OF COVERT INVESTIGATIVE (SEARCH) ACTIONS

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Abstract

The article examines the additional guarantees provided to specially designated subjects—such as lawyers, journalists, medical professionals, and public officials—during covert investigative (search) actions. These subjects hold positions that require heightened protections due to the sensitive nature of their roles and responsibilities. The study analyzes the legal frameworks, both national and international, that aim to safeguard the rights and freedoms of these individuals when subjected to covert surveillance, searches, or other investigative activities. It emphasizes the need for stringent oversight mechanisms, legal safeguards, and procedural transparency to prevent abuse and ensure that any encroachment on rights is justified, proportionate, and lawful. The article also identifies gaps in existing regulations and suggests enhancements to better protect specially designated subjects, thereby balancing the needs of law enforcement with the preservation of fundamental human rights.

Keywords: Covert investigative actions; Specially designated subjects; Human rights; Legal frameworks; Search actions.

Introduction

Conducting covert activities aimed at obtaining information, and primarily related to invasion of privacy, breach of secrecy of communication, correspondence, inviolability of the home, especially when it comes to special entities, including judges, lawyers, people's Deputy of Ukraine, necessitates weighing the effect of their use in criminal proceedings and the possible threat of abuse by law enforcement officers, unjustified restrictions on human and civil rights, unlawful influence on the court, political decisions or obstruction of the right to defense. Several issues remain controversial today, including determining the legal basis for conducting covert investigative (search) actions (CI(S)A), the procedures for their implementation and the use of their results, as well as the requirements for documenting these procedural actions.

Therefore, the purpose of this article is to determine and assess the feasibility of use and threats arising from emergency (S)A in relation to special entities, identify risks of unwarranted interference in private life during their application, development of criteria and general principles of emergency (S)A on special actors for the harmonious combination of the interests of society in the field of justice and the proper provision of fundamental human rights and freedoms.

Along with this, the secrecy of the CI(S)A, which, although a necessary property, makes it possible to avoid proper control by the state and society (Babikov, 2021). And if such emergencies (S)A as audio, video surveillance of a person or place, control of a crime, covert intrusion, surveillance of a person, is usually carried out when the

prosecution has already received sufficient information indicating possible preparation, attempt or commission crime, conducting such an emergency (S)A as the removal of information from transport telecommunications networks (wiretapping) is usually considered by law enforcement officers not as a means of obtaining evidence of guilt, but primarily as a means of monitoring life, obtaining information about connections, routes, establishing permanent meeting places or receiving information about the planned meeting place on-line. Information transmitted through such channels is hardly used as evidence of a person's guilt, but may contain sensitive information and be used as a means of blackmail or other unlawful influence. This state of affairs is known to all participants: investigators, prosecutors, investigating judges. However, cases of refusal to approve this measure by investigating judges are quite rare. This can be explained by the perfection and validity of the petitions, the convincing report of the investigator or prosecutor, however, such justification should be treated critically. To do this, it is sufficient to analyze the sentences contained in the Unified State Register of Judgments (USRJ) in order to refer to the information obtained during the interception of telephone conversations as proof of guilt of the convicted person. Such cases are rare.

This state of affairs is not a revelation for the parties to the criminal proceedings. The inconsistency of the declared expected results during the interference in private communication with the actual data obtained, which from time to time have no significance for criminal proceedings, gives grounds to conclude that the risk of unfounded approval of the request by the investigating judge is much less than the risk of being criticized by law enforcement for «obstructing the fight against crime.» In fact, operational units, investigators, prosecutors and judges «formed a community» of mutual interest, as a result of which the prosecution's arguments about the exclusivity and necessity of the CI(S)A in most cases are not criticized by investigating judges. And given the fact that investigators and prosecutors usually do not meet the requirements of Art. 253 of the CPC of Ukraine regarding the notification of a person about the emergency (S)A, the facts of unjustified restriction of constitutional rights and freedoms remain behind the «seven seals» and without proper response. Elimination of violations of procedural law and compensation for damage caused by unjustified restrictions on rights and freedoms does not occur, which «encourages» law enforcement agencies to further abuses. Unfortunately, this state of affairs is typical not only in Ukraine, but also in other European countries, where the issue of protection of human rights and freedoms is given much more attention.

Thus, in the publication of the Kharkiv Human Rights Group «Telephone tapping in international law and legislation of eleven European countries (UK, Germany, Finland, France, Switzerland, Sweden, Hungary, Poland, Russia, Romania, Ukraine)» Dennis Tellborg (Interception of telephones in the international law and legislation of eleven European countries..., 2014) whether covert surveillance helps in the fight against crime states: «The basic principles of the Swedish Government Act and the Code of Judicial Procedure are the principle that the inviolability of the person is a priority in relation to the detection of crime. Measures that violate (limit) the inviolability of the person may, according to the law, be used to solve crimes only in exceptional cases. The decision to apply such measures is always made by the court and should be directed against persons in respect of whom there are grounds to suspect them of committing a completed crime (or at least preparation, attempt or aiding and abetting). However, we are convinced that this is not enough for the police to investigate organized crime, drug traffickers, etc., and not enough for the Security Police: in all these cases, the police work mainly before the crime, not retrospectively. The purpose of wiretapping (or other intrusion into private life) is to gather information about a person, organization, or event in order to determine how further investigation will be directed. Naturally, wiretapping is one of the many methods of operational and investigative activities. But

even in such cases, wiretapping is used not so much to obtain evidence of a criminal offense as to plan action.

Materials and Methods

The initial stage, stage or step in any study is the development and use of methodological tools in the context of the study, as this depends on the strategy of the basic concept for the study of additional guarantees of rights and freedoms of specially designated entities during covert investigations. (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 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, the methodology of scientific knowledge includes a system of various components that allow you to cover and explore the whole set of events and phenomena that are most interested in the science of a particular field. The tools used in this case should cover all available methods for research: dialectical, system-structural and system-functional analysis, historical-legal, comparative-legal, hermeneutic, statistical, sociological, mathematical, modeling, description, comparison, experiment, modeling, observation, etc.

Thus, in the process of scientific research of additional guarantees of observance of the rights and freedoms of specially designated subjects during covert investigative (investigative) actions, we chose the following methods: 1) dialectical (this method is central among philosophical methods of scientific knowledge, because allows to consider the corresponding criminal-procedural phenomenon in development and taking into account the basic laws of dialectics); 2) Comparative law is a method that involves understanding the unknown by comparing it with the known; clarifying the characteristics of a phenomenon by contrasting its qualities with its other properties or those of a different phenomenon; and identifying patterns by comparing objects across different time periods, analyzing changes or trends by examining their past and present qualities. This approach aids in defining the content and essence of legislative and theoretical provisions regarding additional guarantees for the rights and freedoms of specially designated entities during covert investigative actions. 3) dogmatic (alternative names: 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 of additional guarantees of respect for the rights and freedoms of specially designated entities during covert investigative (search) actions and practices, as well as serving to systematize criminal procedure, timing, disclosure concepts, construction of legal constructions, clarification of the true content of certain norms by 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) The systems method centers on exploring the integrity of an object and the mechanisms that sustain it,

aiming to identify the various relationships within a complex object and integrate them into a cohesive theoretical framework. By employing a systems approach, complex dynamic entities are examined, revealing the internal mechanisms of their individual components, clarifying how these components function, and tracing their interactions across different levels.

The materials studied are international treaties, EU legislation, the case law of the European Court of Human Rights, the Supreme Court, the work of scientists, information on the results of the work of Ukrainian law enforcement agencies and materials of criminal proceedings.

The research utilized both general scientific and specialized methods, including comparative law, to analyze international and national legislation of Ukraine and other countries, as well as scientific categories, definitions, and approaches. The formal dogmatic method was employed to elucidate the content of procedural law requirements and the legal positions of the European Court of Human Rights (ECtHR). Additionally, the dialectical method was used to establish the legal nature and the preconditions for the development of principles related to additional guarantees for specially designated subjects.

Results and Discussion

Unspoken receipt of information as one of the oldest and most effective forms of establishing the circumstances of a criminal offense provides an opportunity, by recording on technical media, to recreate before the participants in the criminal process an authentic picture of events with minimal risk of misperception. On the other hand, covert measures to obtain information restrict the rights and freedoms guaranteed by international acts and national legislation, interfere with his private life, secrecy of communication, violate the inviolability of housing and other rights and freedoms that determine the content and direction of the state.

The tasks of criminal justice (exposing perpetrators of criminal offenses, bringing them to justice) are certainly important for society, but it should be remembered that the establishment and protection of human rights and freedoms is the main duty of the state in Art. 3 of the Constitution of Ukraine (1996). The conflict between the purpose of wiretapping, as defined in the Code of Judicial Procedure (ie prosecuting criminals), and its convenience as a means of preventing crime, has led to police tactics, which do not provide all collected material «for tactical reasons.» It may seem reasonable to keep some information for a month in order for the court to extend its sanction for wiretapping. As a result, each time only a small part of the information gathered is provided to the court, on the basis of which the court extends the sanction.

Here, perhaps, is one of the reasons why courts, intuitively realizing the true purpose of such measures, almost always satisfy requests for measures combined with interference in private communication, even if the result is so little to initiate criminal proceedings and sentencing individuals. in respect of which a tacit hearing was applied by a court decision. This situation is exacerbated by the fact that a judge who refuses to authorize such events risks further devastating criticism if a terrorist carries out an avoidable attack by tapping the phone. On the other hand, by imposing sanctions on hundreds of secret interceptions, the judge does not risk anything. In Sweden, a person subject to such measures will never be aware of it, regardless of whether wiretapping, wiretapping or other measures have been taken legally or illegally.

This view is currently shared by three judges from the so-called Eavesdropping Commission. They write: "In a system without oversight, it is inevitable that decision-makers will eventually adjust to each other's interests and begin to hold the same views on the appropriateness of measures restricting rights and freedoms. Therefore, there is a growing risk that the decision to apply such measures will be made automatically (SOU 1988: 46, p. 518). I dare say – and this has already become an empirical fact in

Norway (see Lund-report, Rapport till Stortinget 1995-96, n-15) - that this is why requests to listen in on telephone conversations are almost never or never rejected. The same, of course, applies to electronic listening, etc. Naturally, the danger that the court will allow illegal electronic wiretapping is no less than in the case of telephone wiretapping. If we accept the view of the police that these measures are necessary to successfully combat crime - and probably too late to bring the case back - it seems necessary to recognize that these measures are preventive and will remain so in the future. It must also be acknowledged that the court is not and cannot be a guarantee against abuse, as it seems at present, and as everyone wanted to believe. The only way to avoid abuse is transparency of procedures: it is necessary to introduce rules – as introduced by Germany and Austria, as well as many other countries – according to which the person subject to covert measures is informed about their implementation after such actions. This gives him the only opportunity to claim damages if such measures have been taken against him unlawfully. If such cases are tried, the authorities that decide on the use of covert measures will be held accountable. I believe that in this state of affairs, requests for covert measures will be considered more carefully, with a more responsible attitude, taking into account human rights and possible negative consequences in each case. This is probably the only way to be sure that the system meets the requirements of the European Convention on Human Rights. «

Therefore, the organization and conduct of the CI(S)A, especially when it comes to special entities, is extremely important, as they can promote the restoration of violated rights, rule of law, justice, and disrespect guaranteed by the Constitution of Ukraine, international acts and criminal procedural law fundamental rights and freedoms of man and citizen.

The most important international legal act defining the general principles, guarantees of rights and inviolability that apply to the conduct of the CI(S)A is the UN General Assembly Resolution 217 A (III) of December 10, 1948 of the Universal Declaration of Human Rights. This act initiated the protection of human and civil rights and fundamental freedoms at the international level, including protection against unlawful interference with privacy, communication, exchange of correspondence, etc (Universal Declaration of Human Rights, 1948). In particular, Article 12 of the UN Universal Declaration states that no one shall be subjected to undue interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone is guaranteed the right to protection of the law against such interference or encroachment.

Along with the Universal Declaration of Human Rights, the confidentiality of communication is also guaranteed by the European Convention (Convention for the Protection of HRFF (1950)), the International Covenant on Civil and Political Rights (1973), the UN Convention on Migrant Workers (1975). These guarantees are reflected in the national legislation of Ukraine (Criminal Procedure Code of Ukraine, 2022). However, neither at the international nor at the national level is the right to confidentiality, inviolability of communication, prohibition to interfere in private and family life not considered absolute. Article 12 of the UN Universal Declaration prohibits “unjustified” interference. Article 8 of the European Convention allows public authorities to interfere with the right to respect for private and family life, home, and correspondence, provided that such interference is legally justified. It must be necessary in a democratic society for reasons such as national and public security, the economic well-being of the country, the prevention of disorder or crime, the protection of health and morals, or the safeguarding of the rights and freedoms of others. Thus, interference in private communication is permissible under appropriate conditions. Public authorities must have grounds for restricting human rights and freedoms, but it must be carried out on the basis and in the manner prescribed by law and the purpose of such interference may be: the interests of national and public security; economic well-being of the country;

prevention of riots or crimes; protection of the health, morals, rights and freedoms of others. It is important to keep in mind that these international acts focus on the form of legal regulation of issues related to interference in private communication. The procedure for limiting confidentiality is subject to regulation exclusively by law and not by-laws, which increases the level of protection of such rights.

Along with the general principles of guaranteeing rights and fundamental freedoms set out in the UN Universal Declaration and the European Convention, it was the European Court of Human Rights in its decisions that specified such principles, defined the basic conditions and permissible limits of privacy by the state in private communication and the exercise of other rights. Analyzing the provisions of the UN Universal Declaration and the European Convention, the ECtHR not only explains the main provisions, but also indicates ways to address issues that are not directly regulated by these international acts.

Thus, in the case of *Klass and Others v. Germany*, it was concluded that despite the absence in the Convention of the term «wiretapping», the content of Art. 8 of the Convention gives grounds to believe that telephone conversations are covered by the concepts of «privacy» and «correspondence». It is also important to interpret such a condition for covert activities as defined in the Convention as «necessary in a democratic society».

The Court has taken the legal view that the right to secret surveillance of citizens is inherent in police states, and in democracies, according to the Convention, such surveillance may be permissible only in cases of extreme necessity for the preservation of democratic institutions. The implementation of this position of the ECtHR was embodied in Art. 246 of the CPC of Ukraine, which stipulates that CI(S) A may be conducted only in exceptional cases where it is otherwise impossible to obtain information about the crime and the person who committed it, as well as in Part 1 of Art. 258 of the CPC of Ukraine, which states that any interference in private communication is possible only with the relevant decision of the investigating judge. The CPC of Ukraine does not provide for exceptions to this rule. The existence of such threats to democratic institutions as terrorism, espionage, and transnational crime necessitates the use of measures such as covert surveillance, correspondence control, and other forms of communication, but the ECtHR emphasizes that in a democratic society the use of any surveillance system must be combined with adequate and effective safeguards to prevent abuse.

In the case of *Juwig v. France* (European Court of Human Rights: The case of *Juwig v. France*, 1990) in 1990, the ECtHR focused on the fact that guarantees of rights and freedoms should be established by law (other acts having the force of law), should contain the following main positions:

1. The composition of the crime, during the investigation of which interference in private communication is allowed;
2. Limits on the duration of interference in private communication;
3. Detailed rules for recording information obtained as a result of interference in private communication;
4. Guarantees that the court will receive records of conversations without corrections and notes;
5. The circumstances under which the received records can and should be destroyed;
6. Rules for the destruction of records or their decryption in cases of acquittal of the accused by the court.

Thus, the ECtHR, as a result of considering a number of cases, including *Klass and others v. Germany*, *Juwig v. France*, *Malone v. The United Kingdom*, *Kruslen v. France*, formed the main criteria, compliance with which 8 of the Convention.

“On the basis of law” – is that the invasion of privacy occurs on the basis of the

law, which meets the following requirements:

- availability of the law – according to the written or unwritten law, a person has the opportunity to make sure that the interference in his private life meets the requirements of the law applicable in this particular case;

- predictability – a person has the opportunity (including with the help of a lawyer) to predict the consequences of any possible action;

- quality – the law should provide adequate and effective means of possible abuse.

“Qualitative Law” provides:

- a list of crimes, the investigation of which may be grounds for invasion of privacy;

- exclusivity of application, limited to cases where it is otherwise impossible to obtain evidence;

- permission to intervene may be granted on the basis of a motivated written request by a person who has a certain (high, independent) status;

- actual interference in private communication is possible only after obtaining the appropriate permission of the authorized person (preferably a judge);

- the period during which the invasion of privacy may occur;

- regulation of fixing the received information;

- measures to preserve and protect the information received, the introduction of rules for the exchange of such information between different government agencies;

- conditions and grounds for destruction of the received information;

- measures for information, its copies in case of acquittal.

“Necessary in a democratic society” provides:

- only to the extent necessary for the security of democratic institutions;

- in exceptional circumstances necessary in a democratic society in the interests of national security and / or the prevention of riots and the commission of crimes.

In Ukraine, the legal framework for covert measures involving interference in private communication was first established with the adoption of the Law of Ukraine «On Operational and Investigative Activities» (Law No. 2135-XII) in 1992. This framework was further codified in laws governing the formation and activities of law enforcement bodies, including the Laws of Ukraine «On Police,» «On the Security Service of Ukraine,» and the Law «On Organizational and Legal Basis of Combating Organized Crime» (1993). Following the 2012 revision of the Criminal Procedure Code of Ukraine (CPC), the 1992 Law was updated to align with Chapter 21 of the CPC, which regulates decisions on conducting operational and investigative measures, including the submission, consideration, implementation, documentation, and use of results. This update has led to a more unified approach in regulating measures that restrict human and civil rights and freedoms during criminal investigations and operational activities.

Analysis of the basic principles and guarantees of the CI(S)A, regulated in Chapter 21 of the CPC of Ukraine gives grounds to conclude that the introduction of the CI(S) A was a measure aimed at ensuring compliance with the UN Universal Declaration, European Convention, ECtHR and unification. approaches to the organization and conduct of activities related to interference in private communication and restrictions on human and civil rights and freedoms, approximation to generally accepted standards in this area. Along with the general principles governing the grounds and procedure for conducting an emergency (S)A, the CPC of Ukraine establishes certain features regarding the submission of requests for an emergency (S)A for special entities.

In particular, the CPC of Ukraine established the peculiarities of conducting an emergency (S)A in relation to the following special entities:

- judges;

- judges of the Supreme Anti-Corruption Court;

- the lawyer;

- People's Deputy of Ukraine

According to Part 9 of Article 49 of the Law of Ukraine “On the Judiciary and

the Status of Judges” (2016), investigative actions involving a judge, which require court authorization, must be based on a court decision obtained at the request of the Prosecutor General or their deputy, or the head of a regional prosecutor’s office or their deputy.

In addition to these safeguards for judges, the Criminal Procedure Code of Ukraine (CPC) outlines specific provisions for conducting covert investigative (search) actions (CI(S)A) involving judges of the High Anti-Corruption Court. Article 480-1 of the CPC mandates that any information suggesting a criminal offense by a judge of the High Anti-Corruption Court must be recorded in the Unified Register of Pre-Trial Investigations by the Prosecutor General (or Acting Prosecutor General). The Prosecutor General must then notify the Supreme Court within 24 hours of entering such information.

Accordingly, a request for permission to conduct an CI(S)A against a judge of the Supreme Anti-Corruption Court may be filed (filed) only in criminal proceedings registered against him by the Prosecutor General or his acting and such a request subject to the requirements of Art. 482-1 of the CPC of Ukraine is subject to consideration by the investigating judge, specified in paragraph 18 of Part 1 of Article. 3 of the CPC of Ukraine.

For covert investigative (search) actions (CI(S)A) involving lawyers, additional safeguards are outlined in Paragraph 3 of Part 1 of Article 23 of the Law of Ukraine “On Advocacy.” This provision specifies that such actions, including those involving lawyers whose right to practice is suspended, can only be conducted with court authorization. This authorization is granted based on a judicial decision made at the request of the Prosecutor General, their deputies, or prosecutors from the Autonomous Republic of Crimea, regions, Kyiv, or Sevastopol.

Although the Kyiv City Prosecutor’s Office has been reorganized under the Law of Ukraine No. 5076-VI (2013), the terms “regional prosecutor’s offices” and “oblast prosecutor’s offices” are still used to refer to prosecutor’s offices in different regions. Nevertheless, in line with the general principles of criminal proceedings and the protection of lawyers’ rights, requests for authorization should be made to the Prosecutor General or their deputy, or to the head of the regional prosecutor’s office or their deputy. Along with this has the right to exist and the legal position that before the relevant changes to paragraph 3 of Part 1 of Art. 23 of the Law of Ukraine “On Advocacy and Advocacy” with the replacement of “Regional Prosecutor”, “Kyiv City Prosecutor” “their deputies” to “respectively the head of the regional (regional) prosecutor’s office or his deputy”, granting permission to conduct CI(S)A for the petition filed by the head of the regional prosecutor’s office and his deputy is illegal. Controversial in this part is the presence of the authority to submit a request to conduct an emergency (S)A on special entities to the First Deputy Prosecutor General and the First Deputy Head of the Regional Prosecutor’s Office.

This distinction arises because Paragraph 9 of Part 1 of Article 3 of the Criminal Procedure Code (CPC) of Ukraine defines the “head of the prosecutor’s office” as including the Prosecutor General, the head of the regional prosecutor’s office, the head of the district prosecutor’s office, and their first deputies and deputies acting within their authority. This indicates that the roles of “Deputy Head of the Prosecutor’s Office” and “First Deputy Head of the Prosecutor’s Office” are separate and distinct. Similar distinctions are made in Articles 10, 11, 12, and 15 of the Law of Ukraine “On the Prosecutor’s Office,” which clearly delineate the administrative roles of “Deputy” and “First Deputy” Prosecutor General or Head of the Regional Prosecutor’s Office. According to Part 3 of Article 9 of the CPC, which states that “Laws and other normative legal acts of Ukraine related to criminal proceedings must comply with this Code. Any law that contradicts this Code cannot be applied in criminal proceedings,” this distinction is crucial for CI(S)A involving judges and lawyers.

Regarding requests for authorization to conduct covert investigative (search) actions (CI(S)A) involving a People's Deputy of Ukraine, Part 2 of Article 482-2 of the Criminal Procedure Code (CPC) stipulates that such requests must be approved by the Prosecutor General (or the Acting Prosecutor General). Additionally, this authorization is required only for criminal proceedings being investigated by NABU investigators or the central office of the State Bureau of Investigation. The analysis of the above wording identifies certain aspects that should be taken into account when exercising the following powers:

- in contrast to the established guarantees for lawyers and judges, the application for permission to conduct an CI(S)A in the NDU can be approved not only by a person who holds a certain position, but also performs duties in such a position;
- the Prosecutor General of Ukraine, the person acting as the Prosecutor General is authorized only to approve the petition.

It should be noted that among the powers of the prosecutor defined in paragraph 10 of Part 2 of Art. 36 of the CPC of Ukraine, the legislator clearly distinguishes between the concept of "agreeing or refusing to approve the requests of the investigator to the investigating judge to conduct an emergency CI(S)A and «independently submit such requests to the investigating judge.” These circumstances give grounds to conclude that the Prosecutor General and the person acting in his capacity are not empowered to submit motions to the investigating judge to conduct an emergency CI(S)A, but only to approve such motions prepared and signed by investigators or prosecutors.

However, the question of the need in such cases to include the prosecutor who holds the administrative position of Prosecutor General, his first deputy and deputy, head of the regional (regional) prosecutor's office, his first deputy and deputy in the group of prosecutors in criminal proceedings - remains controversial.

Judicial practice also differs as to whether prosecutors authorized to approve and file motions to conduct CI(S)A on special entities for which the law provides additional guarantees for their activities should be part of the group of prosecutors. On similar issues, which by their legal nature can be correlated with the granting of permission to conduct an CI(S)A as a measure restricting human rights and freedoms, different approaches are used, and, as a result, we have different conclusions about the presence/absence of the prosecutor, holding the relevant administrative position, the right to approve petitions and other procedural actions or decisions. Thus, considering the legality of signing (approving) a notice of suspicion of a judge by the Prosecutor General or his deputy, who were not members of the group of prosecutors and were not procedural leaders, the Grand Chamber of the Supreme Court noted that this power of the Prosecutor General or his deputy is exclusive and may not be delegated to other prosecutors or investigators. In order to exercise this power, neither the Prosecutor General nor his Deputy is obliged to provide procedural guidance in the relevant criminal proceedings against a judge, as the current criminal procedure law does not require such a requirement (Resolution of the Supreme Court No 536/2475/14-k, 2019).

Another legal position is that:

- the burden of proof lies with the investigator, prosecutor, who provides procedural guidance in criminal proceedings;
- High-level prosecutors, including heads of prosecutor's offices, who are not part of the team Theoretical and modern approaches to the search for a suspect specific criminal cases, do not have full access to materials, documents, and other information related to the pre-trial investigation (as per Paragraph 2 of Part 2 of Article 36 of the CPC). They also lack the authority to evaluate the evidence collected during the pre-trial investigation or to substantiate the circumstances outlined in Article 91 of the CPC, which hampers their ability to properly justify a request for an emergency measure.
- in parts 4-6 of Article C of the CPC of Ukraine, which provides for the authority of prosecutors holding administrative positions, the authority to initiate, submit motions

to conduct an emergency (S)A or to approve them are absent;

- holding an administrative position does not give the prosecutor the right to interfere in the procedural activities of another prosecutor, including those who are under his authority, as this would be contrary to the requirements of Part 1 of Art. 36 of the CPC of Ukraine;

- the rules set out in Art. 482-2 of the CPC of Ukraine are special in relation to those set out in paragraph 15 of Part 1 of Art. 3 and item 10 part 2 of Art. 36 of the CPC of Ukraine only in terms of defining specific officials of the prosecutor's office as prosecutors who are procedural leaders in the relevant criminal proceedings, endowed with the authority to carry out the relevant procedural action;

- the adoption of procedural decisions in criminal proceedings by another prosecutor is not a procedural manager is possible only in cases expressly provided for in Part. 4-6 st. 36, part 3 of Art. 37, art. 313 of the CPC of Ukraine, is exclusive and is not subject to expanded interpretation.

In view of the above, the position is expressed that during the pre-trial investigation to perform procedural actions and make decisions in criminal proceedings are vested only prosecutors – procedural managers (except directly provided in Part 4-6 of Article 36 powers of heads of prosecutor's offices and complaints in the cases provided for in Articles 308 and 311 of the CPC of Ukraine), as the procedural management of the pre-trial investigation is primary and decisive in relation to departmental supervision. A prosecutor who does not exercise procedural guidance cannot be held procedurally responsible for the consequences of actions taken and decisions made, so the decision (approval of the petition) by the Prosecutor General (acting Prosecutor General), his deputy, the head of the regional prosecutor's office is not their determining right. but only by derivative powers of primary law arising from procedural guidance.

Restrictions imposed by criminal procedural law on the possibility of conducting emergency situations in relation to certain special entities, due to their special status and guarantees of independence, require an increase in the status of the prosecutor, who may perform such actions against special entities, and, accordingly, , the head of the prosecutor's office, whose powers include the approval (submission) of a petition for an emergency (S)A, must be a member of the group of prosecutors – procedural heads. Summing up the issue related to the application for an emergency (S)A for a special entity, property and premises owned, owned or used, it should be noted the need to comply with the requirements for signing such an application by an authorized person, providing information in the application and / or confirming the relevant document of the fact that such a person holds a relevant administrative position or performing duties. At the same time, special attention should be paid to the requirements of the Law of Ukraine "On Temporary Acting of Officials Appointed with the Consent of the Verkhovna Rada of Ukraine, the President of Ukraine or the Verkhovna Rada of Ukraine on the Nomination of the President of Ukraine". appointed by the President of Ukraine with the consent of the Verkhovna Rada, his duties are temporarily, but not more than one month, performed by the first deputy (and in his absence - the deputy) of this person, appointed by a constitutionally legitimate person.

The status of such entities as the "Acting Prosecutor General" and the "Acting Prosecutor General", the grounds for its acquisition, the content and scope of powers are different. "Acting Attorney General" – the First Deputy, Deputy, to whom the Attorney General by his order entrusts the performance of the duties of the Attorney General for the period of business trip, vacation, etc. The specified subject of procedural activity is provided in the CPC of Ukraine. "Acting Prosecutor General" is a person who temporarily performs duties on the basis of an order of the person who appointed the Prosecutor General – the President of Ukraine. The reason for such a decision is the absence of the Prosecutor General (resignation, disappearance, etc.). The current CPC does not provide for such a subject of procedural activity. As the CPC does not provide

for the possibility of delegating procedural powers of the Prosecutor General to a person temporarily acting, the person with the status of “acting Prosecutor General” is not empowered to approve requests for an CI(S)A or perform other procedural actions, relating to the powers of the Attorney General or the person acting in his capacity. In addition, when deciding on the conduct of an emergency (S)A in relation to a lawyer (defense counsel) should be taken into account established by part 5 of Art. 258 of the CPC of Ukraine prohibits the conduct of emergency situations (S)A, related to interference in the communication of defense counsel with the suspect, accused, convicted, acquitted. In our opinion, the wording of the ban on interfering in private communication between the defense counsel and his client is unsuccessful and does not meet modern trends and standards established by international legal acts, which negatively affects the proper preservation of legal secrecy. confession.

Analyzing these provisions of the criminal procedure law, we can draw the following conclusions:

1. it is not prohibited to interfere in a lawyer's private communication with another client: a witness, a victim, a person whose property is being seized, a representative of a legal entity subject to criminal proceedings, a person whose property is being seized, an insane person, who committed a socially dangerous act, etc.

2. it is not prohibited to interfere in the private communication of one defense counsel with another defense counsel or a representative of a person, including a representative of a juvenile suspect, accused, convicted, acquitted.

When analyzing the guarantees of legal secrecy to determine the boundaries of lawful interference, it is essential to consider both national and international legal instruments, as well as relevant case law. For instance, Article 23 of the Law of Ukraine “On Advocacy” prohibits requiring a lawyer, their assistant, trainee, or anyone employed by a lawyer, law firm, or bar association, as well as individuals whose right to practice law has been suspended, to disclose information that constitutes a lawyer's secret. Such individuals cannot be questioned about these matters unless the person who entrusted the information has legally released them from the obligation of confidentiality. Similarly, Article 65 of the Criminal Procedure Code (CPC) of Ukraine stipulates that priests cannot be interrogated about information received during confession, and lawyers cannot be questioned about information that is legally protected. Additionally, Article 8.224 of the CPC provides that individuals have the right not to answer questions regarding the secrecy of confession and professional confidentiality of defense attorneys.

However, these provisions do not fully address the issue of interfering with legal secrecy during covert investigative (search) actions (CI(S)A). Paragraph 3 of Part 1 of Article 23 of the Law of Ukraine “On Advocacy” offers an additional safeguard by requiring that investigative measures or actions involving a lawyer can only be conducted with court authorization, based on a decision from the court or a prosecutor from the Autonomous Republic of Crimea, regions, Kyiv, or Sevastopol. Additionally, Paragraph 8 of this article prohibits involving a lawyer in confidential cooperation during such measures if it involves legal secrecy. Given the lack of clear definitions in national legislation regarding the boundaries of lawful interference with legal secrecy, the legal positions of the European Court of Human Rights (ECtHR) on this matter are crucial.

The key principles regarding the interpretation and application of Article 8 of the European Convention on Human Rights, particularly concerning interference with private communication during covert investigative (search) actions (CI(S)A), are outlined in the European Court of Human Rights judgment in the case of *Misho v. France*, delivered on December 6, 2012 (§§ 118-119): “While Article 8 protects correspondence between individuals, it also provides enhanced protection for the exchange of information between lawyers and their clients. This is due to the

fundamental role of lawyers in a democratic society – the role of protecting the parties to litigation. Lawyers will not be able to perform this important task if they cannot guarantee to those they protect that the exchange of information between them will remain confidential. In order to carry out this mission successfully, it is important that there is trust between the lawyer and his client, and that is why secrecy is necessary. The right to a fair trial, including the right of the accused not to testify against himself, is not directly related to this, but depends on compliance with this condition”. In view of the additional protection afforded by Article 8 to maintain the confidentiality of the lawyer-client relationship and the grounds on which that confidentiality is based, the ECtHR considers that lawyers’ professional secrecy, by imposing certain obligations on them, has special protection under this Article.” (Judgment of the European Court of Human Right No 12323/11..., 2012).

Please note that the ECtHR does not differentiate between clients of lawyers and suspects, accused, convicted or other persons. There is no distinction between types of proceedings or forms of legal aid provided by lawyers. The main thing to focus on is the confidentiality of the lawyer-client relationship.

In other cases, the ECtHR found a violation of Art. 8 of the Convention:

- study of bank statements on the accounts of a lawyer during the investigation of tax fraud (Judgment of the European Court of Human Rights No 69436/10..., 2015);
- interception by a police officer of papers that a lawyer passed on to his clients, who were accompanied by police in the court lobby (Judgment of the European Court of Human Rights no. 28798/13..., 2018);
- wiretapping of the applicant’s law firm by order of the Federal Prosecutor in connection with the investigation of a criminal case in which the applicant (lawyer) was a third party process, and issues related to activities other than the activities of a lawyer) (Judgment of the European Court of Human Rights No 23224/94..., 1998);
- The interception of a lawyer’s telephone conversations, the inability of the lawyer to contest the legality of this measure, and the destruction of the records were noted by the court. The court emphasized that such wiretapping between a lawyer and their client constitutes a clear violation of professional secrecy, which is fundamental to the trust between them. (Judgment of the European Court of Human Right No 30181/05..., 2015).

In addition, for the objective perception of the criteria for distinguishing between lawful and excessive and unjustified interference with legal secrecy, we consider it necessary to cite a number of cases in which the ECtHR did not recognize a violation of Article 8 of the Convention and interference with legal secrecy.

For example, in *Versini-Kampinci and Krasnyanski v. France*, the Court found that the applicants’ lawyer and his colleague had represented the interests of the director of a company suspected of violating an embargo on beef imports from the United Kingdom during the cow rabies crisis. Records of telephone conversations between the client and the lawyer, which contained information protected by legal secrecy, were used as evidence in the disciplinary proceedings against the lawyers. The Court considers that the violation of Article 8 of the Convention did not occur because the recording of the conversations between the lawyer and the client was made because the lawyer was suspected of having committed an offense and aimed at preventing mass riots.

In the case of *Klass and Others v. Germany*, five German lawyers complained about German law, which allows the authorities to monitor their correspondence and telephone conversations without the authorities having to inform them of the measures taken against them.

While not finding a violation of Article 8 of the Convention, the Court clarified that such interference with the right guaranteed by Article 8 § 1 was deemed necessary in a democratic society for national security and to prevent riots or crimes.

The Court observed that covert surveillance is permissible under the Convention only if it is essential for maintaining democratic institutions. It also acknowledged that modern democratic societies face advanced threats from espionage and terrorism, necessitating effective countermeasures, including secret monitoring of subversive activities. According to the Court, legislation that authorizes covert surveillance of emails, mail, and telecommunications is acceptable only when it is necessary to safeguard national interests and security, or to prevent unrest and criminal activities (Newsletter – Professional Secret Lawyer, 2021).

The ECtHR demonstrated a similar position in its judgment of 5 July 2001 in the case of Selahattin Erdem (Duran Kalkan). Assessing the legality of monitoring his correspondence with a lawyer while in custody, the ECtHR concluded that finding the accused's correspondence with a lawyer under the control of public authorities in this case did not violate Art. 8 of the Convention, because interference in correspondence between a lawyer and an applicant has a legal basis in national law (Pogoretsky & Pogoretsky, 2016).

In this case, the ECtHR actually preferred national law to international law, public danger (terrorism) to legal secrecy.

These legal positions of the ECtHR indicate that the presence of a person in the status of a lawyer can not be perceived as an unconditional circumstance that makes it impossible to interfere in his private communication, especially when it comes to committing a criminal offense by a lawyer. However, such interference must be justified, not violate the guaranteed secrecy of the lawyer's communication with the client and be proportionate to the threats that cause such interference, to exclude excessive interference with a person's private life.

However, in practice it is almost impossible to separate the lawyer's professional activity from his private life. Considering the issue of legal secrecy in this context, the ECtHR noted: Respect for privacy should also include, to some extent, the right to establish and develop relationships with others. Moreover, there seems to be no fundamental reason for such an understanding of "private life" to exclude professional and business activities, it is in their work that most people have a significant, if not the greatest, chance to develop relationships with the outside world. This view is confirmed by the fact that it is not always possible to clearly distinguish which activities of a person are part of his professional and business life. If a person has a humanitarian profession, his work in this context can become an integral part of his life to the point that it becomes impossible to separate who he is acting at this time." (Titova, 2011).

At the same time, when such a distinction can be made, the ECtHR points to the duty of a lawyer to report his suspicions of possible criminal acts of their clients, such as the legalization of criminally obtained property. However, in the Court's view, such a duty should apply to activities which, although practiced by a lawyer, are similar to other professions which are not protected by legal secrecy and are remote from the mission of protection. In particular, if the lawyer participates on behalf of and on behalf of the client in finance or real estate transactions, acts as a principal or assists the client in preparing or conducting transactions for certain financial transactions, which may include: buying and selling real estate or commercial enterprises; management of capital, shares or other assets owned by the client; opening bank, savings or investment accounts; organization of payment of contributions for the creation or management of legal entities; creation, management or administration of trust companies or similar entities - interference in such activities can be considered legitimate (Titova, 2011). Interference with the rights of a lawyer is also considered lawful if there is a suspicion that the lawyer himself has committed or is committing a crime.

Conclusions

Summing up, it is possible to determine the main criteria and limits of lawful

interference with legal secrecy during the CI(S)A:

1. the procedure for such interference and guarantees for the protection of individual rights must be provided for by national law;

2. Confidential exchange of information between a lawyer and his client is unconditionally protected only if the lawyer acts as a defense attorney and his client is a suspect, accused, convicted or acquitted, otherwise in order to assess the legality of such interference, the circumstances of his commission, the public danger, the role of the lawyer in his commission or concealment of its consequences, the guarantees of such intervention provided by national law;

3. Guarantees of protection of lawyer's secrecy apply not only to the conduct of emergency CI(S)A related to interference in private communication, but also others, during which access to information constituting a lawyer's secret may be obtained, in particular secret intrusion into the office lawyer, audio, video control of the place, secret sampling for expert research, etc.;

4. Violation of the inviolability of the lawyer's home, office (place of work), holding of an emergency meeting CI(S)A, including in public places, measures to involve a lawyer in covert cooperation, should be considered not only a violation of legal secrecy, but also a violation of the right to the reputation of a lawyer, which can negatively affect a wide range of his rights and opportunities;

5. Interference with legal secrecy must be carried out in accordance with the law, which provides for compliance with procedural issues: filing a petition by the relevant authorized person, timely involvement of a representative of the bar self-government body in the investigation, exclusion of third parties access to lawyers' files legal secrecy and access of authorized persons to materials directly related to the subject of pre-trial investigation in criminal proceedings and denial of access to other materials (dossier) of a lawyer, possibility to destroy or return materials containing legal secrecy and not related to the subject of investigation unjustified in terms of proportionality.

6. impossibility to differentiate the lawyer's communication with clients (primarily in telephone conversations); 8 of the Convention;

7. The commission by a lawyer of a crime, preparation or attempt to commit it, in the presence of other obligatory and sufficient conditions, may be considered as a legal ground for interfering in his private communication with other persons.

The current regulation of covert investigative (search) actions against specific entities—such as judges, judges of the Supreme Anti-Corruption Court, lawyers, and People's Deputies of Ukraine—within Ukrainian criminal procedure legislation is ambiguous and inconsistent. Several unresolved issues concerning the organization and execution of these proceedings compromise the protection of human and civil rights and freedoms and hinder the effective pursuit of criminal justice objectives.

In view of the above, the issue of granting permission to hold an emergency CI(S)A on judges, lawyers and deputies is subject to additional regulation in terms of determining the basic principles:

1. Exhaustive and unambiguous list of persons entitled to initiate (enter information into the unified register of pre-trial investigations) criminal proceedings against persons endowed with special status.

2. Specification of the requirements for registration of a criminal offense against special entities with the reflection of information about a particular person, whose position he holds (his status), the content of illegal actions on the application (notification) of the crime.

3. Expanding and specifying the range of persons whose interference in the communication of a lawyer with whom is prohibited.

4. Specification of the procedure and conditions for conducting other emergency situations, including inspections of publicly inaccessible places, during which documents containing legal secrecy and in fact related to interference in private

communication may be inspected.

5. Differentiation of the procedure and conditions of the CI(S)A in relation to a judge, lawyer, People's Deputy, depending on whether their illegal activities are related to the performance of duties of a judge, lawyer, deputy.

6. Establishment of a ban on tacit withdrawal of information in the deliberation room of a judge (court).

7. To specify the status of the prosecutor authorized to apply to the court with a request for permission to hold an emergency CI(S)A for persons with special status. This issue can be resolved by introducing the requirement to include such a prosecutor who holds an administrative position in the group of prosecutors – procedural managers in a particular criminal proceeding, assigning him the functions of the head of such a group.

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