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**FOUNDAMENTALS OF CARRYING OUT OF SECRET  
INVESTIGATION ACTIVITIES AND INVESTIGATION AND SEARCH  
OPERATIONS IN MODERN LEGAL FIELD**

*The organizational and legal bases of the investigative activities within the pre-trial investigation and search operations during the research activities are considered.*

**Keywords:** *confidential investigation (investigative) actions, search measures, pre-trial investigation, search activities, bodies of pre-trial investigation, authorized operational units.*

After the adoption of the new Criminal Procedural Code of Ukraine from April, 13, 2012 (hereinafter – CPC) [1] several structural changes in the organization of the activities of bodies involved in criminal proceedings are observed.

In particular, the Act of Ukraine of 13.04.2012 № 4652-VI "About the Amendments to Several Legislative Acts of Ukraine in Connection with the Adoption of the Criminal Procedure Code of Ukraine» [2] introduced innovations to a range of laws, namely the Act of Ukraine of 18.02.1992 № 2145-XII «About Operative and Search Activities” (hereinafter – the Law) [3], which led to the renewal of the process of operational and search activities and caused a number of problems in the field of the solution and investigation of crimes.

An important place among the novelties of the Law belongs to the change of the reasons of the operative and search activities and human rights units, which carry out operative and search activities.

Today the grounds for carrying out the investigation and search operations should not be considered the information regarding persons who have committed a crime or crimes that have been committed by unidentified persons.

Instead, within the investigation and search operations, using operational and detective measures and means, the information about the crimes that are being prepared; persons who are committing the crime; persons, escaping from the bodies of the pre-trial investigation, an investigating judge, the Court or avoiding criminal sentences, etc. is examined (if you have the information about the committed criminal offence or any circumstances that may indicate the commission of criminal offences, a pre-trial investigation, which carry out investigative bodies of the pre-trial investigation).

In addition, the substantial changes to the concretization and expansion of the list of the investigation and search operations, according to which art. 8 of the Act provides:

- according to p. 9. of art. 8: to exercise audio- and video control of a person, removing information from the transport telecommunication networks, electronic information networks in accordance with the provisions of the art. 260, 263-265, CPC;
- according to p. 10 of art. 8: to impose an arrest on correspondence, to carry out its inspection and seizure in accordance with the dispositions of the art. 261, 262, CPC;
- according to p. 11 of art. 8: to inspect supervision over a person, thing or place, as well as audio and video control of the space in accordance with the provisions of the art. 269, 270 CPC;
- according to p. 12 of art. 8: to set the location of radio-electronic means in accordance with the provisions of art. 268 CPC;
- according to p. 18 of art. 8: to create and use previously identified (tagged) or fictitious (simulation) means in accordance with the provisions of art. 273 CPC.

In accordance with the statements of the CPC of Ukraine was introduced a new subject of the investigation and search operations – an investigator who is entitled and obliged to carry out the following implied investigators (special investigation) actions:

audio and video control of a person (Art. 260, CPC); the arrest of the correspondence (Art. 261 CPC of Ukraine); inspection and extraction of the correspondence (Art. 262, CPC); removal of information from the transport telecommunication networks (Art. 268 CPC); removal of the information from electronic information systems (Art. 264 of CPC of Ukraine); the survey of the inaccessible places, dwelling or other possessions (Art. 267, CPC); the detection of the location of radio-electronic means (Art. 268 CPC);

observation of a person, thing or place (Art. 268 CPC); audio and videocontrol of a room (art. 270 of the CPC of Ukraine); control over the committing of a crime (art. 271 CPC of Ukraine); performance of special tasks with the solution of crimes, committed by an organized group or criminal organization (art. 272 CPC of Ukraine); an undercover sampling required for the comparative research (art. 274 CPC) that are closely interwoven with the investigation and search operations, textually reproducing their list of the regulated art. 8 of the law. Also, the investigator has the right to delegate the carrying out of the secret investigation and search operations to the operative units, that use the rights of an investigator.

These innovations have changed in some way the process of investigation and search operations and caused a number of problems in the field of the solution and investigation of crimes, have created a stereotype according to which of the operational subdivisions are denied the right to initiate and carry out investigation and search operations aimed at achieving the tasks of investigation and search operations.

The confirmation of the existing problems is the statement of that fact in the report referred to the first Deputy Chief of the Criminal Detection S. D. Redka on the State of application of the public and secret investigation and search operations

in the solution of the intended killing, in which he emphasized the absence in some control and supervisory acts analytical (integrated) materials according to the results of the investigative (search) and secret integrated with the specific (reasonable) versions of the criminal offenses committing, proposals to the leadership of an investigative unit (pre-trial) on the planning and committing of pre-trial investigations, evidence procuring, consistency and appropriateness of the public and secret the investigation and search operations, as well as about the cases, in which a number of initiative reports of the employees of criminal investigations concerning the necessity of the secret investigation and search operations remain without responding to them, or the investigator does not direct any assignments to units of the criminal investigation about the secret investigation and search operations within the proceedings [4].

In our opinion, for the purpose of the eliminating of controversies regarding the grounds and subjects of secret investigation and search operations as well as investigation and search operations it is reasonable to investigate the issue.

So, if you have an information about the committed criminal offence or clarifying of circumstances that must indicate on its commitment, a pre-trial investigation, which carry out investigative bodies of pre-trial investigation (art. 214 CPC), begins .

In the course of pre-trial investigation in the cases, when the information about the crime and the person, who committed it, it is impossible to get in another way, investigator, Prosecutor, investigating judge at the request of Prosecutor or investigator's petition, agreed with the Prosecutor, makes a decision about carrying out secret investigation and search operations as a kind of investigators operations, which refer to the highly confidential information

To conduct secret investigation and search operations has the right an investigator, who carries out a pre-trial investigation of the crime, or on his behalf, the authorized operational units.

By the decision of the investigator or the Prosecutor for carrying out of secret investigation and search operations can also be engaged other persons.

In other words, the application of secret investigation and search operations within criminal proceedings is initiated by a coroner (Prosecutor).

After the approval of the investigator judge about the permission for secret investigation and search operations in exceptional emergency cases related to the saving of people's lives and the prevention of the commitment of a grave or especially grave crime, the action can be initiated before the Resolution of the Ordinance of an investigator judge.

According to the results of polling of 1146 investigators of MIA Pre-trial Investigation, carried by the employees of SRI of MIA of Ukraine, it was found that during the period from November, 2012, till May, 2013, they carried 2226 secret investigation and search operations, and the operational units on behalf of the investigator - 4 977 secret investigation and search operations, and it is caused, first of all, with great workload of the investigators as well as the fact that operative employees have more experience in carrying out of such actions in cooperation with units and persons acting on the basis of confidential cooperation, etc.

These data as well as analytical materials give grounds to classify secret investigation and search operations and determine the forms of their proceedings.

The forms of secret investigation and search operations should be considered: independent proceedings, carried out by the investigator (a Prosecutor); joint proceedings, carried out both by the investigator (Procurator) and the authorized operational units; with the involvement of other persons; by the authorized operational unit (clause 6 of art. 246, CPC).

It is reasonable to classify secret investigation and search operations according to the degree of the gravity of the crime and the decisions.

According to the degree of the gravity of the crime secret investigation and search operations are divided into: the actions that are carried out exclusively in criminal proceedings concerning grave or particularly grave crimes: audio, video (art. 260, CPC); arrest of correspondence (art. 261, CPC); review and extraction of correspondence (art. 262, CPC); removing information from electronic information

systems without the knowledge of its owner or holder (art. 264 of CPC of Ukraine); survey publicly inaccessible places, dwelling or other possessions of persons (art. 267, CPC); observation in publicly accessible places (art. 299 CPC); audio-, videocontrol of the room (art. 270 of the CPC of Ukraine); an unspoken sampling required for the comparative research (art. 274 CPC); the actions that are carried out regardless of the gravity of the offence: removing information from electronic information systems, or its parts, to which access is not restricted by its owner or holder or are not associated with overcoming of a system of logical protection (part 2 of art. 264, CPC); setting the location of radio-electronic means (art. 268 CPC).

According to the subject, which makes the decisions about their conduct, secret investigation and search operations are divided into those, that are carried out: without the permission of the investigator judge: performance of special tasks with the clearance of crimes, committed by gang or criminal organization (Art. 272, CPC); the Resolution of Ordinance of an investigator judge (in exceptional urgent cases determined by Art. 250, CPC): setting the location of the radio-electronic means (Art. 268, CPC), observation of a person, thing or place (Art. 268, CPC); by decision of the Prosecutor (taking control of the crime (Art. 271, CPC), but if when carrying out control over the taking of crime raises the need for a temporal limitation of constitutional rights of a person, it should be permitted by the Constitution of Ukraine, on the basis of the investigator's decision the judges with the requirements of the CPC of Ukraine); by the decision of the investigator judge: (audio, video (Art. 260, CPC); the arrest of correspondence (Art. 261 CPC); review and extraction of correspondence (Art. 262, CPC); removing information from the transport telecommunication networks (article 268, CPC), removal of the information from the electronic information systems (Art. 264 of CPC of Ukraine); the survey publicly inaccessible places, dwelling or other possessions (Art. 267, CPC), observation of a person, thing or place (article 268, CPC); audio and video control of room (Art. 270, CPC), control over taking an offence (Art. 271, CPC), performing a special task of uncovering criminal activity organized by a group or

criminal organization (Art. 272, CPC), an unspoken sampling required for comparative research (Art. 274, CPC).

You should not equate secret investigation and search operations with some procedural actions that have a certain similarity.

In particular, in Art. 159 and cl. 7 p. 1 of Art. 162 of the CPC of Ukraine stipulates such an event ensuring criminal proceedings as temporary access to things and documents which have the operators and providers of telecommunication services, including receiving services, their duration, the content (outgoing or incoming connections, SMS, MMS, etc.), the routes of transmission, and art. 263 and 268 of CPC of Ukraine stipulates such secret investigation and search operations as a removal of information from the transport telecommunication networks and set the location of radio-electronic means.

The procedural actions should be marked off as follows: the actions provided by the Art. 263, 268, CPC, are secret investigation and search operations, permit for which is rendered by the investigating judge of the Court of Appeal. Information about these actions, in accordance with the Act of Ukraine "About State Secret" [5] and paragraphs 4.12.4. and 4.12.5. of an information that constitutes State secret, approved by the security service of Ukraine dated 12.08.2005 No. 440 [6] contains information that constitute the state secret. At the same time the actions, provided by Art. 159, cl. 7, p. 1. 162 of the CPC of Ukraine, are the measures ensuring criminal proceedings, permit an application which provides the investigating judge of the first instance, the information about such actions does not constitute state secrets; – temporary access is provided to documents that contain information about the connection with the Subscriber, the provision of telecommunications services, including receiving services, their duration, the content (outgoing or incoming connections, SMS, MMS, etc.), the routes of transmission, etc. and do not give the opportunity to intervene in private communication, i.e. access to the content of the information transmitted. And removal of information from the transport telecommunication networks (art. 268, CPC) is a kind of intervention in private communication, because of an access to

the content of any messages or information that is passed to the person during the connection; – in Art. 159, 162, CPC of Ukraine stipulates obtaining investigative (public prosecutor) information about the communication that took place in the past (ex post facto), including the location of electronic means in a particular day and time, defined in Art. 268, CPC of Ukraine secret investigation and search operations is to set the location of radio-electronic means – provides localization (monitoring) the location of radio-electronic means in real time (i.e. allows you to get an information where is the appropriate remedy at the moment of an observation after it, determines the route of its tenure).

Regarding investigation and search operations it should be noted the following.

The grounds for carrying out of the investigation and search operations are: checking information about the crimes that are being prepared; persons who are committing the crime; persons, escaping the bodies of the pre-trial investigation, an investigating judge, the Court or escaping serving criminal sentences, etc.

Within the operative and search activities the operative units have the right to carry out investigation and search operations.

Exceptionally for the purpose of the preventing of commit serious or especially serious crime, prevention and cessation of terrorist attacks and other assaults special services of foreign States and organizations, if in a different way to get information is impossible (in the absence of an open criminal proceedings according to this information), head of the operational unit shall have the right to contact investigator judge agreed with the request of the Prosecutor, about conducting such operational-search measures as: an unspoken survey publicly inaccessible places, housing or other ownership, audio, video, audio, video, surveillance, removal of the information from the transport telecommunication networks, electronic information networks, the arrest of correspondence, making its examination and seizure, an assignment of electronic means.



Further results of operatively-search measures according to the Art. 214 of the CPC of Ukraine may serve as grounds for the start of criminal proceedings, as in the case of the detection of signs of the crime operations units, which carries out operative and search activities, shall immediately send the collected materials in which the recorded factual data about the wronged individuals and groups, responsibility for which is provided by the Criminal Code of Ukraine, to the relevant body of the pre-trial investigation for the early implementation of the pre-trial investigation.

In criminal proceedings the operational units by investigators (special investigation) actions and unspoken investigators (special investigation) of a work commissioned by the investigator, the Prosecutor.

In the course of conducting the survey of investigators of pre-trial investigation of MIA of Ukraine by the SRİ MIA of Ukraine it turns out the issues about the appropriateness of providing operational employee rights contact an investigator with the initiative drawn up about the secret investigation and search operations.

Most respondents (87,7%) answered the posed question positively.

But, as it was mentioned in the questionnaires, the practice when operating workers appeal to the investigators with the initiative raports, who have limited an access and provided through the special divisions, has already asserted.

They have outlined briefly the information that was received during operatively-search measures and for which implementation it is needed the destination of the secret investigation and search operations.

Unfortunately, inexplicably to investigative units is supplied the scarcity of the initiative raports of the operational staff on the assignment of secret investigation and search operations that in some proceedings leads to a loss of valuable information, evidentiary base.

The majority of operational employees initiate secret investigation and search operations provided by the Art. 260, 263, 271 of CPC, while documenting the crimes related to the illegal sale of narcotic substances, measures envisaged by

the Art. 268 CPC with the installation of the electronic device, by the Art. 269 of the CPC about the observation of the place, person or thing.

Above mentioned gives the grounds to argue that the criteria of differentiation of the secret investigation and search operations are: the purpose of conducting; subjects of initiation; substantiation of the petition, the agreed specific purpose.

Considering the above mentioned, operational units within the operative and search activities are authorized to carry out operational and search measures regulated in accordance with the dispositions of the Art. 21 CPC to verify the information about the crimes that are being prepared; persons who are committing the crime; persons, fugitives of pre-trial investigation, for entering the information in the unified register of pre-trial investigations. Since the beginning of the pre-trial investigation if the information about the crime and the person, who committed it, cannot be got in other ways, an investigator who conducts a pre-trial investigation of the crime, or on his behalf, the authorized operational units are implied by the investigators (special investigation).

In addition, with the purpose of an effective interaction between the investigator with the authorized operational units during the secret investigation and search operations, we consider to be the appropriate an action to authorize the operational units the right to apply to the investigator or the Prosecutor with the initiative report for the secret investigation and search operations and legalize in the legal field the organizational principles regarding regulation of this issue.

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